Kluwer Arbitration Blog

Indian Supreme Court Strikes Down Automatic Stay Provisions for Good

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The automatic stay provisions in the Indian arbitration regime have been a matter of a long debate. At first blush, the automatic stay seems like the perfect protection mechanism for any award debtor; however, it often puts the award creditor in a difficult spot. Arbitral awards rarely go unchallenged in India. The automatic stay provision enables a party to use arbitration to effectively delay the settlement of legal rights or access to justice. In essence, the provision not just runs afoul of the objects and purpose of arbitration, but also runs the risk of promoting litigation at the expense of arbitration.

Pursuant to Section 36 of the Arbitration and Conciliation Act, 1996 ('*1996 ACA*'), on the filing of a setting aside application under Section 34, the arbitral award could be enforced only after the Section 34 petition was rejected. Consequently, any challenge to an award of the arbitral tribunal rendered it unexecutable. In light of the same, in the case of *National Aluminum Company Ltd. v. Pressteel & Fabrications Ltd. and Anr*, the Supreme Court interpreted Section 34 of the 1996 ACA to allow for an automatic stay of an arbitration award on the filing and pendency of an application for setting aside of an award.

With the Arbitration and Conciliation Amendment Act 2015 ('*2015 ACA*'), Section 36 of the 1996 ACA was amended, which did away with the automatic stay provisions. Accordingly, the award debtor was required to make an application seeking a stay. However, there was persistent ambiguity among various High Courts in India over the applicability of the 2015 ACA provisions.

BCCI v Kochi – A temporary halt

The 2018 Indian Supreme Court case of *BCCI v Kochi* revolved around the interpretation of Section 26 of the 2015 ACA (for a previous analysis on the Kluwer Arbitration Blog, see here and here). Section 26 delineates the temporal scope of the 2015 ACA and has been the source of divergent interpretations by various High Courts. The confusion was whether Section 26 is prospective and applies to both

arbitral proceedings initiated *on or after* the commencement of the 2015 ACA and even to court proceedings *in relation to arbitral proceedings* initiated on or after the 2015 ACA having come into force. Consequently, the accompanying problem, which fell for contemplation before the Court, was whether the amended Section 36 of the 1996 ACA would apply to enforcement proceedings in case a challenge to such awards was made under Section 34 of the 1996 ACA.

The *BCCI v Kochi* case read Section 26 to imply that the 2015 ACA as a whole was to apply prospectively (*i.e.*, to arbitral proceedings commenced after October 23, 2015 – the date on which 2015 ACA came into force). This position, nonetheless, came with an exception. The Court posited that with respect to enforcement of domestic awards under Section 36 of the 1996 ACA, the 2015 ACA was to be applied retrospectively. This is because the right to obtain an automatic stay under Section 36 was not a vested one. Therefore, there would be no automatic stay of an award unless a separate application was successfully made for such a stay. In delivering the judgment, the Court took into account past recommendations made by this Court, including the suggestions of the 246th Law Commission Report. The Report recommended that the erstwhile Section 36 be substituted, as the automatic suspension of the execution of the award, as soon as a party seeks to challenge the award, defeated the objective of the alternate dispute resolution system to which arbitration belongs.

While one would have believed the *BCCI v Kochi* case to end the debate, the 2019 Amendment to the Arbitration and Conciliation Act, 2019 (*'2019 ACA'*), brought the discussion back to the forefront. The 2019 ACA deleted Section 26 and introduced a new Section 87, which provides that (unless the parties agreed otherwise), the 2015 ACA amendments would apply prospectively — thus bringing back the provision of automatic stays.

The Saga Continues

On November 27, 2019, the Supreme Court rendered a decision in *Hindustan Construction Company v UOI* (*'HCC Case'*), which again did away with automatic stays. The petitioners (infrastructure companies) approached the Court, pointing that they were being forced into insolvency even after the Indian Government and other government-owned companies owed them over INR 6000 crores (approximately USD 850 million) pursuant to various arbitral awards. They argued that they were disabled from recovering the money due to the automatic stay provisions.

In this case, the Court struck down Section 87 as unconstitutional for being arbitrary and revived Section 26 of the 2015 ACA. The Court noted that the automatic stay provision was a "double-whammy" for firms in favor of whom arbitration awards were passed. Despite the arbitral award being in their favor, the creditors were not able to enjoy the fruits of the same, as the principal amount would be automatically stayed due to a Section 34 petition (challenging the award), which in turn takes years for final disposal.

As a consequence, the firm could become financially unhealthy and vulnerable to

being declared insolvent under the Indian Insolvency Code. This retrospective resurrection of an automatic stay also results in payments already made under the amended Section 36 to award-creditors in a situation of no-stay or conditional-stay now being reversed.

Along with this absurdity, the Court noted that, on average, about six years are spent in defending these challenges. This delay defeats the very objective of the alternate dispute resolution system. The Supreme Court, therefore, brought back the position laid down by the *BCCI v Kochi* case, thus providing award creditors the immediate benefit of an award by way of security and not letting any automatic stay stymie the execution for several years.

Invalidity of automatic stay provisions: a welcome step?

Arbitration serves to foster profitable relationships by resolving disputes in a way that both parties regard as expeditious. Given that, disabling enforcement of the award after the entire process of arbitration is done renders the exercise pretty much futile. In fact, the automatic stay provision is often used by the award debtors to skirt away from their obligations and encourages them to file objections, howsoever pointless or frivolous. This delays the process of dispute resolution and runs antithetical to one of the most sacrosanct tenets of arbitration that is speedier resolution of disputes.

The interpretation of Section 34 of the 1996 ACA by the judiciary to provide for automatic stays was done with the intention of giving efficacy to the arbitration regime in India, an ironic result. This is particularly surprising because even under the much-criticized Arbitration Act of 1940, no provision was interpreted to provide for automatic stay of the award and the court had to explicitly order stay on awards. The introduction of automatic stay was a result of an incorrect interpretation by an earlier Supreme Court judgment and did not originally belong in the Indian arbitration framework.

To conclude, the application of amended Section 36 and the deletion of Section 87 now mirrors the pro-arbitration approach codified under the UNCITRAL Model Law. Article 36(2) of the same particularly refers to applications for setting aside or suspension of an award, in which the other party may provide appropriate security. However, Section 36 was read to allow automatic stay of awards as soon as a setting aside petition was filed. With automatic stays now a thing of the past, this anomaly has also been resolved. Several arbitration awards, the enforcement of which was hitherto prevented by pending setting-aside applications, will now be executed with minimum judicial intervention. This would also ease the burden of Indian courts, as parties will be dissuaded from filing strategic setting aside applications. Further, it brings back the vested right of enforcement and binding nature of an arbitral award along with speedy determination and recovery of amounts contained therein. This is a welcome step in the Indian arbitration regime. It is hoped that arbitration will now be more universally and reliably used domestically over other forms of dispute resolution.

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