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ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021: THE FINAL WORD ON UNCONDITIONAL STAY ON ENFORCEMENT OF CHALLENGED DOMESTIC AWARDS?

—Naresh Thacker* & Samarth Saxena**

ABSTRACT

The newly enacted Arbitration and Conciliation (Amendment) Act, 2021 is the fourth change made in the Indian arbitration regime in the last six years. With amendments being made this frequently, one would expect them to iron out the ambiguities and make the arbitral process smooth. However, much like its predecessors, the 2021 Amendment Act seems to have distanced itself from this objective. The chief offender in this regard is the fresh introduction of the “fraud or corruption” standard allowing unconditional stay on the ever so difficult and exacting, enforcement of domestic awards pending challenge under Section 34 of the Arbitration and Conciliation Act, 1996.

This article critically analyses the effect of the 2021 Amendment Act on the enforcement of domestic awards and argues that the 2021 Amendment Act is cryptic and capable of being misused and thus, would require extensive judicial interpretation.

1. INTRODUCTION

Oscar Wilde once famously said: “*Experience is simply the name we give our mistakes*”. Perhaps as a lesson from the constant horrors faced by the litigants while enforcing domestic arbitral awards, the Arbitration and Conciliation (Amendment) Act, 2015 (“**2015 Amendment Act**”) was enacted to bring about a major pro-enforcement evolution through cessation of automatic and unconditional stay on enforcement of domestic awards pending challenge proceedings under Section 34 of the Act.

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Circa 2019, the Arbitration and Conciliation (Amendment) Act, 2019 (“**2019 Amendment Act**”) was brought into force. The 2019 Amendment Act caused a major uproar in the arbitration community for being a medley of wrong notes. Amongst the major stumbling blocks was the provision that made the 2015 Amendment Act only prospectively applicable, thereby, diluting the removal of automatic and unconditional stay on enforcement of domestic awards. Fortunately, this misadventure of the 2019 Amendment Act was short-lived and soon undone by the Supreme Court in *Hindustan Construction Co. Ltd. v. Union of India*¹ (“**HCC v. Union of India**”) wherein the relevant provisions of the 2019 Amendment Act were struck down as unconstitutional.

Just when it looked like the dust had settled on this debate, the legislature implemented the Arbitration and Conciliation (Amendment) Ordinance, 2020 (“**2020 Ordinance**”) and thereafter replaced the same with the Arbitration and Conciliation (Amendment) Act, 2021 (“**2021 Amendment Act**”). The 2021 Amendment Act, which is identical to the 2020 Ordinance, introduced two key changes in Part I of the Act.² Firstly, it retrospectively amended Section 36 of the Act and introduced “*fraud or corruption*” as a standard to seek unconditional stay on the enforcement of domestic awards. Secondly, it deleted Schedule VIII of the Act which prescribed certain eligibility criteria for being an arbitrator. This article aims to elaborate on the constant back and forth in legislative amendments concerning the enforcement of arbitral awards in India, and to demonstrate that the uncertainties in this regard are far from over.

Part I of this article presents a brief conspectus of the different episodes in the Indian arbitration regime’s tryst with unconditional stay on enforcement of challenged domestic awards. It also deals with the introduction of the 2021 Amendment Act and its effects on the 2015 Amendment Act. Part II of the article analyses the correctness of retrospective introduction of the “*fraud or corruption*” standard by the 2021 Amendment Act. In Part III, the authors put forth their closing remarks and describe the murky waters which still lie ahead when seeking enforcement of challenged domestic arbitral awards.

1. *Hindustan Construction Co. Ltd. v. Union of India* 2019 SCC OnLine SC 1520.

2. Part I of the Act concerns itself with only India seated domestic and International Commercial Arbitrations.

2. TO (UNCONDITIONALLY) STAY OR NOT TO STAY

Pursuant to the liberalization of its economic policies in 1991, India looked to bring about a sea change in its dispute resolution machinery.³ By this time, the Arbitration Act, 1940 had already been in force for half a century and its inefficiency⁴ in handling modern commerce had long rendered it a colonial relic. Thus, with the dream of building India into a robust arbitration jurisdiction, in 1996, the Act was enacted.

