

Indian Supreme Court Takes Another Step to Strengthen Arbitration

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Over the last few years, India has slowly but surely been addressing its spotty history of costly and inefficient dispute resolution. While the court system has improved, many parties still choose to resolve disputes via arbitration, notwithstanding the risks of enforcement delay. Furthermore, arbitration is mandatory in some cases such as for certain domestic government contracts. Reducing enforcement delays is therefore important for the continued growth in the use of arbitration in India.

On 27 November 2019, in the case of *Hindustan Construction Company Ltd. v. Union of India*, the Supreme Court of India took a positive step in that regard by holding that enforcement of arbitral awards challenged in Indian courts will not be automatically stayed. Instead, the courts will have discretion in deciding if the facts justify a stay. The decision applies to arbitrations seated in India and brings Indian law in line with international standards on this point.

The facts of the case demonstrate the peril faced under the old law on automatic stays. As a contractor to governmental bodies hoping to get paid, the petitioner was involved in numerous arbitrations against the Government of India regarding cost overruns. The Government's usual practice was to delay payment by challenging awards favourable to the petitioner and applying to the courts to set them aside—a tactic which could delay resolution of the dispute by up to six years. The effect was to leave the petitioner out of pocket and facing pressure from its creditors.

A legislative amendment effective on 23 October 2015 ("2015 Amendment") to the Act clarified that, pending a challenge, an arbitral award remains enforceable unless a court considers that the circumstances of the case justify a stay on enforcement of the award. While it was clear that the 2015 Amendment applied to arbitrations commenced after 23 October 2015, it was unclear whether it applied to pre-23 October 2015 arbitral proceedings if court proceedings were instituted after 23 October 2015.

Prior to the *Hindustan* decision, if an award was issued in an arbitration commenced before 23 October 2015 and challenged before Indian courts, its enforcement was automatically stayed pending the determination of that challenge.

Not only did the *Hindustan* decision clarify that the 2015 Amendment applies in all cases where the court proceedings were instituted after 23 October 2015, irrespective of the date of commencement of the underlying arbitration proceedings, it went even further. The Court also held that, even before the 2015 Amendment came into effect, the Act did not require an automatic stay on enforcement pending conclusion of challenge proceedings.

The *Hindustan* decision provides welcome clarifications that improve the predictability of the legal regime in India. In particular, in making stays of enforcement discretionary rather than automatic, India makes itself a more attractive seat of arbitration. It remains to be seen whether the courts will grant stays sparingly in order to reduce delays in enforcement and dissuade parties from advancing tactical challenges in Indian courts.



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