

## Reflections on Section 36 of the Indian Arbitration Act

A swift and smooth enforcement of domestic arbitral awards is unquestionably an ideal prospect, but can be elusive at times due to the framework for court proceedings involved in enforcing an award. The time taken and procedures involved in enforcement proceedings have drawn substantial criticism over the years, paving the way for the amendments in 2015 and 2019 to the Arbitration and Conciliation Act, 1996 (the “**Arbitration Act**”).

These amendments have, however, caused uncertainty in deciphering the legislative framework that would apply to court proceedings in relation to an arbitral award. This article discusses the amendments to the Arbitration Act concerning the enforcement of domestic awards and the implications of a recent judgment of the Supreme Court of India in *Hindustan Construction Company Limited & Anr. v. Union of India & Ors.* (Writ Petition (Civil) No. 1074 of 2019) (“**Hindustan Construction**”).

Section 36 of the Arbitration Act provides that a domestic arbitral award shall be enforced in the same manner as if it were a decree passed by the court, once the time prescribed for making an application to set aside the award under Section 34 of the Arbitration Act had expired or an application made for this purpose had been refused. Prior to its amendment in 2015, the Arbitration Act did not specifically address the issue of whether the operation of a domestic arbitral award would be stayed while a challenge to the award under Section 34 of the Arbitration Act was pending.

Considering this issue, the Supreme Court, in *National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr.* ((2004) 1 SCC 540) (“**NALCO**”) held that a domestic arbitral award becomes “*unexecutable*” once it is challenged under Section 34 of the Arbitration Act, and that such “*automatic suspension*” would apply until challenge proceedings were dismissed.

This ‘*automatic stay*’ rule (as it came to be colloquially known) forced an award-holder to await the outcome of challenge proceedings before any steps could be taken to enforce the award. The hardship caused by this rule was exacerbated by general delays faced in disposal of court proceedings. This state of affairs drew substantial criticism, including in 2014 from the Law Commission of India in its 246<sup>th</sup> Report.

Parliament then enacted the Arbitration & Conciliation (Amendment) Act, 2015 (the “**2015 Amendment**”), which sought to do away with the automatic stay rule. It amended Section 36 by stipulating that the mere filing of a challenge under Section 34 would not render a domestic arbitral

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award unenforceable, and a stay of the operation of the award would have to be specifically sought from and granted by the relevant court. Accordingly, unless a court stayed the operation of an award, the award-holder was at liberty to have it enforced in accordance with the Arbitration Act. The 2015 Amendment became effective on October 23, 2015 (the “**Effective Date**”).

While the 2015 Amendment was perceived as being pro-arbitration, it immediately invited controversy on whether the relevant amendments would apply retrospectively to proceedings in relation to arbitration matters pending in Indian courts before the Effective Date. This controversy rested on an interpretation of Section 26 of the 2015 Amendment, which provided that nothing in the 2015 Amendment would apply to arbitral proceedings which had commenced prior to the Effective Date (unless agreed to by the parties) and would apply in relation to arbitral proceedings which commenced on or after the Effective Date.

After conflicting views of various High Courts, the controversy was finally settled by the Supreme Court in *BCCI v. Kochi Cricket Pvt. Ltd.* ((2018) 6 SCC 287) (“**BCCI**”). In *BCCI*, the Supreme Court ruled that the 2015 Amendment would apply to (i) arbitration proceedings that commenced on or after the Effective Date and (ii) all court proceedings that commenced on or after such date. The sole exception made by the Supreme Court to this bifurcation was that there would be no automatic stay of an award in challenge proceedings irrespective of when the underlying arbitration proceedings had commenced.

As a consequence, all award-debtors were required to file applications pursuant to the amended Section 36 of the Arbitration Act for stay of the operation of the award, failing which the award-holder would be entitled to proceed to enforce the award.

The finality of *BCCI* was, however, short lived, as Parliament passed the Arbitration and Conciliation (Amendment) Act, 2019 (the “**2019 Amendment**”) soon after the judgment in *BCCI* was issued. The 2019 Amendment introduced a new Section 87 in the Arbitration Act which provided that the 2015 Amendment: (i) will apply to arbitration proceedings commenced on or after the Effective Date and to court proceedings arising out of or in relation to such arbitration proceedings; and (ii) will not apply to arbitration proceedings commenced prior to the Effective Date or to court proceedings arising out of or in relation to such arbitration proceedings (irrespective of whether such court proceedings commenced prior to or after the Effective Date).

The sequitur to the 2019 Amendment was, *inter alia*, that the amended Section 36 of the Arbitration Act no longer applied to arbitral awards issued in arbitration proceedings commenced prior to October 23, 2015. This could lead to potentially absurd situations where (i) an award-debtor whose application for stay of the award was rejected by a court could now claim refuge under the automatic stay rule, and (ii) award-debtors who had been unsuccessful in obtaining a stay of the operation of the award pursuant to the amended Section 36 now sought refunds of decretal amounts paid under the award.

The constitutional validity of the new Section 87 of the Arbitration Act was at challenge before the Supreme Court in *Hindustan Construction*. Subsequently, the Supreme Court declared that its interpretation in *NALCO* of the un-amended Section 36 of the Arbitration Act as providing for an automatic stay was bad in law. The Supreme Court also declared Section 87 of the Arbitration Act unconstitutional and restored the position under Section 26 of the 2015 Amendment, as interpreted in *BCCI*. The Supreme Court’s view was based on, *inter alia*, findings that it was arbitrary to reinstate through Section 87 the mischief that the 2015 Amendment had sought to

correct.

The immediate consequence of the judgment in *Hindustan Construction* is that the automatic stay rule would no longer be available, irrespective of whether the arbitration proceedings in which an award is issued commenced prior to or after the Effective Date. This would also mean that award-debtors whose applications for stay of the operation of an arbitral award under the amended Section 36 (as interpreted in *BCCI*) were rendered futile once Section 87 came into force may now have to make fresh applications for stay.

While the decision in *Hindustan Construction* is a progressive development intended to expedite the conclusion of arbitration proceedings, its effect on other positive amendments introduced pursuant to the 2015 Amendment are yet to be revealed. Finally, while the discontinuation of the automatic stay rule has the potential of aiding award-holders, it could tend to protract court proceedings on account of delays in disposal of applications for stay of the operation of the award (and appellate proceedings arising therefrom) and increase litigation costs.

*This insight/ article is intended only as a general discussion of issues and is not intended for any solicitation of work. It should not be regarded as legal advice and no legal or business decision should be based on its content.*

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