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***Post Amendment Challenge and Enforcement of Arbitral Awards – Clarification by the Delhi High Court***

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Recommended by:

***Un-amended (Indian) Arbitration Act would continue to apply to challenge and enforcement proceedings concerning awards delivered in arbitrations commenced prior to the amendment. The party challenging such an arbitral award is therefore entitled to an automatic stay on its enforcement without deposit of any money in the court, in keeping with the position prior to the amendment.***

**I. Introduction**

The Delhi High Court (“**DHC**”), has on January 6, 2017 delivered a significant judgment *Ardee Infrastructure Private Limited vs. Ms. Anuradha Bhatia/Yashpal & Sons* (“**Judgment**”) holding that a challenge to the enforcement of an arbitral award in cases where arbitration proceedings commenced prior to October 23, 2015 would be governed by the un-amended Arbitration and Conciliation Act, 1996 (“**Un-amended Act**”).

Resultantly, the parties seeking to challenge arbitral awards in cases where the respective arbitrations commenced prior to October 23, 2015, now:

- A. Are entitled to an automatic stay on the execution of the arbitral award once the challenge to the same is filed/admitted. Such a provision for an automatic stay has been specifically done away within the amended Arbitration and Conciliation Act, 1996 (“**Amended Act**”).
- B. Are not required to deposit the awarded amount in the court, which would have otherwise been required if the Amended Act applied and the party initiating a challenge to an arbitral award for money sought a stay on the operation/enforcement of such arbitral award pending the challenge.

**II. Background**

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The Arbitration and Conciliation Act, 1996 was amended on January 1, 2016 with retrospective effect from October 23, 2015. Section 26 of the Amended Act states 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.”*

Under the Un-amended Act, the filing and pendency of a challenge to an arbitral award, in effect, operated as an automatic stay on enforcement of the arbitral award.

The Amended Act changed this legal position to in effect specify, that the mere filing and admission of a challenge to an award would not operate as an automatic stay on the enforcement of the arbitral award. To seek a stay on the operation/enforcement of the arbitral award under the Amended Act, the party challenging the arbitral award must now file a separate application seeking stay of the operation/enforcement of the arbitral award which may be granted by the court as it may deem fit subject to the conditions for granting the same being recorded in writing.

The Amended Act further specifies that while considering grant of stay in case of an arbitral award for payment of money, courts shall have due regard to the provisions of the Code of Civil Procedure, 1908 relating to grant of stay of a money decree. The provisions prescribe the deposit of money in the court/creation of security by the party seeking the stay corresponding to the decretal amount.

In the case before the DHC:

- The arbitral award was delivered on October 13, 2015;
- The Amended Act came into effect from October 23, 2015 onwards;
- The challenge to the arbitral award was filed before the DHC on January 4, 2016;
- On May 31, 2016, the single judge bench of the DHC directed the appellants to deposit INR 27 million (approximately USD 393,000) else the challenge against the arbitral award would stand dismissed;
- Appeal against the above direction of deposit of money was filed before the division (two judge) bench of the DHC, which resulted in the Judgment, which set aside the single judge order to the extent that it required a deposit from the appellants.

### III. The Verdict:

In its 30 page judgment, the DHC considered various provisions of the law, arguments and counter-arguments, and finally concluded that to give a harmonious interpretation to Section 26, and to the respective applicability of the Amended and Un-amended Acts, the challenge to the arbitral award in the present case would be governed by the Un-amended Act (i.e. the appellant would not be required to deposit money for seeking stay of the operation and enforceability of the arbitral award). The DHC recorded that the right to an automatic stay upon filing of a

challenge was an accrued/vested right of the parties, and as such cannot be taken away retrospectively unless a different intention to that effect appears in the amending law. The DHC further observed that the intention of the legislature while amending the Un-amended Act was not to take away such accrued/vested rights of the parties.

The effect of the DHC's decision is that in all cases where arbitration proceedings have commenced prior to October 23, 2015, the resulting challenge to the arbitral award's operation and enforcement would be governed by the Un-amended Act, irrespective of the date of the arbitral award in such proceedings or the date of filing a challenge to the enforcement of the same. For those arbitration proceedings which commence on or after October 23, 2015, the Amended Act would apply to the entire arbitration proceedings.

While the Judgment endeavours to give a harmonious interpretation, attempting to anticipate legislative intent, it appears to be in conflict with judgments delivered by other High Courts of India on the similar question of the applicability of the Amended Act, including the Kolkata High Court (in the case of *Tufan Chatterjee vs. Rangan Dhar*, specifically disagreed to by the DHC in the Judgment) and the Mumbai High Court [*BCCI vs. M/s Rendezvous Sports World* and *BCCI vs. Kochi Cricket Private Ltd.* (not discussed in the DHC judgment)].

The judicial disagreements lead to an interesting situation where the challenge to the enforcement of arbitral awards in different states of India would for the time being be governed by the Amended or Un-amended Act, depending on the decisions of their respective High Court (whose decisions have a binding effect within the state) or the inclination of such High Court to follow any of the two interpretations by the other High Courts.

The differences are likely to prevail till such time the Supreme Court of India conclusively clarifies the position. The Supreme Court is, in any case, considering the question in certain appeals emanating from High Court judgments on the issue.

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