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**“ANALYSIS OF THE ARBITRATION
AND CONCILIATION (AMENDMENT)
ACT, 2021 AND ITS IMPACT ON
INDIA’S PRO ARBITRATION
OUTLOOK”**

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**ANALYSIS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT,
2021 AND ITS IMPACT ON INDIA'S PRO ARBITRATION OUTLOOK**

By: Ayush & Astha

ABSTRACT

Arbitration in India has recently undergone a profound change with the adoption of arbitration and conciliation amendment act 2021 this amendment partially touches the very foundation of arbitration, an institution that has a vital role to play in international commerce indeed arbitration is progressively taking over the role that national courts previously play in this regard. The Arbitration and Conciliation (Amendment) Act, 2021 was enacted to address the issue of fraud and corrupt practices in securing contracts or arbitral awards by empowering the courts to grant an unconditional stay in such cases. According to the statement of objects and reasons of the amendment act of 2021 it was necessary to omit the Eighth Schedule of the Act in order to develop India as a hub of international commercial arbitration by attracting renowned arbitrators to the country. The changes brought by this amendment have targeted the major complications of the principal act in acknowledging the needs of the public. However, the act has certain shortcomings. It is hoped by the legal community that the clouds of uncertainty would be eradicated by the legislature shortly and the efficacy of the 2021 amendment act is yet to be witnessed. The researchers through this paper have attempted to analyse the Arbitration and conciliation (amendment) Act, 2021 and its impact on India's pro arbitration outlook. The researchers have also tried to identify the lacunas of the 2021 amendment act.

INTRODUCTION

The Black's Law Dictionary defines the term Arbitration as, the submission for determination of disputed matters to private unofficial persons selected in manner provided by law or agreement¹. It is in fact a legal technique for the resolution of dispute outside the courts, wherein the parties to the dispute refer it to one or more persons namely arbitrator(s) whose award is binding upon both the parties. As a matter of general rule there is no right to appeal an arbitrator's decision, except under certain circumstances provided under section 37 of the Arbitration and Conciliation Act, 1996. Thus, there is very little scope for judicial intervention in the arbitration process which has resulted in reducing the pendency of cases in the traditional courts. Arbitration helps in upholding the principle of speedy justice which is one of the fundamental rights of any society.

The law pertaining to Arbitration in India is contained in the Arbitration and Conciliation Act, 1996. The objective of this act is to "consolidate and amend the law relating to domestic arbitration and international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto"².

Prior to this act the arbitration laws in India were governed by the Arbitration act of 1940 which only dealt with domestic arbitration. In the year 1980, UNCITRAL Conciliation Rules, were adopted by the United Nations Commission on International Trade Law and the United Nations General Assembly (UNGA) recommended all countries to implement the UNCITRAL Rules in situations where any dispute emerges in the context of international commercial relations and the parties are willing to seek an amicable settlement of that dispute. The Model Law and Rules established a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations thus it was necessary to formulate law respecting arbitration and conciliation, taking into account the aforesaid Model Law and Rules thus the legislators in India enacted the Arbitration and conciliation Act, 1996 which came into force on 16 August, 1996.

¹ Black's Law Dictionary

² Preamble of The Arbitration and Conciliation Act, 1996

After the enactment of the Arbitration and Conciliation act, 1996 the Civil Procedure Code (CPC) of 1908 was amended and section 89 along with rules 1A, 1B and 1C of order-X of the First Schedule was inserted as per the recommendations of Law Commission of India and the Malimath committee, with a view to promote alternate dispute resolution (ADR).

However, the need to update the laws according to the changing times has been felt continuously thus, The Arbitration and Conciliation Act, 1996 was amended in 2015, the rationale behind this amendment was to make the arbitration process transparent, economical and ensure speedy disposal and neutrality of arbitrators. Subsequently the Arbitration and Conciliation (Amendment) Act, 2021 was enacted to address the issue of corrupt practices in securing contracts or arbitral awards by empowering the courts to grant an unconditional stay in such cases. According to the statement of objects and reasons of the amendment act of 2021 it was necessary to omit the Eighth Schedule of the Act in order to develop India as a hub of international commercial arbitration by attracting renowned arbitrators to the country

