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The 2020 Amendment to the Indian Arbitration Act: Learning from the Past Lessons?

Subhiksh Vasudev (MIDS Geneva) · Thursday, December 10th, 2020

In a bid to make its legal regime international arbitration-friendly, India has repeatedly amended its principal legislation, i.e. the Arbitration and Conciliation Act, 1996 (the 'Act'), over the last five years. The most recent one, the Arbitration and Conciliation (Amendment) Ordinance, 2020 (the '2020 Amendment'), came into force on 4 November 2020 seeking *"to address the concerns raised by stakeholders after the enactment of the Arbitration & Conciliation (Amendment) Act, 2019* [the '2019 Amendment']". I had earlier discussed on this blog the concerns raised by the 2019 Amendment from the standpoint of international arbitration. This post aims to serve as an update by analysing the two changes introduced by the 2020 Amendment.

Amendment to Section 36(3): Additional grounds for an unconditional stay on enforcement

Section 36 falls under Part I of the Act and deals with the enforcement of domestic arbitral awards. Part I of the Act applies where the place of arbitration is in India (Section 2(2) of the Act). If the seat of arbitration is outside India, Section 36 of the Act would not be relevant – the enforcement of that award would be subject to conditions set out in Section 48 in Part II of the Act. No amendments have been made to Section 48 of the Act. Nonetheless, from an international arbitration practitioner's standpoint, the amendment to Section 36(3) of the Act carries relevance from two aspects – substantive and procedural.

The Substantive Aspect

The 2020 Amendment adds a new Proviso to Section 36(3) of the Act. It reads as follows:

> *Provided further that where the Court is satisfied that a prima facie case is made out,-—*
>
> *(a) that the arbitration agreement or contract which is the basis of the award; or*
>
> *(b) the making of the award,*

> *was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.*

While the new Proviso is a positive step, there are four key issues here that may require attention. ***First***, for a court to make an order under Section 36(3) (or the new Proviso) of the Act, there must be an application under Section 36(2) of the Act. That application is further dependent on the pendency of an application challenging the award under Section 34 of the Act. Interestingly, Section 34 does not contain any express provision for setting aside an award or refusing its enforcement if "*the arbitration agreement or contract which is the basis of the award*" was induced or effected by fraud or corruption. As per Section 34(2)(b)(ii) of the Act, the only ground (in cases involving allegations of fraud or corruption) to refuse enforcement is where "*the making of the award*" was induced or affected by fraud or corruption. Therefore, one might argue that if a ground is not available for setting aside an award, how can it be available to an applicant seeking a stay of its enforcement. ***Secondly***, whether an arbitration agreement or a contract is affected by fraud or corruption is a matter of fact and ought to have been debated by the parties during the arbitration proceedings. In most cases, it would have been inquired in detail by the tribunal. To second-guess the tribunal's reasoning and reappreciate the evidence would be contrary to the Proviso to Section 34(2A) of the Act, which states that "*an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.*" ***Thirdly***, a possible counter-argument may be that Section 34(2)(a)(ii) provides for setting aside an award where "*the arbitration agreement is not valid under the law to which the parties have subjected it*" and therefore, an arbitration agreement induced by fraud or corruption will be void under Indian law. But that again begs the following question: given that Section 34(2A) prevents the court from setting aside an award in an international commercial arbitration even when the award is vitiated by patent illegality on the face of it, how could the enforcement of the same award be stayed for an illegality based on fraud or corruption? Moreover, to identify such illegality may not be a straightforward exercise. While corruption in the "*making of an award*" may be identified by evaluating the tribunal's conduct and is more a matter of procedure, corruption in procuring the underlying contract is a matter of merits and would, thus, require more than just *prima facie* evaluation of evidence. ***Lastly***, the mandate to unconditionally stay the enforcement in cases of corruption seems to lack logic or reasoning, especially when, in other situations, the court can exercise its discretion to put any applicant to such terms, as it deems fit, before granting any stay order.

The Procedural Aspect

The temporal scope of Section 36 of the Act was the subject-matter of some controversy in the past after it was amended by the Arbitration and Conciliation (Amendment) Act, 2015 (the '2015 Amendment'). It took some back and forth between the Indian government and the Supreme Court of India to conclusively resolve that issue (see previous pots on this blog here, here, and here). With the 2020 Amendment, it seems that judicial intervention in revisiting the same issue would not be needed. The Explanation to the new Proviso to Section 36(3) of the Act makes it abundantly clear that the said Proviso shall have retrospective effect and shall be deemed to have been inserted with effect from 23 October 2015 (i.e., the date on which the 2015 Amendment came into force). This is also in conformity with the decisions in BCCI v Kochi Cricket Pvt. Ltd. and Hindustan Construction Co. v Union of India where Section 36 of the Act was held to be retrospective in its

applicability. The 2020 Amendment further states that the new Proviso would apply to all court proceedings, irrespective of whether the court or underlying arbitral proceedings commenced before or after 23 October 2015. The 2020 Amendment, therefore, settles the debate from a procedural aspect by formally acknowledging the maintainability of an application for stay of enforcement on the grounds mentioned in the newly added Proviso to Section 36(3) of the Act, irrespective of when that application was filed.

