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Case Comment

India: applicability of amendments in Indian arbitration law to arbitral and related court proceedings

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Subject: Arbitration . **Other related subjects:** Legislation.

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Legislation:

Arbitration and Conciliation (Amendment) Act 2015 (India) s.26

Arbitration and Conciliation (Amendment) Bill (India)

Case:

Board of Control for Cricket in India v Kochi Cricket Pvt Ltd unreported 15 March 2018 (Sup Ct (Ind))

***Int. A.L.R. N-11 Introduction**

With an arbitration-friendly ecosystem shaping up in India, the judiciary has consistently followed the footsteps of the legislature's pro-arbitration regime, introduced by the Arbitration and Conciliation (Amendment) Act 2015 (Amendment Act).

The Amendment Act resolved the anomaly to effective enforcement of arbitral awards caused by applications filed by the judgment-debtors (i.e. parties against whom the award is passed) to set aside the awards. Prior to the Amendment Act, enforcement proceedings could begin only upon expiry of the time for making an application to set aside the arbitral award or upon refusal of such application having been made. Thus, an application to set aside an arbitral award would result in an automatic stay on the award, resulting in a party not being able to enjoy the fruits of litigation.

The Amendment Act sought to correct this anomaly. It introduced the requirement for a separate application requesting for a stay of the operation of the award. It would be at the court's discretion to allow such an application granting stay of the award, for which it may impose conditions as deemed appropriate under the given facts and circumstances. Thus, an application to set aside an arbitral award would not automatically result in a stay on operation of the award or stall the enforcement proceedings.

Applicability of the amendments

In light of the above, award-holders sought execution of the awards and several such execution petitions were filed in various courts notwithstanding the pendency of applications challenging the awards. Thus, the applicability of the Amendment Act to such execution proceedings where the set aside proceedings had been initiated prior to the Amendment Act drew immense attention.

Section 26 of the Amendment Act, provides that

"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."

This triggered differing interpretations among several High Courts in a catena of judgments, as to what amounts to "in relation to arbitral proceedings" and the proceedings to which the amendments would apply.

The case before the Supreme Court

Several appeals were tagged together and placed before the Supreme Court of India (Supreme Court) in Board of Control for Cricket in India v Kochi Cricket Pvt Ltd and etc (Civil Appeal Nos 2879–2880), for determination of the following:

Whether s.26 of the Amendment Act makes the amendments applicable only to arbitral proceedings commenced on or after the commencement of the Amendment Act and to court proceedings which arise out of such arbitral proceedings. **Int. A.L.R. N-12*

Whether an application challenging an arbitral award rendered prior to the amendment be tantamount to an automatic stay on the operation of the award and stall execution proceedings commenced post-amendment.

In some of the appeals, the applications for challenging the arbitral awards were filed prior to the amendments being made, while in the remaining appeals such applications were filed subsequent to the amendments.

Held

Dismissing the appeals, the Supreme Court held as below:

i. The Amendment Act is applicable to arbitral and court proceedings commenced post-amendments, i.e. 23 October 2015

The Supreme Court drew the distinction between "to the arbitral proceedings" and "in relation to arbitral proceedings" in s.26 of the Amendment Act and concluded that:

"the arbitral proceedings" refers to proceedings before an arbitral tribunal, as is evident from the heading of Chapter V of the Act, which reads as "Conduct of Arbitral Proceedings". This entire chapter contains the provisions related to proceedings conducted before an arbitral tribunal;

the second part, i.e. "in relation to arbitral proceedings", only deals with court proceedings which relate to the arbitral proceedings. This is furthered by the discernible absence of "in accordance with the provisions of section 21 of the principal Act" (which relates to commencement of arbitral proceedings) in the second part.

Thus, the Amendment Act is prospective in nature and will apply (i) to arbitral proceedings which have commenced on or after 23 October 2015; and (ii) to court proceedings which have commenced on or after 23 October 2015.

ii. A pending challenge petition will not result in an automatic stay of enforcement proceedings commenced post-amendments

One of the arguments for prospectivity of the amendment was that the amendment was far-reaching and affected the vested and substantive rights of parties, who could have otherwise stayed the execution of an award. However, referring to the settled law that an arbitral award is executable and stamped as a decree,¹ and that execution proceedings are procedural in nature,² the Supreme Court ruled that there is no vested right in a judgment-debtor to resist execution.

Prior to the amendments, the requirement of disposal of challenge/setting aside petitions was a mere clog on the rights of the award-holder. However, this did not vest a corresponding right in the judgment-debtor to stay the execution of the award. Thus, such court proceedings for execution of an award shall be amenable to the Amendment Act, including cases where an application for setting aside an award was filed prior to the Amendment Act. **Int. A.L.R. N-13*

Rectification of the mischief caused by the existing regime

A reference was made to the 246th Law Commission Report, underlying the Amendment Act and the Supreme Court's observation in National Aluminum Co Ltd v Pressteel and Fabrications³ that such automatic stay of awards upon filing of setting aside applications leaves "no discretion in the court to put the parties on terms ... defeats the very objective of the alternate dispute resolution system to which arbitration belongs. In view of the urgency of such amendment, we sincerely hope that necessary steps would be taken". The Supreme Court also referred to the Parliamentary debates in this regard, to conclude that the need of the hour was to remedy the unwarranted delays in execution of awards caused by automatic stay of awards.

Comments

Prior to the judgment being pronounced, the Government of India issued a press release on 7 March 2018, referring to a proposed Arbitration and Conciliation (Amendment) Bill 2018 (Amendment Bill). This Amendment Bill is based on the recommendations of the Report of the High-Level Committee to Review the Institutionalisation of Arbitration Mechanism in India.⁴ The Amendment Bill proposes that the Amendment Act be made applicable to only "arbitral proceedings commenced on or after the commencement of the [Amendment Act] and to court proceedings arising out of or in relation to such arbitral proceedings". It explicitly excludes "court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether such court proceedings are commenced prior to or after the commencement of the [Amendment Act]"⁵ from applicability of the Amendment Act.

Condemning this proposal, and on due consideration of the legislative intent to solve the mischief played by automatic stay on operation of awards, the Supreme Court observed that "The immediate effect of the proposed [amendment] would be to put all the important amendments made by the [Amendment Act] on a back-burner". Thus, it ordered for the judgment to be placed before the Ministry of Law and Justice to resolve to the underlying slip-up on applicability of the amended provisions.

With the pendency of the Amendment Bill 2018, and the flourishing pro-arbitration regime in India, it may only be expected that the legislature takes note of the Supreme Court's well-spirited solution to the applicability of the Amendment Act.

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Int. A.L.R. 2018, 21(3), N11-N13

². Nishith Desai Associates.

¹. See *Fuerst Day Lawson Ltd v Jindal Exports Ltd* (2001) 6 S.C.C. 356.

². *Narhari Shivram Shet Narvekar v Pannalal Umediram* (1976) 3 S.C.C. 203, 207.

³. *National Aluminum Co Ltd v Pressteel & Fabrications* (2004) 1 S.C.C. 540.

⁴. For an analysis of the report, see Kshama Loya, Ashish Kabra and Vyapak Desai, "Arbitration in India: The Srikrishna Report—A Critique" (2018) 20(1) *Asian Dispute Review* 4.

⁵. See the Arbitration and Conciliation (Amendment) Bill 2018.