NEED FOR ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

The requirement of the Arbitration and Conciliation (Amendment) Act, 2021 can be inferred from the statement of objects and reasons stated in the Act. The legislators felt that in order to address the issue of corrupt practices in securing contracts or arbitral awards, the stakeholders must get an opportunity to seek an unconditional stay of enforcement of arbitral awards. The Act of 1996 allowed a party to set aside an arbitral award (i.e., the order given in an arbitration proceeding) by filing an application before the appropriate court u/s 34 of the act. This provision was interpreted by the courts that an automatic stay would be granted, the moment an application under Section 34 of the act was invoked by the party³. This conflict was resolved by the 2015 Amendment Act, which in categorical terms stated that mere moving an application under section 34 of the act to set aside the award does not mean that the arbitral award is stayed ipso facto. The current situation after the Amendment act of 2021 provided that, where the court is prima facie of the opinion that the arbitration agreement or the contract on which the arbitral award is based or in making, was induced

³ National Aluminium Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr., 2004 1 SCC 540

or effected by fraud or corruption then the courts shall grant an unconditional stay on the enforcement of such arbitral award till the application under section 34 is pending.

From the statement of objects and reasons of the act the intention of legislators to make India a hub of international arbitration can be observed clearly, thus in order to achieve this it was necessary to abrogate the VIIIth schedule which was inserted by 2019 amendment act, it specified an exhaustive list of qualifications an arbitrator needs to possess. The schedule also specified the general norms that would apply to an arbitrator for accreditation such as fairness, integrity, and being capable of applying objectivity in arriving at settlement of disputes etc. Furthermore, the Amendment Act of 2021 *vide* its Section 3, substitutes Section 43J of the Arbitration Act by laying down that the qualification, experience, and norms for accreditation of arbitrators must be as prescribed by the regulations.

ANALYSIS OF THE 2021 AMENDMENT ACT

The Amendment act has introduced primarily two amendments to the principal Act which are as follow:

- A) Unconditional Stay on Awards: Section 2 of the amendment act states that “where the court is satisfied that prima facie is made out that,
 - (a) the arbitration agreement or contract which is the basis of the award; or
 - (b) the making of the award,was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award”.
- B) The qualifications of the arbitrators under 8th Schedule are omitted from the Arbitration and Conciliation Act, 1996 and the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.

Analysis of section 2 of the Amendment Act : The term “Arbitral award” is to be construed in the manner defined under section 2(c) of the Arbitration and Conciliation Act to include an interim award. According to the Amendment act of 2015, Section 34(2)(b) of the Arbitration and

Conciliation Act 1996, an arbitral award would be in conflict with the public policy if the making of the award is induced by fraud and corruption, as specified by the Central Government. But Section 34 of the Arbitration Act does not permit setting aside the arbitral award if the arbitration agreement and/or contract entered between the parties was induced by fraud or corruption.

It is pertinent to note that an applicant under Sub-Section 3 of section 36 of the Arbitration and Conciliation Act, 1996 empowers the court to stay the execution of the arbitral award, subject to the conditions as it may deem fit, and to provide reasons in writing thereto. Further the proviso to this sub-section states the procedure to be observed by the court in the cases where the arbitral award has been given in the payment of money. While considering the application for granting of stay of an arbitral award for payment of money the court shall give due regard to the relevant provisions of civil procedure code, 1908 with respect to the grant of stay of a money decree.

Now after the Arbitration and Conciliation (Amendment) Act, 2021 a new clause under section 36, in sub-section (3), after the proviso is added, wherein the courts shall grant unconditional stay to the arbitral award from being executed in cases where it appears prima facie to the court that the award itself, or the contract on which such award is based, was induced or effected by fraud or corruption. The amendment to Section 36 is to be applied in the retrospective effect irrespective of the fact that initiation of the court proceedings is done prior to the enactment of the 2015 Amendment.

Analysis of section 3 of the 2021 Amendment Act

The Arbitration and Conciliation (Amendment) Act, 2019 introduced section 43J in the act which provided the qualifications of the arbitrator as per those specified in VIII Schedule of the act. The VIII th schedule contained the exhaustive list of qualifications and experience of arbitrators, which were, inter alia, (1) an advocate, or (2) a chartered accountant/cost accountant, or (3) company secretary or (4) Officer in Indian Legal Service or an officer within engineering degree, person with educational qualification at degree level with 10 (ten) years of experience in scientific or technical streams, etc.

Other than setting forth the professional qualifications of an arbitrator, the VIIIth Schedule also provided for general norms that would be applicable to an arbitrator for accreditation, such as an arbitrator shall be a person of general reputation of fairness, integrity, and capable of applying objectivity in arriving at settlement of disputes, impartial etc.

