

## **INDIAN ARBITRATION LAW – SUPREME COURT IMPLEMENTS UNCITRAL MODEL LAW**

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Recently, on September 6, 2012, the five members constitutional bench of the Indian supreme court (“**Supreme Court**”) in ‘*Bharat Aluminum Co. Vs. Kaiser Aluminium Technical Service Inc.*<sup>2</sup> (“**Balco Judgment**”)’ after reconsidering its various previous decisions on the Indian Arbitration & Conciliation Act 1996 (“**Indian Arbitration Act**”) concluded that the Indian Arbitration Act should be interpreted in a manner to give effect to the intent of Indian Parliament. In Balco Judgement, the Supreme Court reversed its earlier rulings in cases of ‘*Bhatia International v Bulk Trading S.A & Anr*<sup>3</sup>’ and ‘*Venture Global Engineering v Satyam Computer Services Ltd and Anr*<sup>4</sup>’ stating that findings in these judgments were incorrect.

Based on the Balco Judgment, the following is new legal position w.r.t. arbitrations law in India which is in line with the intention of the parliament when they enacted Indian Arbitration Act in 1996:

- a) The Indian Arbitration Act has accepted the territoriality principle which has been adopted in the UNCITRAL Model Law. Accordingly, Part I of the Indian Arbitration Act applies only to arbitrations taking place in India irrespective of whether such arbitrations takes place between Indian parties or between the Indian and foreign parties (“**Domestic Awards**”). The Domestic Awards can be challenged (section 34) and are enforceable (section 36) under Part I of the Indian Arbitration Act.
- b) Part I of the Indian Arbitration Act has no application to arbitrations seated outside India irrespective of whether parties chose to apply the Indian Arbitration Act or not (“**Foreign Awards**”). The grounds to challenge of awards given in Part I (section 34) of the Indian Arbitration Act are thus applicable only to Domestic Awards and not to Foreign Awards.
- c) The law of the seat or place where the arbitration is held is normally the law to govern the arbitration. If the agreement provides for a “seat/place” outside India, Part I of the Indian Arbitration Act would be inapplicable to the extent inconsistent with the arbitration law of the seat/place, even if the agreement purports to provide that the Indian Arbitration Act shall govern the arbitration proceedings.
- d) In case of Domestic Awards, Indian laws shall prevail if substantive law conflicts with the laws of India. In case of Foreign Awards, the conflict of laws rules of the country in which the arbitration takes place would have to be applied.
- e) There is no provision under the Civil Procedure Code 1908 or under the Indian Arbitration Act for a court to grant interim measures in terms of Part I (section 9) of the Indian Arbitration Act in arbitrations which take place outside India, even though the parties by agreement may have made the Indian Arbitration Act as the governing law of arbitration. An inter-parte suit simply for interim relief pending arbitration outside India would not be maintainable in India.

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<sup>2</sup> Civil Appeal No. 7019 of 2005

<sup>3</sup> 2004 (2) SCC 105

<sup>4</sup> 2008 (4) SCC 190

- f) The regulation of conduct of arbitration and challenge would be done by the courts of the country in which arbitration is conducted. Accordingly, a Foreign Award can be annulled by the court of the country in which the award was made, i.e., the country of the procedural law/curial law (“**First Alternative**”) and not before the courts of the country under the law of which the award was made, i.e., the country of substantive law (“**Second Alternative**”). It can be challenged in the courts of the Second Alternative, only if the court of the First Alternative had no power to annul the award under its national laws.
- g) The Indian Arbitration Act intentionally limits it to awards made in pursuance of an agreement to which the New York Convention or the Geneva Protocol applies. Therefore, no remedy is provided for the enforcement of the ‘non convention awards’ under the Indian Arbitration Act.
- h) Most importantly, these findings of the Supreme Court are applicable only to arbitration agreements executed after 6 September 2012. Thus all disputes pursuant to arbitration agreement entered into upto 6 September 2012 shall be decided by old precedents irrespective of fact that according to the Supreme Court such rulings were incorrect and have been reversed.

It is noted that the foreign investors/parties have been facing problems in enforcing the Foreign Awards in India against Indian parties because earlier the Supreme Court consistently held that provisions of Part I of the Indian Arbitration Act are applicable to the Foreign Awards as well. Thus, the Foreign Awards were subject to interference by Indian courts both during pendency of arbitration proceedings and at enforcement stage because Indian parties were entitled to challenge the Foreign Awards on various grounds available under Part I of the Indian Arbitration Act. Also, under such proceedings, the Foreign Awards were challenged on merits as well before the Indian courts. Therefore, now in view of the Balco Judgment, the Indian parties will no more enjoy such protections if the place/seat of arbitration is outside India.

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