

Arbitration Seated in India? It is Time to Enforce Your Award!

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The Indian Parliament passed the Indian Arbitration & Conciliation (Amendment) Act, 2015 (“Amendment Act”) in a bid to refresh and reform the existing arbitration regime under the existing Arbitration Act. Ironically, the Amendment Act spiralled new waves of persistent ambiguity and uncertainty regarding the applicability of these amendments to pending as well as fresh proceedings before the arbitral tribunals and the national courts.

The entire controversy regarding the amendments emanated from Article 26 of the Amendment Act, 2015, which reads:

Section 26. Act not to apply to pending arbitral 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. (emphasis supplied)

A detailed discussion of the issues regarding Article 26 have been previously discussed on this Blog here. Given the length and drafting of the provision, it is not surprising that various High Courts in India have only contributed to the confusion by offering diverse interpretations of this provision.

The Supreme Court of India recently made a laudable attempt to set the record straight. The judgement of the Court in *Board of Control for Cricket in India vs. Kochi Cricket Pvt. Ltd* finally settled the confusion surrounding the date of application of the amendments and their operation vis-à-vis the previous Act. The major takeaways of the judgment are:

2015. The operation of the Amendment Act, 2015 is prospective in nature and the critical cut-off date is October 23, 2015. The amended version of the Arbitration & Conciliation Act will apply to those arbitrations that were/are initiated on or after this date and to all arbitration-related court proceedings commenced on or after this date.

2015. Prior to the Amendment to Section 36, if an application for setting aside was filed under Section 34, it led to an automatic stay on the enforcement of the award. The amended Article 36 requires a party to make a separate application requesting for a stay on enforcement of the award. By this judgment, the benefit of the amended Section 36 has been extended even to those applications that were filed prior to October 23, 2015.

Prospective Operation of the Amendments

The Supreme Court performed an extensive textual analysis and distinguished between the two 'limbs' of Section 26 separated by the 'but'. It focused particularly on the use of "*to the arbitration proceedings*" in the first part versus "*in relation to arbitral proceedings*" in the second part. The Court concluded that the first part applies to proceedings that are conducted before the Arbitral Tribunal alone whereas the second part refers to courts proceedings that are commenced in

aid and assistance of arbitral proceedings. Thus, the operation of the Amendment Act, 2015 has been held to be prospective and applied to arbitrations as well as related court proceedings under the Arbitration Act initiated on or after October 23, 2015. This means that for awards that have been rendered before this date, any setting aside proceedings initiated on or after this date would benefit from the application of the amended provisions of the Act.

Automatic Stay on Enforcement of Domestic Awards Lifted with Retrospective Effect

Prior to the amendment, if and when a party filed an application for setting aside before a Court under Article 34, the other party could not seek enforcement of the award until the application was refused. Notably, the Supreme Court of India had previously criticized this provision in *National Aluminium Co. Ltd. v. Pressteel & Fabrications (2004)* because it did not grant discretion to the Court and instead, the mere filing of a Section 34 application led to an automatic stay on the enforcement of the award. Fortunately, the newly amended Article 36 has replaced this 'automatic' stay with the discretion to the Court to grant a stay where it receives a request from a party. In this judgment, the Court noted that the amended Section 36 would apply to all setting aside applications filed on or after October 23, 2015. However, the main issue before the Court was whether the newly amended Section 36 could also be applied retrospectively to applications filed before this date.

Under the Indian Arbitration Act, the award is deemed to be a decree by the Civil Court and deemed to be enforceable without any further action on the part of the Indian courts. Therefore, the issue was whether 'execution' proceedings relating to a decree gave rise to vested rights of a substantive nature which would not permit retrospective application of the amendment. Notably, the Court found that the execution of a decree (and therefore, an award) is a matter within the realm of procedure and does not give rise to any substantive right vested in a party to resist the enforcement of the award. Therefore, all domestic arbitration awards can now be enforced in India irrespective of any pending setting aside applications before national courts!

Interestingly, the Court also took into account '*the practical aspect and the nature of rights presently involved, and the sheer unfairness of the unamended provision*', which reflects the Court's evolving pragmatism and its acknowledgement that minimum judicial intervention is necessary to promote the efficacy of arbitration. It is evident the Supreme Court sought to cast its net far and wide and attempted to extend the progressive regime created under the Amendment Act to as many beneficiaries as possible within the textual contours of the legislation.

To conclude, the application of the amended Section 36 now mirrors the pro-arbitration approach codified Article 34 (4) of the UNCITRAL Model Law. The retrospective effect of Section 36 would undoubtedly benefit several arbitration awards, the enforcement of which was hitherto blocked by pending setting-aside applications. In addition, it would discourage parties from filing strategic Section 34 applications merely to block the enforcement of the award by the other parties and therefore, ease some of the burden on Indian courts. Important questions still remain regarding the application of other provisions of the Amendment but the Supreme Court has set the ball rolling and clarified critical issues, finally granting predictability and certainty to the High Courts as well as the arbitration community to a certain extent.

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