As it can be observed, this schedule was vast in its stipulation of standards for arbitrators. These standards were however critiqued as they were deemed to be quite restrictive and contrary to the nature of arbitration itself, which has always been intrinsically associated with party autonomy. Moreover, the 2019 Amendment left no room for foreign qualified professionals to be appointed in India-seated arbitrations, which would heavily compromise the freedom of parties to opt for arbitrator(s) of their choice.

In order to promote India as a hub of international commercial arbitration the legislators found it to be essential that this schedule shall be omitted and done away with and with the amendment act of 2021 the eight schedule was scrapped. Currently the section 3 of the Arbitration and conciliation (Amendment) Act, 2021 states “the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations as prescribed by the Arbitration Council of India. This change also contributed to the better application of the party autonomy principle, which enables them to choose arbitrators regardless of their qualifications.

LIMITATIONS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

Upon prima facie reading of The Arbitration and Conciliation (Amendment) Act, 2021 seeks to make a robust arbitral environment for the stakeholders as it provides a parallel judicial scrutiny in the form of an extra layer of appellate review, but there can be a flurry of challenges of this additional scope of interference that are catastrophic:

1. The Amendment of 2021 Disregards the doctrine of minimal judicial intervention:

The 2021 Amendment’s implementation could lead to an increase in the excessive judicial interference in an arbitration proceeding which is detrimental to the overall objective of

having the dispute resolution mechanism i.e., minimal judicial intervention as enshrined under Section 5 of the Arbitration and Conciliation Act to avoid the process of a traditional litigation process. Furthermore, it will put an immense pressure on already overburdened courts and the pendency of cases in India. The amendment will most likely delay the enforcement of arbitral awards in India.

2. **A potent tool for harassment:** The 2021 Amendment may become a formidable tool for the aggrieved parties to harass the other party by pleading fraud or corruption in every arbitration proceeding to stay the enforcement of the arbitral award, as most applications filed under Section 34 of the Act allege a violation of public policy. This may not only add to the costs but also inconvenience, and delay the dispute resolution process but may also end up increasing the fear of the innocent parties. This may defeat the overall purpose of arbitration.
3. **Flurry of challenges with retrospective applicability:** The second part of section 3 of the Arbitration and Conciliation Act, 2021 Amendment, provides the retrospective applicability of the 2021 Amendment. It gives an opportunity to the parties to make an application under Section 36(2) of the Act and invoke the grounds of fraud or corruption envisaged under the additional provision to Section 36(3) of the Act. Due to the lack of procedural clarity, it is unclear that whether:
 - a. The parties may invoke the fresh grounds of fraud and seek unconditional stay under the 2021 Amendment, by way of an amendment application, in the pending applications of Section 36(2) of the Act where the plea of fraud was not initially taken.
 - b. the parties may move an application to withdraw their pending Section 36(2) application with leave to file a fresh Section 36(2) application that may possibly give the parties an opportunity to inculcate the grounds of fraud and make use of the 2021 Amendment.

4. **Ambiguity as to qualification of arbitrators:** As discussed above this amendment act of 2021, vide section 3 of the amendment act has omitted the eighth schedule which provided an exhausted list of accreditation norms for the arbitrators. Since the Arbitration Council of India has not been constituted till now and no regulations have been made for the appointment of an arbitrator. has created a void in the Arbitration law.

CONCLUSION

In the 21st century the lawmakers intend to make India a hub of International commercial arbitration which can be witnessed by the various amendments in the Arbitration regime. These amendments reflect the intention that the legislators are adapting to the dynamic changes in Alternate Dispute Resolution (ADR) mechanism with open-mindedness.

The Arbitration and Conciliation (Amendment) Act, 2021 used broad and perplexing terms in both the amendments. The amendment in section 36 uses the terms like fraud and corruption without specifying a comprehensive list as to what will constitute the fraud and corruption practices. This can become a formidable tool by the aggrieved to harass the other party by pleading fraud and corruption in every arbitration proceeding. Consequently, this will force us back to the orthodox litigation mechanism.

The amendment of section 43J has the potential to attract international arbitrators and proves a pro arbitration scheme of India but the word “regulation” is left undefined which has created a void in the arbitration law. The automatic stay of award is more like a double - edged sword which has the potential to stretch matter and create obstruction in enforcing arbitral awards. To overcome this, legislator should be meticulous while drafting the law as law is a precise endeavour.

The changes brought by this amendment have targeted the major complications of the principal act in acknowledging the needs of the public. However, the act has certain shortcomings. It is hoped by the legal community that the clouds of uncertainty would be eradicated by the legislature shortly and the efficacy of the 2021 amendment act is yet to be witnessed.

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.