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To,
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Sub: **Representation on the need for reintroducing automatic stay on arbitral awards**

1. The real estate sector partakes in a considerable amount of private equity investment, strategic investment, joint ventures, and other forms of partnerships and collaborations between various entities. The transactions between these entities typically contain arbitration agreements in the event that disputes arise. Certainty, stability and predictability of the arbitration regime is critical to the stability of the real estate sector itself.

2. However, recent decisions of the Hon'ble Supreme Court in *BCCI* v. *Kochi Cricket Pvt. Ltd. & Ors.*[1] (*"**BCCI**"*) and *Hindustan Construction Company Limited & Anr.* v. *Union of India & Ors.*,[2] (*"**HCC**"*) though intended to propel arbitration laws in a progressive direction, have had the unintended effect of disrupting a 19-year old regime retrospectively, creating a considerable degree of uncertainty and instability for various stakeholders, as set out more particularly hereinafter.

Removal of automatic stay on arbitral awards from pre-2015 arbitrations:

3. Under the Arbitration and Conciliation Act, 1996 ("**1996 Act**") as it originally stood, the filing of a challenge to an arbitral award under Section 34 resulted in an automatic stay on the operation of the award.[3] The Arbitration and Conciliation (Amendment) Act, 2015 ("**2015 Amendment**") inserted a new sub-section (2) to Section 36 of the 1996 Act, which effectively removed the provision for automatic stay and required the aggrieved party to file a separate application for a stay.[4]

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[1] (2018) 6 SCC 287
[2] W.P. (C) No. 1074 of 2019, judgment dated 27th November, 2019
[3] See Paragraph 10, *National Aluminium Company Ltd.* v. *Pressteel & Fabrications (P) Ltd. & Anr.*, (2004) 1 SCC 540
[4] Section 36(2), Arbitration and Conciliation Act, 1996: *Where an application to set aside the arbitral award has been filed in the Court under section 34, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award in accordance with the provisions of sub-section (3), on a separate application made for that purpose.*

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4. However, the legislature was cognizant of the fact that for 19 years, parties had been operating under the provisions of the 1996 Act. To disrupt the arbitration regime retrospectively would create a lot of uncertainty, instability and unpredictability for parties who were functioning under the legitimate expectation of being governed by a particular arbitral procedure. The legislature therefore provided, in Section 26 of the 2015 Amendment, that the amendments introduced by the 2015 Amendment would only apply in relation to arbitral proceedings commenced on or after the date of commencement of the 2015 Amendment Act.

5. In *BCCI*, the Hon'ble Supreme Court interpreted Section 26 in such a manner that regardless of when the arbitration had commenced, if the application under Section 34 was filed after the commencement of the 2015 Amendment Act, the amended Section 36 would apply and there would be no automatic stay on the arbitral award.

6. The decision in *BCCI* seems to have been contrary to the legislative intent because on 9th August, 2019, the legislature, through the Arbitration and Conciliation (Amendment) Act, 2019 ("**2019 Amendment**"), sought to clarify by introducing a new Section 87 into the 1996 Act that the 2015 Amendment would only apply to arbitrations commenced after the 2015 Amendment ("**post-2015 arbitrations**") and not to arbitrations commenced prior to the same ("**pre-2015 arbitrations**"), regardless of whether court proceedings arising out of or in relation to pre-2015 arbitrations had been filed after the commencement of the 2015 Amendment.[5] In effect, this meant that in respect of all pre-2015 arbitrations, the filing of a challenge under Section 34 would result in an automatic stay on the operation of the award, even if the Section 34 application was filed after the enactment of the 2015 Amendment.

7. In fact prior to the enactment of section 87, the government appointed a High Level Committee headed by Hon'ble Mr. Justice B. N. Shrikrishna (Retd.) to review the institutionalisation of arbitration in India and submit a report on it. The Srikrishna Committee after lengthy deliberation had also opined that by permitting the 2015 Amendment to apply to pending court proceedings related to arbitrations commenced prior to 23rd October, 2015 would result in uncertainty and prejudice to parties. The Committee was also of the opinion that if the 2015 Amendment was applicable to fresh court proceedings in relation to such arbitrations, it could result in an inconsistent position. As a result, the amending Section 26 limited the applicability of the 2015 Amendment Act to arbitrations commenced on or after 23rd October, 2015 and

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[5] Section 87, Arbitration and Conciliation Act, 1996: *Unless the parties otherwise agree, the amendments made to this Act by the Arbitration and Conciliation (Amendment) Act, 2015 shall –*

(a) not apply to–

(i) arbitral proceedings commenced before the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(ii) court proceedings arising out of or in relation to such arbitral proceedings irrespective of whether su0ch court proceedings are commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015;

(b) apply only to arbitral proceedings commenced on or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 and to court proceedings arising out of or in relation to such arbitral proceedings.