The Act is based upon the UNCITRAL Model Law on International Commercial Arbitration (“**Model Law**”). However, in enacting the Model Law as a municipal legislation, the legislature made certain modifications, one of which was the omission of Article 36(2) of the Model Law.⁵ Pertinently, Article 36(2) of the Model Law provides the courts with the discretion to adjourn the enforcement of awards pending challenge proceedings and seek appropriate security whenever if such adjournment is granted.

The lack of a provision similar to Article 36(2)⁶ of the Model Law ultimately resulted in the courts holding that there existed an implied prohibition on the enforcement of an award pending challenge proceedings under Section 34 of the Act.⁷ In fact, in *National Aluminum Co. Ltd. v. Pres steel & Fabrications (P) Ltd.*,⁸ while reiterating that the scheme of the Act provided for automatic and unconditional stay of domestic awards upon filing of a challenge under Section 34, the Supreme Court even noted that such an automatic stay of the award was against the very fundamentals of

3. Rohit Moonka and Silky Mukherjee, *Impact of the Recent Reforms on Indian Arbitration Law* (2017) 4 BRICS Law Journal.

4. *Guru Nanak Foundation v. Rattan Singh and Sons* (1981) 4 SCC 634.

5. UNCITRAL Model Law, Article 36(2) reads as: “2. *If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.*”

6. It also deserves mentioning that Article 36 of the Model Law is based on Article V of the New York Convention.

7. *National Aluminum Company Ltd v. Pressteel & Fabrications (P) Ltd.* (2004) 1 SCC 540; *National Buildings Construction Corpn. Ltd. v Lloyds Insulation India Ltd.* [2005] 2 SCC 367; *Fiza Developers and Inter-trade (P) Ltd. v AMCI (India) (P) Ltd.* (2009) 17 SCC 796.

8. *Ibid.*

arbitration and thus legislative measures ought to be taken to overcome this hurdle.

Taking this into account, the 246th Report of the Law Commission of India⁹ recommended that Section 36 of the Act be amended appropriately. Accordingly, the 2015 Amendment Act inserted Section 36(2)¹⁰ and 36(3)¹¹ into the Act which expressly forbade the grant of both an automatic and unconditional stay on the enforcement of a domestic award undergoing challenge under Section 34. Subsequently, when questions as to whether the 2015 Amendment Act applied prospectively or retrospectively arose, supporting the latter proposition, the Supreme Court observed that granting automatic stay of an award was incorrect and Section 36, even as originally enacted, was not meant to do away with Article 36(2) of the UNCITRAL Model Law.¹²

Unfazed by the fact that the Supreme Court was not in support of granting such unconditional stay on the enforcement of domestic awards,¹³ the legislature has first by means of the 2020 Ordinance,¹⁴ and then through the 2021 Amendment Act, devised a novel surrogate for allowing unconditional stays. Section 2 of the 2021 Amendment Act has inserted a new proviso to Section 36 of the Act,¹⁵ which provides that an unconditional stay on

9. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Com No. 246, August 2014) 43, 44, 45.

10. Arbitration and Conciliation Act 1996, s. 36(2), as inserted by the Arbitration and Conciliation (Amendment) Act 2015, reads as: “(2) *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.*”

11. Arbitration and Conciliation Act 1996, s. 36(3), as inserted by the Arbitration and Conciliation (Amendment) Act 2015, reads as: “(3) *Upon filing of an application under sub-section (2) for stay of the operation of the arbitral award, the court may, subject to such conditions as it may deem fit, grant stay of the operation of such award for reasons to be recorded in writing:*

Provided that the court shall, while considering the application for grant of stay in the case of an arbitral award for payment of money, have due regard to the provisions for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908 (5 of 1908).”

12. See (n 1).

13. National Aluminum Company Ltd. v. Pressteel & Fabrications (P) Ltd. (2004) 1 SCC 540 11.

14. Arbitration and Conciliation (Amendment) Ordinance 2020, s. 2.

15. Arbitration and Conciliation (Amendment) Act 2021, s. 2 reads as: “*In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section*

enforcement of a domestic award “shall” be granted where the Court is satisfied that either of the following suffer from fraud or corruption:

- i. the arbitration agreement; or
- ii. the contract which is the basis of the award; or
- iii. the making of the award.

