

Retrospective Application of the Arbitration Ordinance?

Authored By
Niharika Dhall
Advocate

The Ordinance to amend the Arbitration and Conciliation Act ("Arbitration Act") has created much speculation regarding its enforcement and applicability to pending arbitration matters. The Ordinance was promulgated on 23rd October, 2015, and has since been creating more problems than it offers solutions.

The most recent mention of the Ordinance took place in the case of *Royal Sundaram Alliance Insurance Co. Ltd. v. CEPCO Industries Pvt. Ltd.* 2015 SCC OnLine Del 13415, wherein the Petitioner had challenged an arbitral award dated 27.08.2014 on the grounds that it contravened the fundamental policy of Indian law under Section 34(2)(b)(ii) of the un-amended Arbitration Act. The Petitioner contended the same based on the facts of the case. The Respondent argued that the Court could not go into the merits of the dispute in accordance with Section 18 of the Ordinance which has amended the provisions of the law in the following manner:

Section 18: In section 34 of the principal Act-

(1) in sub-section (2), in clause (b), for the Explanation, the following Explanations shall be substituted, namely:-

Explanation 1- For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81: or

(ii) it is in contravention with the fundamental policy of Indian law: or

(iii) it is in conflict with the most basic notions of morality or justice.

Explanation 2- For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

The Court ruled in favour of the Respondent and held that the petition failed on two counts: first, the court could not look into the merits of the case; and second, the award was well reasoned and suffered no infirmity.

The Court passed this judgement taking into consideration the arguments raised by the Respondent regarding the Ordinance, but did not explicitly state whether or not the Ordinance would be binding on pending arbitrations, such as this case. Notwithstanding this, the Court would not have cited the Ordinance if there was doubt regarding its applicability to the present case.

It is expected that there will be significant litigation on the question of retrospective application of the Ordinance. A verdict on this matter, will also require the Court to determine concurrently, which provisions of the law are procedural in nature, and which create substantive rights. In that sense, this judgement has created a dangerous precedent since retrospective application of substantive law is *constitutionally* suspect.

The Ordinance itself is silent regarding implementation and applicability of the amendments to pending arbitration matters. The only helpful provision is contained in Section 8 of the Ordinance which states that the amendment to Section 12 of the Arbitration Act shall apply prospectively, that is, only to cases where the arbitrator is appointed after the commencement of the Ordinance. The absence of a provision such as this, in the rest of the Ordinance could be used to argue that the Legislators intended the amendments to be made applicable retrospectively. However, the amendments were not legislated by the Parliament. This, in essence reflects the most challenging part of the whole debate.