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Arbitration with Indian Parties Now More Predictable Following Landmark Indian Supreme Court Decision

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India's Supreme Court recently gave the country's standing as a jurisdiction hospitable to international commercial arbitration a major boost. On 6 September 2012, the Court handed down a landmark judgment in *Bharat Aluminium v. Kaiser Aluminium*, C.A. No. 7019/2005 ("Bharat Aluminium") (available here), holding that Indian courts would no longer exercise authority to annul awards, or remove and appoint arbitrators in arbitrations seated outside India. In doing so, the Court relied on international authority, including Gary Born's *International Commercial Arbitration*, to overrule three decades of domestic decisions in which Indian courts had claimed the right to set aside awards made outside India—notwithstanding the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and essentially uniform international authority to the contrary.

In *Bharat Aluminium*, the appellant had filed applications under Part I, Section 34 of the Indian Arbitration and Conciliation Ordinance of 1996 ("Indian Act") to set aside two ad hoc arbitral awards rendered by a tribunal seated in London. The Supreme Court held that Part I of the Indian Act, which confers significant powers on Indian courts to grant provisional measures (Section 9), to make arbitral appointments in the absence of agreement by the parties (Section 11), to obtain evidence (Section 27) and to set aside arbitration awards (Section 34), does not apply to arbitrations seated outside of India and that Indian courts therefore may not annul awards made outside of India under Section 34 of the Act. It further held that arbitrations seated outside India are dealt with only in Part II of the Act, which addresses the recognition and enforcement in India of foreign arbitral awards under the New York Convention and which provides for no judicial supervisory or annulment authority for foreign-seated arbitrations.

In holding that Part I of the Act does not grant Indian courts supervisory authority with respect to arbitrations seated outside India, the Court in *Bharat Aluminium* expressly overruled two of its own highly controversial earlier decisions. In its 2002 decision, *Bhatia International v. Bulk Trading SA*, AIR 2002 SC 1432 ("*Bhatia*"), the Supreme Court had held that Part I of the Act applied to all arbitrations, including foreign arbitrations, unless expressly or impliedly excluded by agreement of the parties. That holding paved the way for the Court's 2008 holding in *Venture Global Engineering v. Satyam Computer Services Ltd.*, AIR 2008 SC 1061 ("*Venture Global*") that Indian courts were

authorized to annul awards made outside India under Part I, Section 34 of the Act. In that regard, the *Bhatia* and *Venture Global* decisions had led to substantial criticism of India for adopting an outlier position that was incompatible with the New York Convention.

In addition to overruling *Bhatia* and *Venture Global*, the Supreme Court in *Bharat Aluminium* clarified a number of other issues regarding the meaning of the Act. In particular, it affirmed that Part I of the Act adopted the territorial principle embraced by the UNCITRAL Model Law; that the law of the seat of the arbitration governs the conduct of the arbitration; and that an annulment action may be brought outside of the arbitral seat only in the very rare circumstance of the parties having agreed upon a procedural law other than that of the arbitral seat.

At the same time, *Bharat Aluminium* re-exposed some of the lacunas in Indian arbitration law that *Bhatia* had intended to cover over. These include the inability of parties to foreign arbitrations to obtain any form of effective interim relief with respect to assets located in India, and the unenforceability in India of foreign arbitral awards rendered in states that are not parties to the New York Convention and recognized as such in the official Indian Gazette. The Court also indicated that its holding would only "apply prospectively, to all arbitration agreements executed hereafter," leaving parties with arbitration agreements executed before 6 September 2012 subject to the Court's *Bhatia* decision and its progeny.

Despite its effective date and the challenges that remain in its aftermath, *Bharat Aluminium* is of momentous significance. The decision represents an affirmation by the Indian Supreme Court of India's commitment to the New York Convention, and marks a new beginning for international arbitration in India and the region. On a practical level, knowing that arbitrations with Indian parties seated outside of India will not be subject to interference by local courts will encourage parties to do business on more favorable terms with Indian parties, while consistent application of this approach should contribute to increased willingness to select India as an arbitral seat.

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