related court proceedings. Before enacting section 87, a full comprehensive study of the correct legal position had been undertaken. There was also merit in enacting such a provision because in respect of pre-2015 arbitrations, Section 87 had the effect of preserving and continuing the automatic stay that was already operational on awards that had been challenged under Section 34. Pertinently, several of these awards wrongly/erroneously directed various government bodies, government corporations and public sector undertakings to pay thousands of crores to private entities. The *BCCI* judgment erroneously interpreted the provisions for retrospectively removing the automatic stay already operational on such awards, changing the status quo and bringing uncertainty and prejudice to the parties, resulting in grave loss to government/ government bodies/corporations. Pertinently, as per information available, a staggering amount of INR 96,012.26 crores across 14 major public sector undertakings and government agencies was declared as contingent liability in the year 2016-2017, largely equating to amounts that are subject matter of court/arbitration proceedings. A break-up of these contingent liabilities against the respective entities is as under:-

Name of Companies	*Rs. In Crs.*
1. Nation Highways Authority of India	42,076.63
2. National Thermal Power Corporation	13,371.75
3. Delhi Metro Rail Corporation	11,494.85
4. National Hydroelectric Power Corporation	9,648.25
5. Bharat Heavy Electricals Ltd.	8,945.04
6. Indian Oil Corporation Limited	3,816.89
7. Mahanagar Telephone Nigam Limited	3,205.71
8. NLC India Limited	1,875.85
9. Steel Authority of India Limited	408.62
10. Dedicated Freight Corridor Corporation of India	350.00
11. SJVN Limited	273.43
12. Dredging Corporation of India	230.50
13. Mangalore Refinery and Petrochemicals Limited	185.74
14. National Projects Construction Corporation Limited	129.00
Total	**96,012.26**

This, in turn, have resulted in a huge burden on the public exchequer and/or taxpayer money. It was therefore important even from this perspective to ensure, by enacting Section 87, that automatic stay on arbitral awards resulting from pre-2015 arbitrations is not disturbed.

8. Contrary to the legislature's clear intention and despite the Justice Shrikrishna Committee's report, the Hon'ble Supreme Court, in the case of *HCC* (supra), struck down the newly introduced Section 87 as being "manifestly arbitrary" primarily on the ground that it did not address the pitfalls of such a provision as pointed out in *BCCI*. The so-called "pitfalls" of such a provision adverted to by the Court were that it would result in delays in the disposal of arbitration proceedings and increase court interference therein, thereby becoming contrary to the objects of the 2015 Amendment[6]

9. It is pertinent to note that the provisions of Section 36 prior to the 2015 Amendment removing the provision of automatic stay were in line with the

[6] *ibid.*, Paragraph 48

narrow scope of challenge provided under Section 34. For an award to stand to judicial scrutiny, it had to satisfy the bare minimal tests prescribed under Section 34 of the Act and hence a stay was provided therein to enable courts to consider whether an arbitral award complied such stipulations.

10. In any event, the provisions of Section 36 of the 1996 Act were not amended for 19 years, i.e., nearly two decades. The courts, despite recognizing the difficulties being faced in view of automatic stay under Section 36 of the Act, did not strike down the provisions as unconstitutional and deferred to the legislative policy.[7] The legislature recognized that retrospectively subjecting parties to a new regime would result in substantive rights available to such parties being retrospectively taken away. This is plainly impermissible. Equally importantly, the legislature keeping in view the fundamental principles of party autonomy which is the thread running through the arbitration act, enable such parties to adopt the new legal regime if they found it appropriate so as to ensure a balance being struck between the rights of the parties who have entered into arbitration agreements under a particular legal regime and have a legitimate expectation that such a regime would not be altered to their detriment in such a manner. However, the Hon'ble Supreme Court in *BCCI* and *HCC* went contrary to the legislative intent and misinterpreted the 2015 Amendment, making the removal of automatic stay, retrospectively applicable to pre-2015 arbitrations where court proceedings were commenced post the 2015 Amendment.

11. It must be appreciated, that subjecting parties who had entered into arbitration agreements under the pre 2015 legal framework to a new regime would result in (a) retrospectively denuding such parties of accrued substantive rights, (b) result in degeneration of party autonomy which is a fundamental facet of arbitration law, (c) be contrary to such parties legitimate expectation that their rights and remedies would not be detrimentally altered. It is also apparent that the imposition of a new legal regime and the taking away of substantive rights that have accrued to parties only leads to uncertainty and instability which is not desirable for any country seeking to have a more investor friendly legal framework. To this extent, the provisions governing arbitration proceedings and those governing court proceedings arising therefrom form part of a single package from the perspective of the parties to a dispute and the same and ought not to be bifurcated in a manner that creates uncertainty. Certainty, stability and predictability of the legal regime are as important as speedy resolution and minimal court intervention for the purpose of attracting foreign investment into the country. Accordingly, Section 26 and Section 87 were enacted to strike a balance between these varied objects of the Indian arbitration framework, intended to ensure that changes to the arbitration law are only applied prospectively and not retrospectively. In the circumstances, it is suggested that the legislature re-introduce the provisions relating to automatic stay of arbitral awards in respect of pre-2015 arbitrations.

