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Marking their Territory: Bharat Aluminum v Kaiser Aluminum Technical Services (2012)

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The Supreme Court of India has finally spoken to deliver a definitive ruling on the role of Indian courts in international arbitrations seated outside India. Overruling the controversial decision of *Bhatia International v Bulk Trading* (2002), the Supreme Court held that Indian courts do not have supervisory authority over international arbitrations taking place outside India. The Court examined and defined the scope of Indian Arbitration and Conciliation Act, 1996 ("Arbitration Act") and clarified the concept of seat of arbitration under the Indian law. The Court also unequivocally affirmed that the Arbitration Act adopted the territorial principle of the UNCITRAL Model Law and accepted the views of leading experts in international arbitration on Article V(1)(e) of the New York Convention.

Bharat Aluminum Co. v Kaiser Aluminum Technical Services, Inc. (2012) involved several appeals but the same broader legal question: was *Bhatia International* correctly decided? The issue was whether courts of India can perform supervisory functions relating to arbitrations seated outside India? The Supreme Court replied to this question with an emphatic "no" on 6 September 2012. This effectively means that the courts of India can no longer make interim orders regarding arbitrations with seats outside India or entertain annulment challenges to foreign arbitration awards.

The proceedings of *Bharat Aluminum* were watched closely by all quarters with great interest. A five-member bench of Chief Justice S.H. Kapadia and Justices D.K. Jain, S.S. Nijjar, Ranjana Desai, and J.S. Khehar heard the case earlier this year. Justice S.S. Nijjar authored the judgment, which was joined by all members of the bench. The Supreme Court's 190-page ruling is certainly a landmark judgment and resolves various lacunas of Indian arbitration law.

The Indian Arbitration Act

The regulation of arbitration, according to *Bharat Aluminum*, consists of four stages: a) commencement of arbitration; b) conduct of arbitration; c) challenge to arbitration award; and d) recognition and enforcement of arbitration award.

Part I of the Arbitration Act deals with all four stages and provides for comprehensive regulation of arbitration proceedings. In particular, Section 9 of Arbitration Act gives courts of India vast powers to make interim orders in relation to arbitration proceedings. Section 34 allows courts to entertain challenges and set aside an arbitration award under specified circumstances. Part II of the

Arbitration Act deals with recognition and enforcement of foreign awards.

Bhatia International and Venture Global Engineering

In *Bharat Aluminum*, the Supreme Court was asked to revisit the jurisprudence of *Bhatia International* which held the field for around ten years. The ruling of *Bhatia International* was not only affirmed by later rulings of the Court, but the scope of judicial intervention in arbitral proceedings outside India was further expanded by the Court.

In *Bhatia International*, the Supreme Court held that provisions of Part I of the Arbitration Act would apply to international commercial arbitrations taking place outside India "unless the parties by agreement… exclude all or any of its provisions." This would mean that a party to international arbitration proceedings outside India could apply to an Indian court under Section 9 of Arbitration Act for an *ex parte* interim injunction relating to arbitration outside India.

In fact, one of the appeals before the court in *Bharat Aluminum* emanated from an *ex parte* ad interim injunction given by District Court of Mangalore under Section 9 relating to an arbitration in London. The District Court's decision was set aside by the High Court of Karnataka on appeal and a special leave petition was filed before the Supreme Court against High Court's judgment.

The scope of Bhatia International was further broadened by the Supreme Court in *Venture Global Engineering v Satyam Computer Services Ltd.* (2008). The Court stated: "Though in *Bhatia International* the issue relates to filing a petition under Section 9 of the Act for interim orders the ultimate conclusion that Part I *would apply even for foreign awards* is an answer to the main issue raised in this case." (emphasis added)

Pursuant to *Venture Global Engineering*, a court of India could hear and decide on challenge to a foreign arbitration award under Section 34 of Arbitration Act. In one of the appeals in *Bharat Aluminum*, a party had challenged two arbitration awards delivered in London under section 34 of the Arbitration Act. The challenge was rejected by District Court of Bilaspur and High Court of Judicature at Chattisgarh. An appeal was subsequently filed before the Supreme Court of India.

The missing word – "only"

A large part of the Supreme Court's decision centers around the absence of a word -"only" – in Section 2(2) of Arbitration Act. Section 2(2) of Arbitration Act, falling in Part I, says no more than "this Part shall apply where the place of arbitration is in India." As Section 2(2) does not say that Part I shall apply only where the place of arbitration is in India, Part I will apply, one side contended, even if place of arbitration is not India.

The word "only" would not have been significant had it been not used in Article 1(2) of UNCITRAL Model Law. Article 1(2) of UNCITRAL Model Law (prior to 2006) stated: "The provisions of this law, except Articles 8, 9, 17(H), 17(I), 17(J), 35 and 36 apply only if the place of arbitration is in the territories of this State."(emphasis added). As the word "only" is conspicuously omitted in Article 2(2) of Arbitration Act, did it express the conscious decision of India's legislature to widen the applicability of Part I of Arbitration Act to arbitrations outside India?

The Supreme Court rejected this proposition. The omission of "only" in Section 2(2) of Arbitration Act does not indicate that Indian courts could supervise arbitrations taking place outside India. The Court determined that the Arbitration Act adopted a scheme different from UNCITRAL Model

Law. In Article 1(2) of the UNCITRAL Model Law, it was necessary to include the word “only” to clarify that, expect for certain provisions, Model Law would be applicable on strictly territorial basis. The exceptions stipulated in Article 1(2) of UNCITRAL Model Law were not enumerated in Section 2(2) of Arbitration Act. The word “only” would have been superfluous in Section 2(2) of Arbitration Act.