Although the 2020 Amendment brings clarity to the temporal scope of the newly added Proviso to Section 36(3) of the Act, it raises two potential concerns. ***First***, in cases where an application under Section 36(2) of the Act is pending adjudication before a court, the applicants will now have to make fresh applications based on the grounds listed in the new Proviso. This is likely to involve delays and increased costs unless the courts can *sua sponte* take notice of this new Proviso and dispense with the filing of fresh submissions. ***Secondly***, in cases where applications under section 36(2) already stand dismissed, the applicants would claim to have a fresh cause of action to file a new application based on a legal ground that is deemed to have existed since 23 October 2015 in the statute but could not be relied upon earlier. Given the tendency to take one's chances in an already lost cause, especially in Indian courts, it would not be surprising to see some applicants trying to take a second shot at the same pie. Since it is not difficult to rule out such abusive behaviour, the revival of already decided cases using the new Proviso may be cautiously handled by the courts.

Amendment to Section 43J of the Act

In my previous post, I had highlighted how the 2019 Amendment outrightly disqualified foreigners (such as a foreign scholar, or a foreign-registered lawyer, or a retired foreign officer) from being an accredited arbitrator under the Act. This was because of the limitations imposed by the Eighth Schedule to the Act, that was introduced by the 2019 Amendment. The Eighth Schedule specified the qualifications, experience, and norms for accreditation of arbitrators and these norms were largely biased in favour of Indian lawyers, cost accountants, government officers, etc. The 2020 Amendment directly addresses that concern by removing the Eighth Schedule altogether from the Act and replacing it with "*the regulations.*" It means that the accreditation of arbitrators will now be governed by the criteria laid down in these "*regulations.*" However, what these "*regulations*" might be, who would make them, by when they would be released, are some of the questions that have been left unanswered. It is only hoped that scholars, practitioners, and key stakeholders will be consulted in finalizing these regulations to prevent any further controversy on this issue. It is likely, in my view, that these regulations will ensure inclusivity through diversity rather than fall prey to the same limitations in the Eighth Schedule.

Conclusion

What is evident is the intent of the Indian government in streamlining its arbitration regime through a flurry of amendments in the last few years, particularly after a stalemate of 19 years since the Act was enacted in 1996. On a positive note, it confirms that the concerns of the international arbitration community are reaching the ears of Indian policy-makers, who are not only taking them into account but are keeping an open-minded approach in rectifying past errors

when needed. Until the next amendment, we can keep our fingers crossed.

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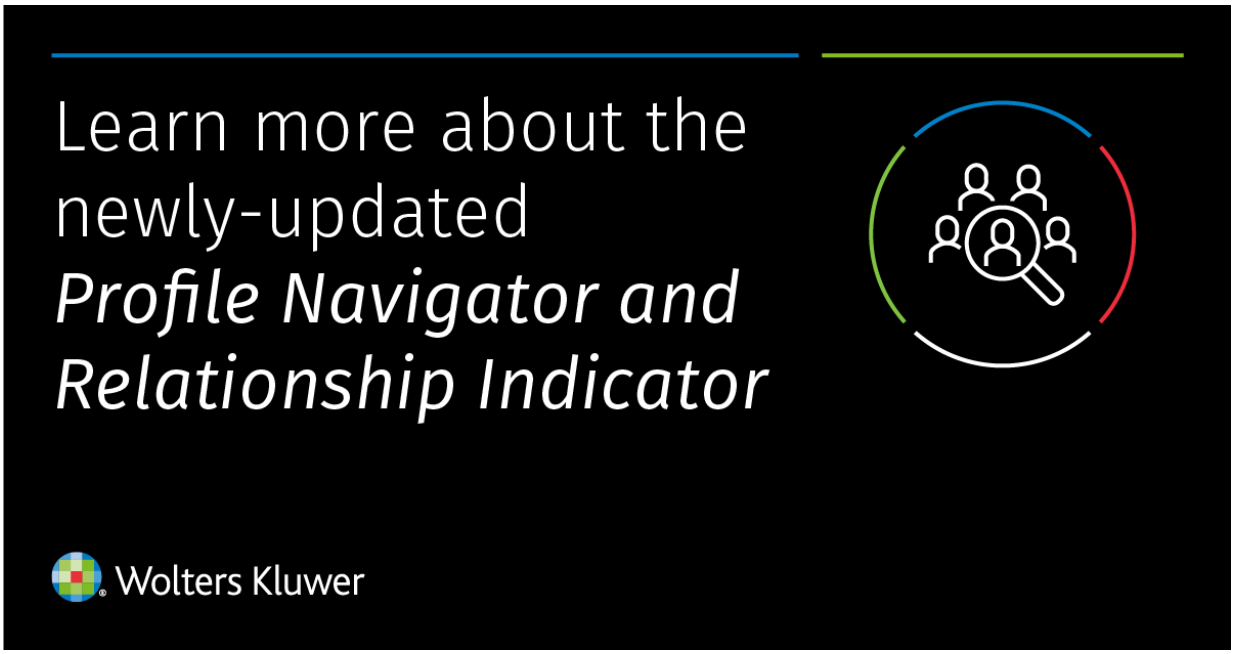

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