

De Jure

September 26, 2012

SEAT AS CENTRE OF GRAVITY FOR ARBITRATION



The objective - 'a bird's eye view at the changes that have been brought about by the judgment of Supreme Court of India in the case of Bharat Aluminum versus Kaiser Aluminum Technical Service Inc.'

"Seat centric arbitration"

This article is aimed at providing a bird's eye view, as set out in the table below, at the changes brought about by the judgment of Supreme Court of India in the case of Bharat Aluminum versus Kaiser Aluminum Technical Service Inc. ("**Bharat Aluminum**") & other connected matters, passed on September 6, 2012.

The Arbitration and Conciliation Act 1996 ("**Arbitration Act**") brought the UNCITRAL Model Law into force in India. Part I of the Arbitration Act deals with Domestic Arbitrations and Part II of the Arbitration Act deals with International Commercial Arbitrations.

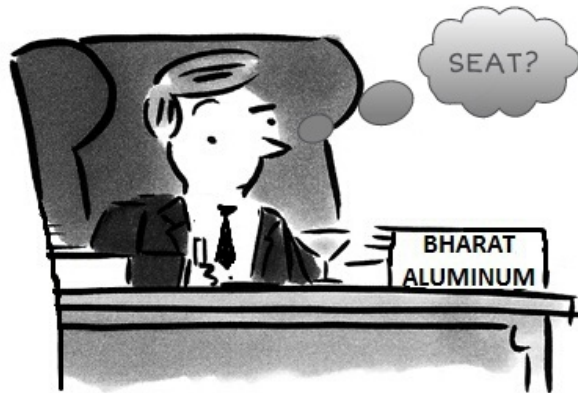
In *Bhatia International versus Bulk Trading S.A* [2002 AIR SC 1432] ("**Bhatia International**"), the Supreme held that while in case of "domestic arbitrations", provisions of Part I compulsorily apply; in "international commercial arbitrations" held outside India, Part I of the Arbitration Act would apply unless the parties have expressly or impliedly excluded these provisions.

Venture Global Engineering Case versus Satyam Computer Services Ltd. expanded the scope of Court's intervention in the enforcement of Foreign Arbitral awards.

Therefore, the earlier position entailed culling out various permutations and combinations in terms of deciding place/seat of arbitration, choice of law and jurisdiction of Courts, exclusion (implied or express) of the Part I of the Arbitration Act.

However, in *Bharat Aluminum* the Court has now held that only if the place/seat of arbitration is in India, Part I of the Arbitration Act would apply and the Part I would not apply in case parties opt for a seat/place outside India.

Thus, *Bharat Aluminum* shifts the focus from deliberating upon choice of law and jurisdiction of Courts, etc. to making it "seat centric" since once the seat of arbitration is decided, the applicable laws as regards conduct of arbitration would follow as applicable to that seat.



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Various Permutations and Combinations on applicability of Part I of the Arbitration Act based on Bharat Aluminum:

PARTIES	SEAT/ PLACE	LAWS APPLICABLE	APPLICABILITY OF PART I
Both Indian	India	India	Part-I would apply since the seat of arbitration is in India
One Foreign	India	India	Part-I would apply since the seat of arbitration is in India
One Foreign	India	Foreign	Part-I would apply since the seat of arbitration is in India
One Foreign	Foreign	Foreign	Part I would not apply since the seat of arbitration is Foreign
One Foreign	Foreign	India	Part I would not apply since the seat of arbitration is Foreign
Two Foreign	India	India	Part I would apply since the seat of arbitration is in India
*Parties can select any Rules for conduct of arbitral proceedings.			
*One Foreign party - International Commercial Arbitration			

"Permutations and Combinations on applicability of Part I"

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Whether Part I would apply to international commercial arbitrations seated outside India?

The Supreme Court, in *Bhatia International*, had held that Part I mandatorily applies to all arbitrations held in India, and also applies to arbitrations conducted outside India unless expressly or impliedly excluded by the parties.

The Supreme Court, in *Bharat Aluminum*, has now held that Part I of the Arbitration Act would apply only when the seat/place of arbitration is in India and will not be applicable where the seat/place of arbitration is outside India.

