CLIENT UPDATE

INDIA SUPREME COURT DECISION SIGNALS PRO-ARBITRATION TURN

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To Our Clients and Friends:

Yesterday, in an important reversal of precedent, the Supreme Court of India held that Indian courts may not exercise supervisory jurisdiction over foreign-seated arbitrations pursuant to the Arbitration and Conciliation Act, 1996. The ruling, issued in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service Co*., Civil Appeal No. 7019 of 2005, marks a pro-arbitration turn by the judiciary and will likely soften India's image as an "arbitration-hostile" jurisdiction. International businesses and legal practitioners had expressed growing concern in recent years over Indian courts' interference in international arbitration proceedings.

Bharat Aluminum directly overturns the Supreme Court's prior decision in *Bhatia International v. Bulk Trading S.A. & Anr*., [2002] 1 LRI 703, which had given Indian courts expansive authority to supervise international commercial arbitrations taking place outside India. It also invalidates decisions that had relied on *Bhatia*, including *Venture Global Engineering v. Satyam Computer Services Ltd*., [2008] 4 SCC 190, a much-criticized ruling that allowed Indian courts to annul foreign arbitral awards if they violated Indian statutory law or "public policy."

Yesterday's decision in *Bharat Aluminum*, like the earlier *Bhatia* ruling, concerns the scope of India's domestic arbitration legislation, the Arbitration and Conciliation Act, 1996. At issue was whether Part I of the Arbitration Act, whose provisions apply "where the place of arbitration is in India," extends to international commercial arbitrations seated in foreign countries. Arbitration Act, 1996, § 2(2). If the provisions of Part I apply, Indian courts enjoy statutory authority to supervise the arbitration's conduct and review the tribunal's award on the merits. *See id*. chs. III, V-VII. If the provisions of Part I do not apply, Indian courts' supervisory authority is limited.

In *Bhatia*, the Supreme Court held that the statutory language defining Part I's scope of application—"This Part shall apply where the place of arbitration is in India"—did not actually *limit* Part I's scope. Rather, the Supreme Court held that the provisions of Part I applied to *all* arbitrations, but were only compulsory with respect to domestic arbitrations or international arbitrations taking place in India. The Supreme Court found that the provisions of Part I applied by presumption to international arbitrations taking place elsewhere, but could be overridden by the express or implied agreement of the parties. The result of the *Bhatia* ruling was to give Indian courts the same supervisory authority over foreign arbitral proceedings as over domestic arbitral proceedings.

Although *Bhatia* arose in the context of Indian courts' authority to grant interim measures (*e.g.*, injunctions) *in support* of foreign arbitral proceedings, its holding also dramatically expanded the power of Indian courts to interfere with foreign arbitrations. In 2008, the Supreme Court's *Venture Global* decision relied on *Bhatia* to hold that Indian courts had authority under the Arbitration Act to review foreign arbitral awards for compliance with Indian statutory law and public policy—and to annul such awards if they fell short of India's domestic standards. The *Venture Global* ruling, which was widely criticized, reinforced a growing perception that the Indian judiciary was moving in a strongly "interventionist" direction with respect to international commercial arbitrations.

Yesterday's ruling in *Bharat Aluminum* appears to end this trend. The nearly 200-page opinion, delivered by a five-member constitutional bench that included the Chief Justice, carefully reconsiders and rejects *Bhatia* and its progeny. In particular, *Bharat Aluminum* expressly adopts the "territoriality principle" (the notion that the juridical place of an arbitration should determine which body of law will govern the proceedings) and confirms that the Arbitration Act's reference to the "place of arbitration" indeed means the arbitral seat, as chosen by the parties or the relevant arbitral institution. Accordingly, Part I of the Arbitration Act has no application to international commercial arbitrations seated outside India.

Although the Supreme Court's decision applies only prospectively, that is, to all arbitration agreements concluded *after* yesterday's ruling, it has potentially far-reaching positive implications for arbitration law in India and the region.

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Please do not hesitate to contact us with any questions.

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