The territorial principle

The Court then turned to territorial principle that forms the conceptual basis of Article 1(2) of UNCITRAL Model Law. The principle was adopted by the UNCITRAL in the 18th Session at Vienna in 1985. The principle, as the Report of UNCITRAL on 18th Session stated, means that Model Law would only apply where the place of arbitration was the enacting State. The territorial link between the place of arbitration and the law governing arbitration has been accepted by leading experts and commentators on international commercial arbitration. The law of other countries, such as England and Switzerland, also maintain the link between the seat of arbitration and *lex arbitri*.

The Court affirmed that the Arbitration Act adopted the territorial principle of UNCITRAL Model Law. “The Scheme of the Act,” the Court held, “makes it abundantly clear that the territorial principle, accepted in the UNCITRAL Model Law, has been adopted by the Arbitration Act, 1996.” The application of Part I of Arbitration Act is, therefore, restricted to arbitrations taking place in India. Arbitrations outside India are not covered by Part I of Arbitration Act because they lack the territorial link with India.

Domestic Award under Arbitration Act

The decision of *Bharat Aluminum* is crucial for understanding the difference between the foreign and domestic awards under the Arbitration Act. The Court clarified that Part I of Arbitration Act applies not only to arbitrations in India where both parties are Indian, but also to international commercial arbitrations which take place in India. The awards in arbitrations seated in India are *domestic awards*, distinguishable from *foreign awards*, for the purposes of Arbitration Act. The difference is significant because domestic awards can be challenged and annulled under Section 34 of Arbitration Act.

The Arbitration Act does not recognize *international awards*, i.e., awards rendered in India in an international arbitration. All awards rendered in India, the Supreme Court made clear, are domestic awards under the Arbitration Act. Similarly, Part I applies to all arbitrations with a seat or place of arbitration inside India irrespective of whether or not it’s an international arbitration or a “purely domestic” arbitration.

The Centre of Gravity: Seat of Arbitration

“The seat of an arbitration,” Alan Redfern wrote in Law and Practice of International Commercial Arbitration (1986), “is thus intended to be the central point or its center of gravity.” By recognizing that this principle applies equally to the Arbitration Act, the Court in *Bharat Aluminum* endorsed one of the most fundamental concepts of arbitration law.

Just as the case with English law, the Indian law does not recognize de-localized arbitration proceedings or, as stated in Dicey & Morris on Conflict of Laws, “arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.” If the parties have

not selected the law governing the conduct of arbitration, the law of the seat of arbitration governs the arbitration proceedings because it is "most closely connected with the proceedings" (Dicey & Morris on Conflict of Laws).

By agreeing to a seat or place of arbitration outside India, the parties choose the laws of seat of arbitration to govern the conduct of arbitrations. This is an issue of party autonomy and the Arbitration Act allows parties to opt out of Arbitration Act by choosing the seat of arbitration in another country. Part I of the Arbitration Act would not apply in such a case.

Enforcement and Annulment

The language of Article V(1)(e) of New York Convention, adopted by Section 48(1)(e) of Arbitration Act, is a bit quizzical. The provision says that enforcement of a New York Convention award can be refused where it "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." According to Hans Smit, as the Supreme Court noticed, choice of this language is "both most fateful and most regrettable" because it would mean that the award could be concurrently challenged in "the country in which…the award was made" as well as in "the country…under the law of which the award was made."

The Supreme Court in *Bharat Aluminum* correctly recognized that this would be recipe for litigations. The Court held that the correct interpretation of Article V(1)(e) of New York Convention is that an award can be challenged in "the country…under the law of which the award was made" only if the annulment action in "the country in which…the award was made" is not available.

The Court further specified that the terms "under the law" in Article V(1)(e) refer to procedural law of arbitration proceedings rather than substantive law of arbitration. The Court wholeheartedly endorsed the view of Gary Born in International Commercial Arbitration (2009) that "under the law" refers to the procedural law of arbitration. Therefore, an annulment action could only be brought in the country "under the law of which the award was made" in "once-in-a-blue-moon" situation where parties have agreed upon a procedural law other than that of the arbitral seat.

The Conclusions

The Court's decision in *Bharat Aluminum* brings conceptual clarity and resolves some of the most controversial issues in the Indian arbitration law. The Court's conclusions can be effectively summarized as follows:

a) The Indian courts does not have the authority to supervise conduct of international commercial arbitrations seated outside India because, amongst other reasons, the Arbitration Act adopts the territorial principle of UNCITRAL Model Law;

b) The Indian courts can only exercise supervisory role where the seat of arbitration is in India because Part I of Arbitration Act only applies to arbitrations that take place in India;

c) There is no overlap between Part I and Part II of the Arbitration Act and courts of India cannot annul foreign arbitral awards (unless, perhaps, the procedural law of arbitration is Indian law);

d) The Indian courts cannot make interim orders relating to arbitrations seated outside India under

Section 9 of Arbitration Act and applications for interim orders relating to foreign arbitration proceedings are not maintainable;

e) The law laid down by *Bharat Aluminum* would apply, to avoid rocking the boat, prospectively to all arbitration agreements executed after 6 September 2012.

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