

FOREIGN ARBITRATION - THE NEW ROAD AHEAD!

13-SEPTEMBER-2012

From Our Website
www.hariani.co.in

■ SUPREME COURT
BACKS THE RIGHT
TO EDUCATION ACT

Your View

Please feel free to comment on this newsletter. You can send us an email at editor@hariani.co.in

Introduction

A path breaking judgment regarding the future implications of foreign award and foreign arbitration vis a vis jurisdiction of Indian Courts was passed on 6 September 2012 by the Constitutional Bench of the Hon'ble Supreme Court comprising Hon'ble Chief Justice S.H Kapadia, Justice Surinder Singh Nijjar, Justice D.K. Jain, Justice Mrs. Ranjana Desai, Justice Jagdish Singh Khehar. This landmark judgment passed in Civil Appeal No. 7019 of 2005 (Bharat Aluminium Co. vs. Kaiser Aluminium Technical Service, Inc.) along with 7 other Appeals lays down a new foundation in India in respect of foreign arbitrations and foreign awards passed in respect thereof.

The Indian Arbitration Act, 1996 ("**said Act**") is divided into four Parts with Part I dealing with arbitration held in India and Part II dealing with foreign awards. For the purposes of the above mentioned landmark judgment passed on 6 September 2012, we are concerned with Part I and Part II of the said Act.

Previous decisions of the Supreme Court:

Section 2(2) of Part I of the said Act provides that "this Part shall apply where the place of arbitration is in India", It is pertinent to note that Part I of the said Act contains provisions regarding grant of interim reliefs and setting aside of an arbitral award (Section 34 of the said Act). [\[1\]](#)

In the case of **Bhatia International vs. Bulk Trading S.A & Anr. (2004 2 SCC 105)** (referred to as the "**Bhatia International case**"), it was held by the Hon'ble Supreme Court that Section 2(2) of Part I of the said Act did not provide that Part I shall apply "only" where the place of arbitration is India. It was held that Part I and Part II of the said Act must be construed harmoniously and that Part I is applicable to foreign arbitrations. The result of the Bhatia International case led to foreign awards being challenged in India. Thus, the scope of Part I of the said Act was extended to foreign arbitrations by virtue of the Bhatia International case.

Further, in the case of **Venture Global Engineering vs. Satyam Computer Services Limited (2008 4 SCC 190)**, the Hon'ble Supreme Court relied on the

judgment passed in the Bhatia International case and applied Section 34 of Part I of the said Act to set aside a foreign award.

The moot question in the present case before the Constitutional Bench of the Hon'ble Supreme Court was whether Part I of the said Act is applicable to foreign awards passed in foreign arbitrations.

Brief facts of the case:

Bharat Aluminium Co., ("**BALCO**") and Kaiser Aluminium Technical Service, Inc. ("**KATSI**") entered into an Agreement dated 22 April 1993 ("**said Agreement**") vide which KATSI was to supply and install a computer based system for shelter modernization for BALCO. The said Agreement contained an arbitration clause for resolution of disputes arising out of the contract. The arbitration clause was contained in Articles 17 and 22 of the said Agreement, which is reproduced for reference purposes (emphasis supplied):

"Article 17.1 - Any dispute or claim arising out of or relating to this Agreement shall be in the first instance, endeavor to be settled amicably by negotiation between the parties hereto and failing which the same will be settled by arbitration pursuant to the English Arbitration Law and subsequent amendments thereto."

Article 17.2 - The arbitration proceedings shall be carried out by two Arbitrators one appointed by BALCO and one KATSI chosen freely and without any bias. The court of Arbitration shall be held wholly in London, England and shall use English language in the proceeding. The findings and award of the Court of arbitration shall be final and binding upon the parties.

Article 22 - Governing Law - This agreement will be governed by the prevailing law of India and in case of Arbitration, the English law shall apply."