Essentially, the 2021 Amendment Act has resurrected the evil of unconditional stay that was put to rest by the 2015 Amendment Act albeit only on restricted grounds. In doing so, the 2021 Amendment Act has seemingly divested the courts of their discretion to grant a conditional stay and made it expressly mandatory upon them to grant an unconditional stay upon the fulfilment of the above conditions.

3. THE CONTROVERSY AROUND SECTION 36(3)

A mere look at the changes brought about by the 2015 Amendment Act and then by the 2021 Amendment Act raises an interesting question: when the legislature had, by way of the 2015 Amendment Act, done away with the unconditional stay doctrine, why exactly has it been brought back selectively by way of the 2021 Amendment Act?

As per the Hon’ble Minister of Law, the shift to selective unconditional stay, the doctrine propagated by the 2021 Amendment Act, is to prevent India from becoming “*the centre of procuring award through corrupt and fraud means.*”¹⁶

Section 2 of the 2021 Amendment Act gives rise to certain ambiguities, in as much as the exact amplitude of the words “*fraud*” and “*corruption*”

36, in sub-section (3), after the proviso, the following shall be inserted and shall be deemed to have been inserted with effect from the 23rd day of October, 2015, namely: “Provided further that where the Court is satisfied that a prima facie case 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.

Explanation.—For the removal of doubts, it is hereby clarified 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.”

16. Statement of Hon’ble Minister of Law before the Lok Sabha, Seventeenth Series, Vol. XI, Fifth Session (February 12, 2021/Magha 23, 1942) (Saka) pages 826 and 827.

remains undefined in the Act. The 2021 Amendment Act fails to expand upon the said terms and, therefore, leaves very little guidance for the courts in applying the said standards. Though the fraud and corruption standards have already been used in a limited manner in the Explanation to Section 34(2)(b)(ii) of the Act, there does not appear to be any conclusive judicial decision interpreting the same in the context of setting aside or enforcement proceedings under the Act. In fact, in *Venture Global Engg. LLC v. Tech Mahindra Ltd.*,¹⁷ the Supreme Court has even observed that “fraud” has no universal definition in law. Thus, having such an expansive standard as a ground warranting unconditional stay on the enforcement of domestic awards undergoing challenge is indeed worrisome. There is no denying that allegations of fraud and corruption are difficult to be put into a straitjacket formula, however, it must also be appreciated that having such an elastic test as a ground for resisting enforcement is antithetical to the very idea of expeditious disposal of disputes through arbitration.

Furthermore, contrary to the Hon’ble Minister of Law’s statement at the time of presenting the 2021 Amendment Bill in the Parliament,¹⁸ the 2021 Amendment Act is not a simpliciter transformation of the “fraud” and “corruption” ground already available in Section 34 of the Act-into a ground under Section 36 that allows unconditional stay on the enforcement of awards. In this respect, the 2021 Amendment Act goes far beyond. Section 34(2)(b)(ii) of the Act, which only permits the raising of such grounds when the “award” is induced / affected by fraud or corruption. On the other hand, as per the 2021 Amendment Act, an unconditional stay on enforcement can be granted for an occurrence of fraud or corruption at any stage – be it while making the principal agreement, while making the arbitration agreement or while making the award.

Crucially, the 2021 Amendment Act also fails to explain the material which the court may refer to while deciding whether there exists a “*prima facie*” case of fraud or corruption. Does the court restrict itself only to the material available on record like an enquiry under Section 34 of the Act,¹⁹ or can it go beyond the matters on record and look into additional evidence / records? Also, what happens if fraud or corruption, although in the knowledge of the concerned party, was not alleged during the arbitration proceedings?

17. *Venture Global Engg. LLC v. Tech Mahindra Ltd.* (2018) 1 SCC 656.

18. Statement of Hon’ble Minister of Law before the Lok Sabha, Seventeenth Series, Vol. XI, Fifth Session (February 12, 2021/Magha 23, 1942) (Saka) page 751.

19. *Canara Nidhi Ltd. v. M. Shashikala* (2019) 9 SCC 462; *Emkay Global Financial Services Ltd. v. Girdhar Sondhi* (2018) 9 SCC 49.

