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Court Discretion in Indian Setting-aside Proceedings: Modification v. Doing "Complete Justice"

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Proceedings for setting-aside arbitral awards in India have been the subject of controversy since time immemorial. Recent trends indicate that the tendency of courts to set-aside awards has been on the wane. However, on many occasions, courts have been sympathetic to the losing party on issues of quantum, costs and interest, and have undertaken a balancing exercise, while refusing to set-aside an award completely.

The Supreme Court of India ('**Supreme Court**') has finally decided the scope of an Indian court's power to modify awards under the (Indian) Arbitration and Conciliation Act, 1996 ('**Act**') when adjudicating setting-aside applications. In ***The Project Director, NH No. 45E and 220, NHAI v M. Hakeem & Anr***. SLP (C) No. 13020/2020 (**'*NHAI v. Hakeem*'**), the Supreme Court found that the Act does not provide any power of modification of arbitral awards, although such discretion may be used in rare circumstances by the Supreme Court as discussed below.

Scope of a reviewing court's power in setting aside proceedings

The Act provides for setting aside as the only recourse against an arbitral award. An award can therefore usually only be wholly set-aside where the grounds for the same stand established. A partial set-aside is possible when the award deals with *ultra petita* matters (i.e. issues beyond the scope of submission to arbitration). In all cases however, the scope of the reviewing court's decision is binary, either to confirm or set-aside the award.

On this basis, the Supreme Court held that there was neither any right to seek a modification, nor any power of the reviewing court to modify the award. This reasoning draws support from the fact that the setting-aside provision under the Act is closely modelled on Article 34 of the UNCITRAL Model Law, which uses a clearer title "*Application for setting aside as exclusive recourse against arbitral award*".

While the words "exclusive recourse" are not used in the title to Section 34 of the Act, the remainder of this provision follows Article 34 of the Model Law word-for-word, except for a deviation in language regarding burden of proof. While the Model Law requires that the party assailing the award "furnishes proof that" the grounds under Article 34 are met, the Act requires the party assailing the award to demonstrate these grounds "on the basis of the record of the

Arbitral Tribunal". This deviation in language was made by an amendment in 2019 to reinforce the principle that setting aside proceedings must be very limited in nature and not involve consideration of evidence and issues afresh.

The Supreme Court also referred to various judgments holding that the reviewing court in setting-aside applications cannot review the merits of arbitral decisions. Accordingly, the reviewing court cannot modify the award since this would effectively be based on a review of the reliefs granted by the arbitral tribunal.

This is a relatively straightforward proposition and is in consonance with global arbitral jurisprudence on the meaning of "setting-aside" proceedings. For instance, under arbitral legislation in the United Kingdom and Singapore, the reviewing court's power to set-aside has been specifically distinguished from the power to 'vary' the award. The limited power to 'vary' has therefore been separately incorporated in these legislations, under Section 66, English Arbitration Act, 1996 and Section 49(8)(b) of the Singapore Arbitration Act, 2001.

Statutory power of modification v. Constitutional power of rendering "complete justice"

In practice however, several setting-aside applications in India do result in a modification or concession to the losing side in the arbitration (particularly where the losing side happens to be a state entity). For instance, issues of legal costs or interest on damages in India heavily depend on subjective 'reasonableness' in the minds of the arbitral tribunal, and subsequently the reviewing judge. While refusing to set-aside arbitral awards, reviewing courts frequently end up applying their own 'reasonableness' standard and reducing amounts awarded under these heads. This also emanates from the fact that costs jurisprudence in India, unlike some other jurisdictions, does not usually favour the grant of actual legal expenses, given that counsel fees are extremely variable in the Indian legal market.

