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BHATIA INTERNATIONAL OVERRULED: SUPREME COURT HOLDS PART I OF THE ARBITRATION ACT DOES NOT APPLY TO INTERNATIONAL COMMERCIAL ARBITRATIONS HELD OUTSIDE INDIA

A five judge bench of the Supreme Court in its decision in ***Bharat Aluminium Co. versus Kaiser Aluminium Technical Services INC. Civil Appeal 7019 of 2005***, overruled its earlier judgments in ***Bhatia International versus Bulk Trading SA & Anr, AIR 2002 SC 1432 and Venture Global Engineering Vs. Satyam Computer Services Ltd. & Anr. 2008 (1) Scale 214,*** which had held that Part I of the Indian Arbitration and Conciliation Act, 1996 (the "**Act**") shall apply to international commercial arbitrations, even in cases where the seat of arbitration was situated outside India unless the parties expressly or impliedly excluded the applicability of Part I of the Act in the arbitration agreement.

Now the larger bench has held that Part I of the Act would not apply to international commercial arbitrations having the seat of arbitration outside India. In effect this would mean that in an international commercial arbitration having the seat of arbitration outside India, neither of the parties would be able to move Indian courts for any reliefs including applying to Indian courts for interim measures of protection, challenge to the award, appeal against interim orders, appeal against an order of the arbitral tribunal holding that it has no jurisdiction, etc. In such cases the parties may have to only look at courts having jurisdiction over the seat of arbitration. At the most Indian Courts can look at the binding nature of awards made in such cases when they are brought before them for enforcement under Part II of the Act, that too where they are foreign awards within the meaning of S. 44 of the Act, and not otherwise.

Till now Indian parties to international commercial arbitration agreements were comfortable agreeing to have the seat of arbitration outside India knowing that they could still have the option of moving Indian Courts, but the larger bench decision of the Supreme Court will now impact decisions on whether to have the seat of arbitration outside India. The Parties in an international commercial arbitration having the seat of arbitration outside India cannot even agree to have such powers or jurisdiction to be exercised by Indian Courts.

To avoid uncertainty and confusion the Court has also ruled that its decision **will only apply to arbitration agreements entered into after this judgment**. Therefore in respect of agreements pertaining to international commercial arbitration **already entered into prior to this judgment,** if they do not expressly or by necessary implication exclude application of Part I of the Act, even if the seat of arbitration is outside India, the parties would be entitled to avail of provisions of Part I of the Act and approach Indian Courts for reliefs and remedies.

Inter alia, the apex court has while overruling its earlier judgments held as under:

- The omission of the word "only" in section 2(2) of the Act which provides that Part I shall apply to domestic arbitrations does not mean that Parliament intended to make Part I applicable to foreign-seated arbitrations.
- Parts I and II of the Act are mutually exclusive and that Indian Courts can interfere with the award rendered in arbitration proceedings having the seat of arbitration outside India, only when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Act.
- In international arbitration, jurisdiction is generally determined by the "seat" of arbitration.
- The Indian Act, like the UNCITRAL Model Law, is founded on the "territoriality principle". Therefore, Sections 9 and 34 of the Act apply *only* if the seat of arbitration is in India and cannot be invoked for international commercial arbitrations having a "seat" of arbitration outside India.
- The court exercising jurisdiction over the "seat" of arbitration would be required to exercise supervisory control over the arbitral process;
- Further, a civil suit and an application seeking interim relief there-under in relation to a international commercial arbitration being conducted outside India shall also not lie. A civil suit cannot be instituted for interim relief simplicitor, since seeking an interim relief is dependent on the final relief sought on a recognized *cause of action* and merely a prayer for interim relief cannot itself constitute the cause of action for a suit.

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