



## **BOMBAY HIGH COURT LIMITS APPLICABILITY OF THE 2015 AMENDMENTS, AND RULES THAT 'PRIOR NOTICE' UNDER SECTION 34(5) OF THE ARBITRATION AND CONCILIATION ACT, 1996 IS NOT MANDATORY**

### **Global Aviation Services Private Limited v. Airport Authority of India (February 21, 2018)**

#### **INTRODUCTION**

Undoubtedly the most burning issue in the field of arbitration law in India currently is the interpretation of Section 26<sup>1</sup> of the Arbitration and Conciliation (Amendment) Act, 2015 (**'the Amendment Act'**), and whether the amended provisions of the Arbitration and Conciliation Act, 1996 (**'the Act'**) would be applicable to court proceedings arising out of arbitrations commenced before 23 October 2015 (i.e. the date when the amendments were introduced). Different High Courts in India have given conflicting findings on this issue. This issue arose once again before the Bombay High Court (**'the HC'**) in the case of *Global Aviation Services Private Limited v. Airport Authority of India*<sup>2</sup>, in the context of Sections 34(5) and 34(6) of the Act.

#### **ISSUES AND FINDINGS**

The Respondent raised a preliminary objection to the maintainability of the Section 34 petition, on the ground that the Petitioner had not issued a prior notice to the Respondent as envisaged under Section 34(5)<sup>3</sup> of the Act.

The Petitioner resisted this contention on the basis that (i) the amended provisions of the Act would not apply to the present arbitral proceedings which were invoked before the effective date of the Amendment Act; and (ii) even if the amended provisions were found to be applicable, the requirement under Section 34(5) was merely directory.

The question, essentially, before the HC was whether Section 34(5) of the Act would be applicable to an arbitration invoked prior to the effective date of the Amendment Act (i.e., 23 October 2015) in light of Section 26 of the same, and if so, whether the requirement of a prior notice under Section 34(5) was mandatory or directory?

The Court held that the provisions of the Amendment Act would only apply to those proceedings in which the notice of arbitration has been received by the other party after the Amendment Act came into force i.e. after 23 October 2015. Further, the provisions of the Amendment Act would be applicable to cases where notice invoking arbitration was issued prior to 23 October 2015 only if the parties have agreed under the arbitration agreement to be governed by not only the Act, but also by statutory amendments thereto. The Court also went on to clarify that the date of filing the arbitration petition under Section 34(1) is irrelevant while determining the applicability of the Amendment Act.

On the second issue, the Court further held that a vested and substantive right i.e. to challenge an arbitral award could not be taken away merely on the ground of failure to issue notice under section 34(5). The Court stated that the provisions of Section 34(5) and Section 34(6) are directory and not mandatory. The Court stated that the procedure prescribed under Section 34(5) could be complied with even after the arbitration petition is filed by the petitioner under the said provisions or as set out in the Bombay High Court (Original Side) Rules, as that would sufficiently address the Law Commission of India's concern regarding delays, due to which it had suggested insertion of the said provision.

#### **CONCLUSION**

The importance of the HC's finding on the applicability of the amended provisions is perhaps mitigated by the fact that the Supreme Court is currently hearing a slew of petitions<sup>4</sup> related to that core issue. Based on courtroom information

<sup>1</sup> "26. Act not to apply to pending arbitral proceedings. - 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."

<sup>2</sup> Commercial Arbitration Petition No. 434 of 2017 with Notice of Motion No. 488 of 2017.

<sup>3</sup> Section 34(5) - "An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement."

<sup>4</sup> Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., SLP(C) No. 19545-19546/2016, etc.

received by ELP, arguments before the Supreme Court appear to be primarily centred around the same principles relating to Section 26 of the Amendment Act as before the HC in the present case. However, it is difficult to predict when the Supreme Court would be able to provide a conclusive decision on this issue.

Simultaneously, the finding regarding the requirement of issuing prior notice under Section 34(5) of the Act being directory is clearly another decision taken by Indian courts keeping in mind a broader pro-arbitration objective meant to facilitate speedy resolution of disputes. But, at the same time, it is bound to give rise to the question whether this decision effectively renders the said provision otiose.

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**ECONOMIC  
LAWS  
PRACTICE**  
ADVOCATES & SOLICITORS

**MUMBAI**  
[mumbai@elp-in.com](mailto:mumbai@elp-in.com)

**AHMEDABAD**  
[ahmedabad@elp-in.com](mailto:ahmedabad@elp-in.com)

**NEW DELHI**  
[delhi@elp-in.com](mailto:delhi@elp-in.com)

**PUNE**  
[pune@elp-in.com](mailto:pune@elp-in.com)

**BENGALURU**  
[bengaluru@elp-in.com](mailto:bengaluru@elp-in.com)

**CHENNAI**  
[chennai@elp-in.com](mailto:chennai@elp-in.com)

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