



ELP Arbitration Weekly Alert

January 23, 2018

[Republic of India through Ministry of Defence Vs AgustaWestland International Ltd.](#) ¹
[\(Delhi High Court, January 9, 2019\)](#)

INTRODUCTION

In this case, the Delhi High Court (HC) was called upon to examine the following issues:

1. Whether the mandate of the Arbitral Tribunal stood terminated since the time-limit for making an award under Section 29A of the Arbitration and Conciliation Act, 1996 (Act) had expired.

¹ 2019 SCC OnLine Del 6419

2. Whether arbitral proceedings ought to be terminated, owing to the allegations of fraud and corruption that were raised against a party.

The HC observed that the arbitral proceedings were initiated prior to commencement of the Arbitration and Conciliation (Amendment Act) of 2015 (**Amendment Act**) which introduced Section 29A of the Act and hence, the mandate of the Arbitral Tribunal did not stand terminated. It further held that the Amendment Act was prospective in nature and therefore, Section 29A of the Act was not applicable in the present case. However, with respect to the other issue, the HC agreed to further examine the validity of the arbitration agreement owing to the allegations of corruption and fraud raised against a party.

FACTUAL BACKGROUND

Republic of India through Ministry of Defence (**Plaintiff**) entered into an agreement with AgustaWestland International Ltd. (**Defendant**) for supply of defence equipment under which arbitration was invoked between the parties.

The Plaintiff filed a suit before the HC seeking a stay on the arbitral proceedings, stating that the mandate of the Arbitral Tribunal stands terminated as the time-limit of making an award under Section 29A of the Act has expired. The Plaintiff further argued that there are allegations against the Defendant of corruption, fraud and bribery which are not arbitrable and hence, arbitration proceedings should be stayed.

The Defendant argued that the third Arbitrator was nominated on August 2, 2014 (the Plaintiff gave his no objection to such appointment on August 7, 2014) and thus, the Arbitral Tribunal stands constituted on the said date. Arbitral proceedings were therefore commenced prior to the Amendment Act coming into force.

The Plaintiff refuted the above argument of the Defendant by stating that the document 'Terms of Appointment of the Arbitrators' was fixed on March 16, 2017 and hence, the provisions of Amendment Act should apply to the case.

ISSUES AND FINDINGS

HC noted that the Amendment Act had come into force on October 23, 2015 and as per Section 26 of the Amendment Act, the provisions of the Amendment Act shall not apply to the arbitral proceedings commenced (in accordance with the provisions of section 21 of the Act), before the Amendment Act came into force unless the parties agree otherwise. Additionally, as per Section 21 of the Act, the arbitral proceedings shall commence on the date on which request for the dispute to be referred to arbitration is received by the respondent, unless otherwise agreed by the parties.

HC observed that the Defendant issued a notice on October 4, 2013 invoking the Arbitration clause in the contract and thus, the said date shall be the date of commencement of arbitral proceedings under Section 21 of the Act. The document 'Terms of Appointment of the Arbitrators', dated March 16, 2017, is not an agreement to the contrary between the parties as contemplated under Section 21 of the Act.

It held that the language of Section 26 of the Amendment Act is very clear. As per the said Section, Amendment Act does not apply **"to the arbitral proceedings commenced in accordance with the provisions of Section 21 of the Act"**. If arbitral proceedings have commenced under Section 21 of the Act, then Section 29A of the Act would not be applicable.

The HC also placed its reliance upon the decision of the Supreme Court (**SC**) in *Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd.*² wherein the SC ruled that Amendment Act is prospective in nature and is applicable only to the arbitral proceedings that are commenced, on or after the coming into force of the Amendment Act.

Ultimately, the HC held that the arbitral proceedings were deemed to have commenced as per Section 21 of the Act, prior to the commencement of the Amendment Act and hence, Section 29A of the Act was not applicable to the case. Accordingly, the mandate of the Arbitral Tribunal did not stand terminated.

With respect to the issue whether the arbitral proceedings ought to be terminated owing to the allegations of corruption and fraud against a party, the HC relying upon the decision of SC in *A. Ayyaswamy v. A. Paramasivam*³ held that, there are certain complex disputes like criminal offences of a public nature or complicated allegations of fraud, which can only be decided by

² (2018) 6 SCC 287

³ (2016) 10 SCC 386

courts. The HC agreed to further examine the issue of maintainability of the arbitral proceedings, owing to allegations of corruption and fraud raised against the Defendant.

ELP COMMENT

In the present case, the arbitral tribunal did not raise an objection as to the arbitrability of the disputes involved. Although, owing to the nature of the disputes involved, the HC agreed to further examine the issue of maintainability of the arbitral proceedings, it nevertheless laid emphasis on its decision in the case of *McDonald's India Pvt Ltd V. Vikram Bakshi*⁴ and reiterated as under:

“Courts need to remind themselves that the trend is to minimize interference with arbitration process as that is the forum of choice. That is also the policy discernible from the Act. Courts must be extremely circumspect and, indeed, reluctant to thwart arbitration proceedings. Thus, while Courts in India may have the power to injunct arbitration proceedings, they must exercise that power rarely.”

⁴ (2016) 232 DLT 394