Disputes arose between BALCO and KATSI with regard to the performance of the said Agreement. The disputes were referred to arbitration held in England. The Arbitral Tribunal passed two Awards dated 10 November 2002 and 12 November 2002 in England. BALCO challenged the above mentioned Awards under Section 34 (Part I) of the said Act in the Court of Learned District Judge, Bilaspur, India.

The Learned District Judge, Bilaspur by an Order dated 20 July 2004 held that the applications filed by BALCO under Section 34 of Part I of the said Act for setting aside the aforementioned foreign awards are not tenable and accordingly the same were dismissed. BALCO filed an appeal against the Order of the Learned District Judge, Bilaspur before the Hon'ble High Court of Chattisgarh, Bilaspur. By an Order dated 10 August 2005, a Division Bench of the Hon'ble High Court of Chattisgarh dismissed the appeal. An appeal was filed before the Hon'ble Supreme Court against this decision by BALCO. It is pertinent to note that on account of disagreement between the two judges of the Hon'ble Supreme Court, the appeal was placed for hearing before a three Judge Bench, which by its Order dated 1 November 2011 directed the matter to be placed before the Constitutional Bench of the Hon'ble Supreme Court.

Ratio of the judgment:

In this case, the Constitutional Bench of the Hon'ble Supreme Court analyzed the English law in detail and its applicability to the said Act. Prior to going into the merits of the matter, the history of arbitration in India as well as the scenario pertaining to International Commercial Arbitration was examined at length. The objects of the said Act and the provisions of the UNCITRAL Model Laws, were

taken into consideration. Decisions of various Indian courts, as well as courts of different countries on the aspect of enforcement of awards under foreign arbitral laws were considered by the Hon'ble Supreme Court in this case.

After such comprehensive analysis, the Constitutional Bench of the Hon'ble Supreme Court held that:

- Part I of the said Act is applicable only to all arbitrations which take place within the territory of India.
- There is no overlapping between the provisions contained in Part I and Part II of the said Act.
- Section 2(2) of Part I of the said Act is not in conflict with any provisions of Part I or Part II of the said Act.
- In an International Commercial Arbitration held outside India, no application for interim relief would be maintainable as applicability of Part I of the said Act is limited to arbitrations which take place in India.
- No suit for interim injunction simpliciter would be maintainable in India on the basis of International Commercial Arbitration held outside India.

Consequences of this judgment:

- In order to do justice and maintain equity, it is clarified by the Hon'ble Supreme Court that this judgment shall be applied prospectively to all arbitration agreements executed on or after 6 September 2012.
- On account of the fact that Part I is applicable only to arbitrations held in India, it will be very difficult for foreign parties, whose seat of arbitration is outside India, to seek interim relief in India.
- The judgments delivered by the Hon'ble Supreme Court in Bhatia International case and Venture Global Engineering case (mentioned hereinabove) are set aside with reference to arbitration agreements executed pursuant to the date of this judgment i.e. 6 September 2012. However, the judgment passed in Bhatia International case will still hold good where the arbitration agreements are executed prior to 6 September 2012.
- The exclusion of Part I of the said Act in its application to foreign awards implies that the Hon'ble Supreme Court has negated the concept of "long-arm jurisdiction". This will have far reaching implications. It will lead to a situation where an Indian party will have to challenge the foreign award in a foreign court, thereby restricting the supervisory jurisdiction of Indian Courts where the seat of Arbitration is outside India.

- By Aziza Khatri (Partner) & Ativ Patel (Associate)

[1] : Section 34 of Part I of the said Act provides that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with Section 34(2) and 34(3) of the said Act.

DISCLAIMER :

This new sletter is for informational purposes only, and not intended to be an advertisement or solicitation. This new sletter is not a substitute for professional advice. Hariani & Co. disclaim also responsibility and accept no liability for consequences of any person acting or refraining from acting on the basis of any information contained herein.

Copyright © : Hariani & Co. All rights reserved. Any form of reproduction, dissemination, copying, replication or modification of this new sletter and its contents is strictly prohibited.
