

introduction of Section 87 by the 2019 Amendment Act resurrected the mischief sought to be corrected by the 2015 Amendment Act and thus, its addition was unconstitutional.

Perhaps, to counter this blanket embargo on unconditional stay of the award pending disposal of Section 34 proceedings, irrespective of the date when the award was rendered or related court proceedings were initiated, the aforementioned exception carved out by the Ordinance, has also been inserted with effect from 23 October 2015 along with an explanation which reads as:

“that the above proviso shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015 ”⁴

Removal of Eighth Schedule and regulation of norms for accreditation of arbitrators

The other change brought about by the Ordinance is in respect of the qualifications, experience and norms for accreditation of arbitrators.

The 2019 Amendment Act, had introduced a new regime for eligibility conditions to be accredited as an arbitrator in India. The 2019 Amendment Act had inserted Section 43-J in the Act which in turn introduced the Eighth Schedule that prescribed certain minimum qualifications for a person to be appointed an arbitrator.

As per the Eighth Schedule, a person was not eligible to become an arbitrator unless she/he was one of the following:

- Advocates, chartered accountants, cost accountants or company secretaries within the meaning of their respective governing law.
- Officers of Indian Legal Service.
- Officers with law degree having ten years of experience in legal matters in Government, Autonomous Body, PSU or a senior level management position in private sector.
- Officers with engineering degree having ten years of experience as an engineer in Government, Autonomous Body, PSU or a senior level management position in private sector or self employed.
- Officers having senior level experience in the Central Government or State Government or having experience of senior level management of a PSU or a Government company or a private company of repute.
- Persons having educational qualifications at degree level with ten years of experience in scientific or specified technical streams or other specialized areas in the Government , Autonomous Body, PSU or a senior level managerial position in a private sector, as the case may be.

Apart from this, ‘*General norms applicable to arbitrator*’ were also prescribed in the Eighth Schedule. These norms included provisions, *inter alia*, for keeping a check on the fairness, neutrality and impartiality of the arbitrator. The general norms were aimed at ensuring that the arbitrator doesn’t get involved in any legal proceeding, avoids potential conflicts connected with any dispute, and possesses an understanding of the various prescribed laws and legal principles.

While the aforementioned provisions were never formally notified by the legislature, they caused much concern in the arbitration community due to various inconsistencies. One such inconsistency was that though a person may qualify as an arbitrator due to extensive knowledge in a specified field, the arbitrator may not have the extensive legal knowledge as prescribed under the law.

Also, the Eighth Schedule would have effectively limited appointment of advocates or legal practitioners from foreign jurisdictions, as ‘Advocates’ only under the Advocates Act, 1961 could be appointed as arbitrators. Section 43-J introduced by the 2019 Amendment Act, has now been amended by the Ordinance. Section 43-J no longer relies upon the qualifications stipulated in the Eighth Schedule, and thus, the Ordinance has omitted the Eighth Schedule from the scheme of the Act.⁵

⁴ Explanation to Section 2 of the Ordinance.

⁵ Section 4 of the Ordinance.

Given the fact that the Eighth Schedule has been omitted, it may be assumed that a foreign practitioner may be appointed as an arbitrator in India seated arbitrations. However, the Ordinance reads, that “*The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations.*”⁶ Thus, appointments of foreign practitioners, and the validity of the same, would be subject to the said “*regulations*”.

ANALYSIS

Albeit few, but the changes brought about by the Ordinance are indeed significant.

In its judgements in *BCCI* and *HCC*, the SC had conclusively settled that there existed no room within the framework of the Act for an unconditional stay on enforcement of an arbitral award pending challenge under Section 34. However, the Ordinance seems to have taken a partially contrary view. A view which probably would allow the award-debtor to challenge the award on grounds of either the arbitration agreement, contract or the award being induced by fraud or corruption and seek a mandatory stay. While the legislature may argue that such an exception is in line with justice and fairness since the courts themselves adjudicate allegations of fraud and corruption with utmost seriousness, the interpretation that the courts afford to such an exception remains to be seen.

It is unclear as to whether a court will first examine the allegations of fraud or corruption or a simple plea in the Section 34 application will call for an immediate stay on the enforcement of the award.

In respect of the amendments brought about to Section 43-J of the Act and the omission of Eighth Schedule of the Act, the changes do seem to indicate a step in the right direction. The 2019 Amendment Act, which had introduced Section 43-J and the Eighth Schedule, was widely criticized for unreasonably restricting the eligibility conditions and qualifications for accreditation of arbitrators. By omitting the Eighth Schedule, it appears that the legislature has taken cognizance of this shortcoming. However, as is evident from the language of the newly amended Section 43-J, the qualifications etc. for accreditation of arbitrators shall now be as per the ‘*regulations*’ which the Centre shall notify subsequently. As and when the said regulations are published, it would be interesting to see the kind of qualifications and eligibility criteria stipulated therein.

It must be borne in mind that the Ordinance has been promulgated under the provisions of Article 123 of the Constitution of India. Therefore, the Ordinance would be valid for a maximum period of 6 weeks from the reassembling of Parliament, unless the Ordinance is re-promulgated.

Disclaimer: *The information provided in this update is intended for informational purposes only and does not constitute legal opinion or advice. Readers are requested to seek formal legal advice prior to acting upon any of the information provided herein. This update is not intended to address the circumstances of any particular individual or corporate body. There can be no assurance that the judicial/quasi-judicial authorities may not take a position contrary to the views mentioned herein.*

⁶ Section 3 of the Ordinance.