India’s Arbitration And Conciliation (Amendment) Act, 2021: A Wolf In Sheep’s Clothing?

Kluwer Arbitration Blog
May 23, 2021

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Please refer to this post as: Ashish Dholakia and Ketan Gaur, Kaustub Narendran, ‘India’s Arbitration And Conciliation (Amendment) Act, 2021: A Wolf In Sheep’s Clothing?’, Kluwer Arbitration Blog, May 23 2021, http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/

The Arbitration and Conciliation (Amendment Act), 2021 (“**2021 Amendment**”) is the most recent intervention in, what appears to be, the Indian Parliament’s endless attempts to tinker with the scheme and intent of the Arbitration and Conciliation Act, 1996 (“**1996 Act**”). The 2021 Amendment, which was passed into law on 10 March 2021 follows the Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated by the President of India in November 2020.

This post discusses the changes brought about by the 2021 Amendment to Section 36 of the 1996 Act dealing with the “enforcement” of an arbitral award. The authors contend that the 2021 Amendment represents a retrogression in the pro-arbitration regime sought to be fostered in India. *Firstly*, the 2021 Amendment alters the scheme of the 1996 Act by creating new hurdles to the enforcement of arbitral awards. *Secondly*, by limiting the discretion of courts to tailor relief to the attendant circumstances, the 2021 Amendment has undone the enforcement-friendly changes to the 1996 Act. *Lastly*, the introduction of ill-defined standards for enforcing arbitral awards (a) throws a spanner in the wheel of enforcement and (b) creates grounds to resist enforcement which are divorced from the grounds that are available to challenge an award. Viewed in this light, the 2021 Amendment has the potential to distort the arbitration framework in India,

negatively impacting the rights of award-holders.

Alters the Scheme of the 1996 Act

The over-cautious approach under the Arbitration Act, 1940, where the imprimatur of the Court was a pre-requisite to the enforcement of an arbitral award, was done away with by the 1996 Act. In fact, in conferring direct enforceability upon arbitral awards, the 1996 Act went a step further than the UNCITRAL Model Law ("**Model Law**") which allowed an award-debtor to resist the award at both the challenge stage (Article 34) and at the enforcement or recognition stage (Article 36). At the outset is evident that the 2021 Amendment undermines this trajectory.

By the 2021 Amendment, disposal of a Section 36 application would (in most cases) require the Court to form a *prima facie* view that there has been no fraud or corruption in securing the contract or in the making of the award. The fact that such a finding shall nonetheless be subject to the eventual decision in the Section 34 application does not mitigate the hurdle since, on average, the final disposal of such proceedings (including appeals to the Supreme Court) which may be expected to take up to six years (*See Paragraph 3 of the HCC Case*). In this manner, the 2021 Amendment reintroduces the hurdle to enforcement (in cases of alleged fraud or corruption), representing a retrogression in the arbitral regime.

Nullifies the 2015 Amendment

Even within the realm of Section 36 proceedings, the 2021 Amendment could cause substantial mischief.

One of the major reasons for bringing in the 2015 Amendment was the observation of the Supreme Court in *National Aluminium Company*, that the automatic stay jurisprudence left "*no discretion in the court to put the parties on terms*" which defeated "*the very objective of the alternate dispute resolution system*". This grievance found succour with the 246th Law Commission Report as well, which recognised the paralytic effect of the same and recommended changing the law.

The legislative antidote to allay such concerns was to confer upon the Court

powers to deal with enforcement claims akin to those conferred upon civil courts under Order 41 Rule 5 of the Civil Procedure Code, 1908 (**"CPC"**) (*See Proviso to Section 36 of the 1996 Act inserted by the 2015 Amendment*). The exercise of such powers to stay enforcement of an award under the CPC is well-established and requires illustration that "*substantial loss may result to the party applying for stay of execution unless the order is made*" (*See Order 41, Rule 5(3)(a), CPC*).

With the 2021 Amendment Act, the illustration of a *prime facie* case would entitle the party to procure an "*unconditional*" stay, thereby obliterating any discretion to balance the competing equities which would doubtless vary from case to case in staying the enforcement of an arbitral award. In this respect, the 2021 Amendment re-introduces the stultification of judicial discretion resulting in 'paper awards', which led to the 2015 Amendment in the first place.

Further, the 2021 Amendment includes grounds such as 'fraud' and 'corruption' which are not explicitly contemplated under the CPC for staying a decree. These additional grounds now relate exclusively to arbitral proceedings, suggesting a fundamental distrust in the arbitral process, thereby creating inexplicable discrimination between civil proceedings and arbitral proceedings. Such discrimination has already by decried by the Supreme Court in the *HCC Case* where the Court observed:

> *"[…] The anomaly, therefore, of Order XLI Rule 5 of the CPC applying in the case of full-blown appeals, and not being applicable by reason of Section 36 of the Arbitration Act, 1996 when it comes to review of arbitral awards, is itself a circumstance which militates against the enactment of Section 87 […]." (Para 50).*

Standards are Vague and Arbitrary

With the inclusion of new grounds to resist the enforcement of awards, it may be expected that parties who are dissatisfied with the outcome of arbitral proceedings shall make every attempt to contend that their contract or the award is vitiated by fraud or corruption.

In *Swiss Timing Ltd. v. Commonwealth Games*, the Supreme Court held that

allegations of fraud in the contract would not undermine the arbitration agreement and that a conjoint reading of Section 15 and 16 of the 1996 Act illustrated "*all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration*". Similarly, in both *A. Ayyasamy v. A. Paramasivam* and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd*., the Supreme Court drew a distinction between "*fraud simpliciter*" and "*serious allegations of fraud*," which permeate the entire contract causing damage in the public domain, holding that only in the latter case would the dispute fall outside the competence of an arbitral tribunal.