Seat/Place of Arbitration

In *Bhatia International*, it was held that the Parties are free to choose the place of arbitration and if the place of Arbitration is in India, Part I would apply compulsorily and in case the parties opt for a foreign place, Part I will also apply to the arbitrations conducted outside India, unless expressly or impliedly excluded by the parties.

In *Bharat Aluminum*, the Court has held that the Arbitration Act permits the parties to decide the place of arbitration. The Court interpreting Section 20 of the Arbitration Act pertaining to place/seat of arbitration has clarified that, if the seat of arbitration is India, parties are free to choose any place or venue within India for conducting the arbitration proceedings. However, Section 20 is to be read with Section 2(2) of the Arbitration Act to understand the applicability of principle of territoriality. In the absence of parties failing to specify law governing arbitration proceedings, the same would be governed as per the law of the country in which arbitration is held i.e. the seat of arbitration.

The arbitral hearings may take place at a location other than the seat of arbitration as per convenience of the parties. There is consequently a difference between "seat"/ "place" and "venue" of arbitration. However, where the arbitration agreement designates a foreign country as the "seat"/"place" of the arbitration and also selects the Arbitration Act, as the curial law/law governing the arbitration proceedings, it would be a matter of construction of the individual agreement to decide whether the "seat" referred to in the agreement in fact referred to "venue". In such a scenario, only if the seat is determined to be India, would Part I be applicable. If the seat was foreign, Part I would be inapplicable to the extent inconsistent with the arbitration law of the seat, even if the agreement provides that the Indian Statute would govern the arbitration proceedings.

Eg: one Indian & one foreign party enter in to an agreement having a seat/place of arbitration as Singapore with [Indian] Arbitration Act as the governing law, even then as per Bharat Aluminum Judgment, Part I of the Arbitration Act shall NOT be applicable.

When two foreign parties arbitrate in India having seat of arbitration in India, would Part I be excluded?

The Court in Bharat Aluminum has said that in case two foreigners arbitrate in India under a Foreign Arbitration Act, the provisions of Part I would be applicable, Indian Courts would have supervisory Jurisdiction and the award rendered would be a domestically international commercial award it would be a foreign award for the enforcement in a country other than India.

CONCLUSIONS:

- The law declared by Bharat Aluminum judgment shall only apply to prospective arbitration agreements, that is to the agreements which are executed after September 6 2012, thereby depriving even the parties litigating in this very judgment from availing the benefit of the proposition laid down in the judgment;
- Part I of the Arbitration Act shall apply to all arbitrations which take place within India and Indian courts can exercise supervisory role only where the seat/place of arbitration is in India, making the seat as the center of gravity in arbitrations. This implies that Part I of the Arbitration Act would have no applicability to international commercial arbitration held outside India and Indian courts do not have the authority to supervise conduct of international commercial arbitrations seated outside India;
- The Indian Courts would have no jurisdiction to grant interim reliefs, appoint arbitrators, set aside foreign arbitral awards etc., which fall under Part I of the Arbitration Act where the seat/place of arbitration is outside India;
- Both Part I & Part II of the Arbitration Act are mutually exclusive of each other and Courts of India cannot annul foreign arbitral awards. However, the foreign arbitral awards will be subject to the jurisdiction of Indian Courts when the same are sought to be enforced in accordance with Part II of the Arbitration Act.

THE WAY FORWARD:

It would be interesting now to see as to how the prospective applicability of this judgment will have a bearing on parties entering into arbitration agreements after September 6, 2012 and drafting of an Arbitral Clause will now become more challenging, especially in light of the fact that choice of curial law now has to be in consonance with choice of seat. Also, in cases of International Commercial Arbitration, where the underlying assets of a contract are in India, it would be a matter of choice for the parties as to what would be more preferable for the parties – a foreign seat/place of arbitration or India as the seat/place of Arbitration (to enable parties avail benefit of the provisions of Part I of the Arbitration Act, including provisions of interim reliefs). Also, caution would have to be exercised while using expressions like "seat" or "place" or "venue" especially since use of such words loosely may invite adverse interpretations from Courts in light of what is provided in this judgment.

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This update only contains a summary/ limited description of the topic dealt with hereinabove for general information purposes and should not be construed as a legal opinion or be relied upon in absence of specific legal advice. For further information or legal advice please feel free to contact us at the addresses set out herein.

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