12. An additional reason to consider reintroduction of an automatic stay on awards is the impact of Covid-19 on India's developing economy. As per the Ministry of Statistics, India's growth in the fourth quarter of the fiscal year

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[7] *National Aluminium Company Ltd.* v. *Pressteel & Fabrications (P) Ltd. & Anr.*, (2004) 1 SCC 540

2020 went down to 3.1%. There is no doubt that real estate sector has been adversely affected during this pandemic, as it brought the construction activities to a halt, resulted in reverse migration of the labourers and caused significant erosion in the market of potential flat purchasers. Similarly, government agencies dealing with infrastructure and real estate have also suffered a serious setback, due to the severe disruptions and hardships. Considering the significant adverse impact on business due to pandemic, a substantial right that was otherwise always available to parties ought not to retrospectively be taken away.

Suggestions for the reintroduction of automatic stay in respect of pre-2015 arbitrations:

13. It is settled law that the legislature has the power to reintroduce a law that has been struck down by the judiciary by passing a "Validating Act" that removes the basis on which the said law had been struck down.[8] As held by the Hon'ble Supreme Court in *Indian Aluminum Co.* v. *State of Kerala*,[9] the test is to see whether the Validating Act has removed the defect which the court had found in the previous law.

14. The alleged defect of Section 87 and the re-introduction of automatic stay in respect of certain arbitrations according to *HCC* was that from the same was "manifestly arbitrary" for being contrary to the objects of the 2015 Amendment, i.e., speedy disposal or arbitration matters and minimal court intervention. However, as pointed out above, Section 87 in fact protects principles of party autonomy and legitimate expectation by ensuring that parties are not subjected to a new legal regime retrospectively after being governed by an earlier regime for almost two decades. In light of this, it cannot be said that the re-introduction of automatic stay is manifestly arbitrary. Section 87 ensures that the applicability of the new regime, but only prospectively, and is therefore consistent with and balances all the objects of an alternate dispute resolution mechanism such as arbitration, including speedy disposal and minimal court intervention.

15. The Validating Act may place greater emphasis on party autonomy, specifying that parties who continue to be governed by the provisions of the pre-2015 regime are free to reap the benefits of the 2015 Amendment by expressly agreeing to subject themselves to the new regime. The new section may accordingly provide a more comprehensive mechanism for such parties to subject themselves to the 2015 Amendment, such as but not limited to the following:

    a. Parties to an arbitration agreement, the language of which expressly states or necessarily implies that they will be governed by the 1996

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[8] *D. Cawasji and Co. v State of Mysore and Anr.* (1984 Supp. SCC 490) Para no. 17; *Mohinder Kumar & Ors. V State of Haryana and Anr.* (1985 4 SCC 221) Para no.17; *Misrilal Jain v State of Orissa and Anr* (1977 3 SCC 212) Para No.6; *Prithvi Cotton Mills v. Broach Borough Municipality and Ors.* (1969 2 SCC 283) Para 4; *Welfare Association ARP Maharashtra and Anr. v Ranjit P. Gohil and Ors.* (2003 9 SCC 358) Para 45-48; *State of Karnataka and Ors. V Karnataka Pawn Brokers Association and Ors.* (2018 6 SCC 363) Para 24-25.

[9] (1996) 7 SCC 637, para 36

Act as amended from time to time, should be deemed to have consented to the application of the 2015 Amendment.

b. In all other cases where the arbitration agreement does not expressly mention or necessarily imply the application of amendments to the 1996 Act:
   - Parties may amend their existing arbitration agreement or enter into a new arbitration agreement expressly subjecting themselves to the 2015 Amendment; and
   - The courts shall, in any event, put the parties to an election as to which regime they are to be governed by.

In this manner, the Validating Act can reintroduce the provision of automatic stay in the specified pre-2015 cases by ensuring that parties have the freedom to exploit the benefits of speedy disposal and minimal court intervention under the new regime at the same time as preserving party autonomy and ensuring certainty and stability of the legal regime.

16. It is therefore suggested that a Validating Act be passed reintroducing Section 87, clarifying the aforesaid rationale in its Statement of Objects and Reasons. It may be further reiterated in the Statement of Objects and Reasons that Section 87 allows parties to, by mutual agreement, opt-in to the 2015 Amendment and reap the benefits thereof. Accordingly, the Validating Act may reintroduce Section 87 after (i) deleting the words *"Unless the parties otherwise agree"* and (ii) inserting a new proviso setting out a more comprehensive procedure for parties to subject themselves to the 2015 Amendment as recommended above. In such a manner, an adequate balance between all objects of the arbitration regime can be achieved.

Thanking you,

Yours Faithfully,
For CREDAI-MCHI

Deepak Goradia
President

Pritam Chivukula
Hon. Secretary