

# Dispute Resolution Hotline

October 18, 2016

## ARBITRATION (AMENDMENT) ACT, 2015 SHALL APPLY RETROSPECTIVELY TO COURT PROCEEDINGS IN RELATION TO ARBITRAL PROCEEDINGS

### THE DELHI HIGH COURT

- Holds that provisions of the Arbitration & Conciliation (Amendment) Act, 2015 (“**Amendment Act**”) to apply retrospectively to all court proceedings related to arbitration proceedings instituted post the Amendment Act even if the arbitration commenced prior to the Amendment Act;
- Recognizes that the position regarding non-applicability of Part I of the Arbitration & Conciliation Act, 1996 (“**Act**”) with respect to foreign seated arbitrations stands amended by virtue of Section 2 (2)<sup>1</sup> of the amended Act thereby making Section 9 of the Act available to parties even in case of a foreign seated arbitration even if the arbitration commenced prior to the Amendment Act;
- Holds that choosing a foreign law or foreign seat or foreign institutional rules does not amount to implied exclusion of Section 9 of the Act;

### BRIEF FACTS:

Recently, the Delhi High Court (“**Court**”) in *Raffles Design International India Pvt Ltd. (“Petitioner”) vs. Educomp Professional Education Ltd.*<sup>2</sup> (“**Respondent**”) allowed a petition seeking interim relief under Section 9 of the Act (“**Petition**”) in a Singapore seated arbitration, and held that the provisions of the Amendment Act would apply to all court proceedings in relation to arbitral proceedings instituted after the Amendment Act came into force, even if the arbitration commenced prior to the Amendment Act.

The parties had agreed to resolve their disputes through arbitration seated in Singapore, with the governing law as Singapore Law, and arbitration to be conducted in accordance with the rules of the Singapore International Arbitration Centre (“**SIAC**”). Certain disputes arose between parties wherein the Petitioner proceeded to initiating arbitration in Singapore and also filed for the appointment of an emergency arbitrator under the SIAC rules, pursuant to which certain reliefs were granted to the Petitioner which were later confirmed by the arbitral tribunal. Due to subsequent contravention of the emergency award by the Respondent, the Petitioner filed the present Petition before the Court, to which the Respondent raised a preliminary objection regarding its maintainability.

### RESPONDENT’S OBJECTIONS:

The Respondent’s primary objection was on the ground that Part I of the Act is inapplicable to proceedings held outside India and that by choosing Singapore as the Seat, the parties have impliedly excluded the applicability of Section 9 of the Act and that therefore the present Petition is not maintainable. The Respondent’s also contended that the Amendment Act is inapplicable to the present arbitral proceedings by virtue of Section 26<sup>3</sup> of the Amendment Act, as the arbitral proceedings had commenced prior to the date of commencement of the Amendment Act.

### PETITIONER’S CONTENTIONS:

The Petitioner contended that the very purpose for the amended Section 2 (2) was to confer jurisdiction on Indian Courts in respect of Sections 9 and 27 of the Act, even if the seat is foreign and that the expression “*subject to an agreement to the contrary*” as found in the amended Section 2 (2) would mean and require something more than mere choice of law and seat of arbitration. It was also contended that the expression “*to arbitral proceedings*” as used in the first limb of Section 26 does not apply to court proceedings and that therefore the Amendment Act ought to apply to the present case.

### ISSUES BEFORE THE COURT:

- Whether the provisions of the Amendment Act were applicable to the present Petition?
- If the answer to the above is in the affirmative, whether the parties had excluded application of Part I of the Act, since the arbitration was seated in Singapore with the governing law being Singapore Law?

