

Deciding the Question of Applicability: Arbitration Amendment Act, 2015

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The last decade has seen a concerted effort by the Indian legislature, the executive and the judiciary to promote alternative dispute resolution in India. The Arbitration and Conciliation (Amendment) Act, 2015 (**'Amending Act'**) marks an important milestone in the development of arbitration law in India. Some of the important changes brought about by the Amending Act are as follows:

- Makes arbitration more effective and time bound by introducing a time limit for delivering award and a fast track procedure for arbitration.
- Limits court interference by providing for no automatic stay on operation of awards when an application is filed under Section 34 to set aside the award.
- Limits the interpretation of public policy (one of the grounds for setting aside the award or challenging the enforcement of award, as the case may be), a term broadly interpreted by the courts under the unamended provisions.
- Provision to file an application for interim relief in arbitrations seated outside India to safeguard assets in India, pending the outcome of arbitration.

The Amending Act was brought into force with effect from October 23, 2015, to plug the perceived inadequacies in the Arbitration and Conciliation Act, 1996.

Section 26

The applicability of the Amending Act is governed by Section 26, which reads as follows:

“Section 26: Act not to apply to pending arbitration proceedings: Nothing contained in this Act shall apply to the arbitral proceedings commenced, in accordance with the provisions of section 21 of the principal Act, before the commencement of this Act unless the parties otherwise agree but this Act shall apply in relation to arbitral proceedings commenced on or after the date of commencement of this Act”.

The first part of Section 26 provides that the Amending Act shall not apply to arbitral proceedings commenced before October 23, 2015 (the date of commencement of the Amending Act), whereas the second part provides that the Amending Act shall apply ‘*in relation to arbitral proceedings*’ commenced on or after October 23, 2015. Section 26 is in the nature of a savings clause *i.e.* a provision which sets out the extent to which the rights accrued and liabilities incurred under the repealed provisions are to be governed by the amending act or the repealed act, as the case may be. A plain reading of Section 26 suggests that while it ‘saves’ all arbitrations commenced before October 23, 2015, the applicability of the Amending Act to fresh applications/ pending court proceedings in relation to arbitrations commenced before October 23, 2015 is not clear.

The Conundrum

Prior to the amendment, the Law Commission of India in its 246th Report had recommended introducing Section 85A, which provided that the proposed amendments were prospective and were to apply only to fresh arbitrations (commenced after the date of enforcement of amendment) and fresh applications (*i.e.* proceedings filed before a court or a tribunal after the date of enforcement of amendment). Pending arbitration proceedings and court proceedings filed prior to October 23, 2015 were to be governed by the unamended provisions. However, the legislature did not accept this recommendation and instead enacted Section 26, which in its present form does not provide any clarity on applicability of the

Amending Act to court proceedings arising out of arbitration proceedings that commenced before October 23, 2015.

Court proceedings in respect of an arbitration can be for interim relief (Section 9), appointment of arbitrator (Section 11), setting aside of award (Section 34), stay of enforcement of awards (Section 36) etc. and can be initiated prior to commencement of arbitration, during arbitration or post the termination of arbitration. After the Amending Act came into force, uncertainty arose on the issue of applicability of the amended provisions to court proceedings both pending and fresh.

Judicial Dicta

After the Amending Act came into force, several applications were pending in various Indian High Courts (at various stages) in relation to arbitrations commenced before October 23, 2015 that were required to be adjudicated by Courts. High Courts in India have taken different views.

One view taken by Indian Courts in *Electrosteel Castings Limited v. Reacon Engineers* (Calcutta H.C., January 14, 2016) and *Pragat Akshay Urja v. State of M.P and Ors.* (Himachal H. C., June 6, 2016) is that where the arbitration has commenced before October 23, 2015, court proceedings in respect of such arbitrations will not see the applicability of the Amending Act. In *Electrosteel*, a Section 34 application was filed after October 23, 2015 to set aside an award passed before October 23, 2015. A single judge bench of the Calcutta High Court refused to apply the Amending Act because the application was filed in context of an arbitration commenced before October 23, 2015, which was saved by Section 26.

A second view taken in *New Tirupur Area Development v Hindustan Construction Co. Limited* (Madras H.C, January 27, 2016) and *Rendezvous Sports World v. BCCI* (Bombay High Court, June 30, 2016) is that the Amending Act will be applicable to all court proceedings pending on October 23, 2015 or filed after October 23, 2015 in relation to arbitration proceedings initiated prior to the enforcement date of the Amending Act. The Madras High Court and the Bombay High Court in *New Tirupur* and *Rendezvous* were deciding whether the amended Section 36 was applicable to pending applications under Section 34. It is relevant to state that prior to the amendment, the operation of award was stayed automatically on filing of an

application under Section 34 to set aside the award. After the amendment, Section 36 was amended to provide for a stay only on filing of an application for stay on operation of award, greatly reducing the ability of parties to stall the enforcement of an award by simply filing meaningless challenges to the award under Section 34.

The Bombay High Court and the Madras High Court analysed the scope of Section 26 and the use of different phrases in Section 26, “.....shall apply to *arbitral proceedings commenced ...*” in the first part and “...shall apply in relation to *arbitral proceedings...*” in the second part. In this regard, the Courts relied on the law laid down in *Thyssen Stahlunion GMBH v. Steel Authority of India* that states that the phrase ‘*in relation to arbitral proceedings*’ is wider than ‘*to arbitral proceedings*’ to hold that the first part of Section 26 is restrictive as it saves only arbitral proceedings commenced before October 23, 2015 and the second part of Section 26 is wide due to use of ‘*in relation to arbitral proceedings*’. If this view were to be accepted, the Amending Act would be applicable to *all proceedings* (arbitral proceedings and court proceedings), other than what is saved by the first part of Section 26. Similarly, a Division Bench of the Calcutta High Court in *Tufan Chatterjee v. Rangan Dhar* (March 2, 2016), has held that proceedings in court whether initiated prior to, during or after the arbitral proceedings will not be saved by Section 26.

Therefore, while *Tufan Chatterjee* represents the broadest view in that it allows application of amended provisions to fresh applications (relating to arbitrations commenced before or after October 23, 2015), pending court proceedings and fresh arbitrations; on the other hand, *Electrosteel* represents the narrowest view in making amended provisions applicable to only fresh arbitrations and applications relating to such arbitrations.

Way Forward

Section 26, in its present form coupled with disparate judicial opinion has watered down the positive effect aimed by the Amending Act. While the view taken in *New Tirupur* case and *Rendezvous* case would allow for fresh applications to be adjudicated on the basis of the amended provisions, the application of the amended provisions to the pending court proceedings that were initiated prior to the enforcement of the Amending Act and are at different stages of adjudication may result in a lot of uncertainty. In court proceedings where arguments are

nearing completion, applicability of Amending Act might be prejudicial, as the parties will have to start afresh as per the amended provisions.

The ambiguity gets further compounded by the fact that in India, High Court judgements of one jurisdiction are not binding on the other. In the absence of any clarification from the Parliament or a pronouncement from the Supreme Court, the application of the Amending Act remains a matter of interpretation by Courts and may vary from case to case. The decision in *Rendezvous* case has been challenged before the Supreme Court and is likely to be taken up for hearing in September 2016. It remains to be seen which view would be endorsed by the Supreme Court.