It appears that the 2021 Amendment did not deal with these complexities and failed to identify which particular claims falling under the nebulous concept of 'fraud' will cross the threshold to merit the grant of an 'unconditional stay' of an arbitral award. Similar questions are likely to arise in the case of corruption as well.

It is useful to note the above decisions only relate to the *arbitrability* of fraud and not its assessment following a decision by an arbitral tribunal, that would have conducted a detailed examination of the evidence. In this respect, the legislature has "*passed the buck*" to the judiciary (without any legislative guidance) to clarify:

- ability of the court to examine new evidence or to engage in a *de novo* assessment of evidence *de hors* the analysis of the arbitral tribunal;
- the scope of "fraud" and "corruption";
- the degree to which the conclusions in the award can be examined or differed with; and
- the effect of failure to raise such allegations before the arbitral tribunal or in Court proceedings.

It is the authors' view that such issues would require fresh analysis to evolve standards that hitherto have been absent in both CPC and the 1996 Act. Much confusion will be caused in the interim, particularly given the retrospective application of the 2021 Amendment.

Interferes with Section 34 of the 1996 Act

Readers will note that the Supreme Court has consistently viewed Section 36 of the 1996 Act to be an intermediate process to balance equities between the

parties during the pendency of the Section 34 proceedings. In this respect, the following difficulties are a cause for concern:

Firstly, under Section 34(2)(a)(ii) an award may be set aside if the '*arbitration agreement*' (not the '*contract*' alone) is invalid in law, which may be on account of fraud or corruption. Under the amended Section 36, enforcement may be unconditionally stayed even if the '*contract*' was induced by fraud or corruption.

As noted above in the cases of *Swiss Timing Ltd*, *A. Ayyasamy* and *Avitel Post Studioz Ltd*, fraud in procuring a contract would not necessarily affect the arbitration agreement, which is severable in law.

Secondly, Explanation 1(i) to Section 34(2)(b) of the 1996 Act states that an award would be contrary to the public policy of India, and liable to be set aside under Section 34, only if the "*the making of the award*" was induced or affected by fraud or corruption.

However, Section 36 as amended by the 2021 Amendment, proscribes enforcement additionally in cases where "*the arbitration agreement or contract which is the basis of the award*" was based on fraud or corruption.

In this respect, it is relevant to note that a 'stay' of the award continues to be within the realm of the Section 34 Court to grant considering the merits of the award-debtor's plea for interim relief. However, the 2021 Amendment now pushes the Court to take a view on the merits of the matter under Section 36 (in relation to allegations of fraud or corruption) independent of the legal standards in Section 34. It is also noteworthy that the grounds of fraud and corruption were already available to award-debtor as grounds for staying an arbitral award under the unamended Section 36 read with Section 34. In view of the same, it is unclear if there exists a justifiable reason for providing a distinct ground for the same and thereby limiting the ability of the Court to engage in a holistic evaluation of the arbitral award and render justice that may befit the unique facts of the case.

Complications may also arise from a procedural standpoint. It is settled law that Section 34 is in the form of a summary procedure, where the Court is not to reappreciate evidence, record new evidence or minutely examine the arbitral award only to take a differing view (*See Ssangyong Engineering & Construction Co. Ltd. v. NHAI*). Whereas no *prima facie* case of fraud can be made out in the absence of material evidence to substantiate the allegations in the pleadings (*See*

Svenska Handelsbanken v. Indian Charge Chrome). Given that the scope of interference is limited under Section 34, it is difficult to fathom how any *prima facie* case can be made out under the amended Section 36 without offending the standards or impinging the jurisdiction under Section 34. Needless to state, respective appellate proceedings may also run into conflict.

On Retrospectivity

The *BCCI Case* held that the changes to Section 34, in altering the *ground* to challenge an arbitral award, related to the substantive rights and could not be retrospectively applied to Section 34 applications filed prior to the Cut-Off Date. However, so far as Section 36 was concerned, the Court held that the "*execution of a decree pertains to the realm of procedure*" and no vested right "*to resist enforcement*" under the un-amended Section 36 can be claimed by a party. Accordingly, the Court held that the amended Section 36 would apply even in relation to Section 34 applications filed prior to the Cut-Off Date.

On the contrary, the 2021 Amendment alters the enforceability of the award (as opposed to a right to resist enforcement). In other words, while the 2015 Amendment negatively affected the right of the award-debtor by doing away with the Automatic Stay, the 2021 Amendment negatively affects the rights of the award-holder, making the award unenforceable without the need for providing security. In this sense, the 2021 Amendment revives the "clog" in the right of the award-holder, and in this respect, it is not only procedural but also affects the substantive rights of an award-holder.

Conclusion

Given the substantial overhaul of the scheme of the Arbitration Act, the mere reiteration of the provisions of the 2021 Amendment in the Statement of Objects and Reasons does not inspire confidence. It appears that the Parliament has not fully comprehended these difficulties.

The 2021 Amendment expresses a fundamental distrust of the arbitral process that does not bode well for the Indian arbitration regime, particularly with India's sordid

ranking at No. 163 out of 193 in the enforcement of contracts. The mantle now falls upon the judiciary to ensure that the delicate balance between the integrity of contracts and the enforcement of awards is maintained.

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