This observation was brought to the notice of the Supreme Court in ***NHAI v. Hakeem***, citing an earlier decision where the Supreme Court, in setting-aside proceedings, had changed the date from which interest would apply, thereby reducing the overall interest payable. The Supreme Court readily accepted that this was indeed a modification of the award. However, it held that this was not a modification pursuant to the setting-aside mechanism under the Act, but under the Supreme Court's constitutional power to do "complete justice" under Article 142 of the Constitution of India.

This implies that various High Courts in India, which deal with the bulk of setting-aside applications, cannot modify awards, on any of its terms, including legal costs or interest, as only the Supreme Court can exercise power under Article 142 of the Indian Constitution . This is a positive step towards removing discretion in dealing with such applications and should lead to a trend of recovery of full legal costs as awarded and interest as awarded by an arbitral tribunal (see a previous post on legal costs *here*).

On the flipside, this may result in parties appealing against the rejection of their setting aside applications all the way to the Supreme Court, hoping to secure some modification under Article 142. While the Supreme Court has very rarely used its discretion under Article 142, in-principle, it is evident that some element of discretionary relief does remain to be explored before a losing party finally accepts the verdict under an arbitral award.

The application of the Supreme Court's constitutional discretion

One of such instances, was in ***Ssangyong v. NHAI*** where in exercise of discretion under Article 142, an arbitral award which had been made by 2-1 majority, was set-aside and the separate opinion of the minority arbitrator was effectively converted into the final award (see a previous blog on this case *here*). Incidentally, this decision was also authored by Justice Nariman who authored ***NHAI v. Hakeem.*** Despite the anti-modification stance, the discretion under Article 142 was in fact ultimately applied by the Supreme Court in ***NHAI v. Hakeem*** to uphold a decision of a lower court which had modified the quantum under the award.

The awards in question in this case had been passed under the statutory arbitral mechanism provided under the National Highways Act read with the Act. These awards dealt with disputes on the quantum of compensation paid to private land owners whose properties were acquired by the NHAI (a government agency) for the purpose of construction of highways.

The arbitral mechanism under the NHAI Act provided for an arbitration on this issue, with the appointment of a sole arbitrator by the Indian Government. This appointment procedure is at odds with the decisions of the Supreme Court in ***TRF Limited v. Energo Engineering Projects Ltd***. and ***Perkins Eastman Architects DPC & Anr. v. HSCC (India) Ltd***. (see a previous blog on this case *here*). It is now settled that one of the parties to an arbitration agreement cannot reserve a unilateral right to nominate a sole arbitrator. The NHAI being a state entity under the operation and control of the Indian Government, this unilateral reservation of appointment of the sole arbitrator was clearly bad in law.

However, the proceedings before the Supreme Court in ***NHAI v. Hakeem*** were only in relation to setting-aside of the awards in question, and there had been no constitutional challenge to the statutory provision under the NHAI Act allowing for such an appointment procedure. The Supreme Court thus held that it would cause "grave injustice" if the awards were set-aside only for fresh arbitral proceedings to be re-initiated under the defective appointment process. The Supreme Court had in any case found that the compensation awarded for acquisition of land by the government-appointed arbitrator in an arbitration against the government (NHAI) was perverse and not commensurate with the market value of the land acquired. Consequently, it upheld the effect of the lower court's decision, which had been to modify and enhance the quantum of compensation under the awards.

Conclusion

Ultimately, despite the Supreme Court's effort to reduce the scope of a reviewing court's discretion under the Act, it would appear that this decision adds to the weight of precedent on the discretionary power under the Indian Constitution. The Supreme Court was evidently grappling with multiple policy objectives in this decision, *viz*. (i) reducing scope of a reviewing court's discretion to modify, (ii) a defective appointment procedure under a statute that had itself not been challenged, and (iii) arbitral awards providing less than adequate compensation to persons whose properties were compulsorily acquired by the NHAI for the construction of highways.

What is certain is that this judgment does not close the chapter on modifications of arbitral awards

by reviewing courts in India – effectively replacing one source of discretion with another, although perhaps less reachable than the former.

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