### JUDGMENT & ANALYSIS:

The Court clarifies that Section 26 of the Amendment Act is in two parts, the first couched in negative form, and the second in the affirmative. Relying upon the decision of the Supreme Court in *Thyssen Stahlunion GmbH vs. Steel Authority of India*<sup>4</sup> the Court observes that the usage of the word ‘*to*’ in the first limb instead of ‘*in relation to*’ clearly restricts the import of the first limb of Section 26. The Court therefore holds that the use of the phrase “*in relation to*”

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indicates that the legislature intended the second limb of the provision to have a wider sweep thus covering all proceedings connected to arbitral proceedings, and that therefore the amendments would apply to Court proceedings instituted post commencement of the Amendment Act. In coming to such a conclusion, the Court has upheld recent judgments of the Madras High Court [[Click Here to access NDA hotline](#)],<sup>5</sup> the Bombay High Court<sup>6</sup> and the Calcutta High Court<sup>7</sup> which came to similar conclusions.

The Court however, also observes that the two limbs of Section 26 of the Amendment Act are not exhaustive as the first limb refers only to proceedings commenced in accordance with Section 21 (found in Part 1) of the Act, and that therefore Section 26 is silent regarding applicability of the Amendment Act to proceedings which are not expressly indicated therein. Due to the lack of any express indication as to the applicability of the Amendment Act to arbitrations instituted outside India, the Court adopts a purposive interpretation, sets out the legislative intent behind the Amendment Act, and holds that even in cases where there is no express provision regarding retrospective applicability of the new law, the Courts should look to further intention of the legislature.

Considering that the very purpose of the amended Section 2 (2) of the Act was to enable a party to approach Indian Courts for interim relief even in foreign seated arbitrations, the Court clarifies that the position regarding non-applicability of Part I of the Act in foreign seated arbitrations, as held in *Bharat Aluminium Company Vs. Kaiser Aluminium Technical Services Inc.*<sup>8</sup>, stands amended as far as Section 2 (2) of the Act is concerned and that parties now have recourse to Section 9 of the Act even in foreign seated arbitrations. The Court therefore allows the present Petition and makes it clear that choice of a foreign law or a foreign seat or foreign institutional rules does not amount to implied exclusion of Section 9 of the Act.

The Court has demonstrated its pro-arbitration approach in adopting an effective and purposive interpretation of the provisions to further the intention of the legislature regardless of an apparent lacuna in the law so as to make the provisions of the Amendment Act effective immediately. Such an approach adopted by Courts would go a long way in enhancing the effectiveness of the alternate dispute resolution scenario in India. Parties can now choose a foreign seat and foreign law and still retain the benefit of seeking recourse to Indian courts for interim measures. The question of law regarding the retrospective applicability of the Amendment Act to arbitral proceedings vis-a-vis court proceedings however, is currently pending before the Supreme Court.

– Siddharth Ratho & Vyapak Desai

You can direct your queries or comments to the authors

<sup>1</sup> Section 2 (2) This Part shall apply where the place of arbitration is in India:

[Provided that subject to an agreement to the contrary, the provisions of sections 9, 27 and clause (a) of sub-section (1) and sub-section (3) of Section 37 shall also apply to international commercial arbitration, even if the place of arbitration is outside India, and an arbitral award made or to be made in such place is enforceable and recognized under the provisions of Part II of this Act.]

<sup>2</sup> O.M.P.(I) ( COMM.) 23/2015 & CCP (O) 59/2016, IA Nos. 25949/2015 & 2179/2016

<sup>3</sup> Section 26 : 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" (Emphasis supplied)

<sup>4</sup> (1999) 9 SCC 334

<sup>5</sup> New Tirupur Area Development Corporation vs. Hindustan Construction limited, Madras High Court, A.No. 7674 of 2016 in O.P. No. 931 of 2015

<sup>6</sup> Rendesvous Sports World vs. the Board of Control for Cricket in India, Bombay High Court, Chamber Summons No. 1530 of 2015

<sup>7</sup> Sri Tufan Chatterjee vs. Sri Rangan Dhar, 2016 SCC Online Cal 483

<sup>8</sup> (2012) 9 SCC 552

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