INDIAN SUPREME COURT OVERRULES BHATIA INTERNATIONAL – FOREIGN SEATED ARBITRATION NOT SUBJECT TO INDIAN LAW GOVERNING DOMESTIC ARBITRATION

The Supreme Court of India (**Supreme Court**) delivered a landmark judgment on September 6, 2012 in the case of *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services, Inc.* (**Bharat Aluminium**), overruling its previous decisions of *Bhatia International* v. *Bulk Trading S.A.*[1] (**Bhatia International**) and *Venture Global Engineering* v. *Satyam Computer Services Ltd.*[2] (**Venture Global**), on the applicability of Part I of the (Indian) Arbitration and Conciliation Act, 1996 (**Arbitration Act**) to foreign seated arbitration proceedings (**Foreign Arbitrations**). The Supreme Court's judgement in Bharat Aluminium clarifies that no interim relief can be awarded by Indian courts in relation to Foreign Arbitrations and that the Arbitration Act does not empower Indian courts to annul any awards arising from Foreign Arbitrations (**Foreign Awards**).

BACKGROUND

The Arbitration Act is divided into four parts, each of which provides the law applicable to different categories of arbitration/ conciliation proceedings. Part I of the Arbitration Act (**Part I**) is applicable to arbitration proceedings, where the place or arbitration is in India (**Domestic Arbitration**), and Part II of the Arbitration Act (**Part II**) governs the enforcement of certain Foreign Awards in India. The Supreme Court had in the past, in the case of Bhatia International and Venture Global held that Part I applies to all arbitrations, including Foreign Arbitrations, except if the parties to the Foreign Arbitration had expressly or by implication excluded the applicability of provisions of Part I. Accordingly, the Supreme Court had held that under Section 9 of the Arbitration Act (**Section 9**), Indian courts could award interim relief in case of Foreign Arbitrations and that Indian courts had the power to annul Foreign Awards under the provisions of Section 34 of the Arbitration Act (**Section 34**).

SUPREME COURT'S DECISION IN BHARAT ALUMINIUM

The above decisions of Bhatia International and Venture Global have been overruled by the Supreme Court by its decision in Bharat Aluminium, and the Supreme Court has categorically held that Part I and Part II are mutually exclusive and that Indian courts had no supervisory jurisdiction over Foreign Arbitrations. Accordingly, Part I does not apply to Foreign Arbitrations and no interim relief can be sought in India in case of a Foreign Arbitration.

The Supreme Court also distinguished between the concept of 'seat' and venue' of arbitration and clarified that Part I would only apply to arbitrations that had their seat in India. In this context, the Supreme Court also observed that if the parties provided for a foreign seat but made the Arbitration Act the applicable procedural law, such a choice would not make the arbitration a Domestic Arbitration.

In view of the fact that various Indian courts had applied the ratio of Bhatia International and Venture Global in various cases, the Supreme Court has categorically held that the position clarified in Bharat Aluminium would apply to arbitration agreements executed after the decision.

[1] (2002) 4 SCC 105

[2] 2008 (1) Scale 214

IMPLICATIONS OF THE SUPREME COURT'S DECISION IN BHARAT ALUMINIUM

The decision of the Supreme Court in Bharat Aluminium clearly establishes that Foreign Arbitrations are not subject to Part I and therefore, Indian courts do not have supervisory jurisdiction over such proceedings. In the wake of the decisions in Bhatia International and Venture Global, parties to international commercial arbitration agreements were required to expressly or by implication exclude the application of Part I, which will no longer be necessary.

In view of the above pronouncement of the Supreme Court, based on the subject matter of the agreement, parties will now have to carefully evaluate the choice of seat of arbitration. Under the earlier legal regime, parties had the option of choosing a foreign seat of arbitration, while continuing to have access to Section 9 for obtaining interim relief in India. However, going forward, if a foreign seat of arbitration is chosen by the parties, they will no longer be able to seek interim relief before Indian courts. In such scenarios, the relief available to the parties would be to approach the relevant foreign arbitral tribunal/courts for interim relief and then initiate a process before civil courts in India for the enforcement of such orders, which could defeat the very purpose behind interim relief and involve substantial time and costs.

In view of the above, where directly obtaining an interim relief in India is or could be critical for a party, given the subject matter, it would be preferable to choose India as the seat of arbitration, and to avoid the delays associated with private or ad-hoc arbitration, it would be further preferable for the parties to choose an institutional arbitration under the aegis of a reputable institution.

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