

# **Del HC: Prospective application of Commercial Courts Ordinance for Arbitration Matters**

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The Delhi High Court has recently issued a very interesting judgement on the interplay between the Commercial Courts Ordinance, 2015 and the **Arbitration and Conciliation Amendment Ordinance, 2015** (“Arbitration Ordinance”).

These two ordinances were passed to introduce much needed changes into the arbitration regime of India. Unfortunately, however, they have been mired in controversy since they received Presidential assent.

The Arbitration Ordinance has changed the jurisdiction of the Courts as prescribed in Section 2(1)(e) of the Arbitration and Conciliation Act, 1996 with respect to international commercial matters. All applications and appeals arising from an international commercial arbitration shall now be filed with the High Court. The Commercial Courts Ordinance has introduced a further provision with respect to arbitration matters, which states that all matters “that have been filed in a High Court, shall be heard and disposed of by the Commercial Appellate Division” of the High Court.

Similarly, in the case of domestic arbitrations all matters which lie before the High Court in exercise of its original jurisdiction shall also be heard and disposed of by the Commercial Appellate Division.

In light of these provision, learned single Judge of the Delhi High Court issued an order dated November 20, 2015 whereby he transferred OMP No. 255/2010 and OMP No. 914/2011 to the Division Bench, re-numbering them as OMP (Comm.) No. 1/2015 and OMP (Comm.) 2/2015. OMP No. 255/2010 dealt with the enforcement of a foreign award dated January 05, 2010 and OMP No. 914/2011 challenged a domestic award dated August 01, 2011.

The same order was passed in accordance with Section 10 of the Commercial Courts Ordinance which states that:

*“10. Whereas the subject matter of an arbitration is a commercial dispute of a Specified Value and -*

- (1) If such arbitration is an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 **that have been filed** in a High Court, shall be heard and disposed of by the Commercial Appellate Division where such Commercial Appellate Division has been constituted in such High Court.*
- (2) If such arbitration is other than an international commercial arbitration, all applications or appeals arising out of such arbitration under the provisions of the Arbitration and Conciliation Act, 1996 **that have been filed** on the original side of the High Court, shall be heard and disposed of by the Commercial Appellate Division where such Commercial Appellate Division has been constituted in such High Court.*

The matter subsequently came up before a Division Bench of the Delhi High Court comprising of Justice Pradeep Nandrajog and Mukta Gupta. The question that came up for consideration was whether this particular provision of the Ordinance was to apply prospectively to new



matters that are filed with the High Court after the Ordinance was passed or retrospectively to all matters filed with the High Court even before the Ordinance was passed.

The Court observed that Section 15 of the Commercial Courts Ordinance related to the transfer of arbitration matters pending before the High Court to the Commercial Division. Thus, the retrospective application of Section 10 would render Section 15 purposeless.

Furthermore, Section 13(1) of the Commercial Courts Ordinance deals with the limited right of appeal and states that an appeal from the decision of the Commercial Court or Commercial Division of a High Court will lie to the Commercial Appellate Division of that High Court in accordance with the right to appeal as provided in Section 37 of the Arbitration Act. Therefore, if Section 10 were to apply retrospectively and pending matters be heard by the Commercial Appellate Division, then the right of appeal under Section 37 of the Arbitration Act would be taken away. Since the right of appeal is a vested, substantive right, it *“can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise.”*<sup>1</sup>

Thus, for the two reasons stated above, the Court held that Section 10 would apply prospectively and remanded the two matters back to the Single Bench (re-numbered as OMP No. 255/2010 and OMP No. 914/2011).

This judgement provided a much needed clarification regarding the prospective application of the Commercial Courts Ordinance with respect to arbitration matters. However, it is still unclear how Section 37 (as amended by the Arbitration Ordinance) will function in light of new domestic and international commercial arbitration matters being filed with the Commercial Appellate Division of the High Court. Essentially the right of appeal has changed significantly because of the two Ordinances.

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<sup>1</sup> Gari Kapati Veeraya v. N. Subbiah Choudhry AIR 1957 SC 540