Would the court be empowered to go into such questions? Issues like these would invariably require fresh judicial review.

Another important concern that is likely to be raised is the interplay between the 2021 Amendment and Section 34 of the Act. For instance, under Section 34(2)(a)(ii), an award may be set aside if the arbitration agreement is invalid in law, possibly on account of fraud or corruption. Now, under the newly amended Section 36, enforcement may be stayed even where the contract containing the arbitration agreement was induced by fraud or corruption. The Supreme Court, in the cases of *Swiss Timing Ltd. v. Commonwealth Games*²⁰ and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.*,²¹ has noted that the arbitration agreement is severable in law from the contract in which it is contained, and thus, fraud in obtaining a contract shall not mandatorily affect the arbitration agreement. Thus, the court's discretion to stay enforcement under the now amended Section 36 clearly seems to exceed the limits of its dominant discretion to set aside awards under Section 34.

Additionally, the explanation to Section 34(2A) explicitly restricts courts from reviewing awards on merits or re-appreciation of evidence. The Supreme Court has held that no *prima facie* case of fraud can be made out without material evidence to substantiate the allegations.²² Thus, how exactly will the amended provision be put into effect needs consideration. Furthermore, a bare reading of Section 34(2)(b), Explanation 1(i) clearly exhibits that an award may be set aside if the making of the award was induced by fraud or corruption as it would be against the public policy of India. This again raises the question as to why the 2021 Amendment was needed in the first place.

Apart from this, the 2021 Amendment also threatens to breach the protective wall of exclusivity erected around arbitration proceedings, to protect their sanctity and minimise court intervention. By introducing fraud and corruption in the formation of the main contract as grounds to circumvent enforcement of awards, the legislature has once again opened a door which can potentially frustrate proceedings. This is because an assessment of the main contract being vitiated by fraud is a category of non-arbitrability, one

20. *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee* (2014) 6 SCC 677.

21. *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.* (2021) 4 SCC 713 : 2020 SCC OnLine SC 656.

22. *Svenska Handelsbanken v. Indian Charge Chrome Ltd.* 1994 SCR (1) 261.

that must be referred to arbitration and decided by the arbitral tribunal.²³ The Supreme Court, in the *Avitel Post Studioz* case, drew an exception to this principle only in cases of “serious allegations of fraud” that may cause damage in the public domain where the courts, and not the arbitral tribunal, would have the competence to decide.²⁴

Therefore, the hazards of ambiguous phraseology of the 2021 Amendment are apparent since the lack of clarification regarding the terms “fraud” and “corruption” opens courts’ discretion to decide any and all allegations and nature of claims raised under these grounds.

4. THE RETROSPECTIVE - PROSPECTIVE DEBATE

One of the most significant changes brought about by the 2019 Amendment Act was the introduction of Section 87²⁵ to the Act. The newly inserted Section 87 expressly made the application of the 2015 Amendment Act prospective. This amendment thus sought to undo the change introduced by the 2015 Amendment Act and more particularly the judgment of the Apex Court in *BCCI v. Kochi Cricket (P) Ltd.*²⁶ (“**BCCI v. Kochi Cricket**”). In *BCCI v. Kochi Cricket*, the Supreme Court held that Section 36 of the Act (as amended by 2015 Amendment Act) was applicable to Section 34 proceedings filed both prior to and pending on 23 October 2015, i.e., the date on which the 2015 Amendment was enforced.

23. *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee* (2014) 6 SCC 677.

24. *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.* (2021) 4 SCC 713 : 2020 SCC OnLine SC 656.

25. Arbitration and Conciliation Act 1996, s. 87, as inserted by the Arbitration and Conciliation (Amendment) Act, 2019 reads as:

“87. 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 such 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.”

26. *BCCI v. Kochi Cricket (P) Ltd.* (2018) 6 SCC 287.

Pertinently, while Section 87, as inserted by Section 13 of the 2019 Amendment Act, was already relied upon in a number of decisions²⁷ concerning the application of the 2015 Amendment Act prospectively, the validity of Section 13 of the 2019 Amendment Act itself came to be questioned before the Supreme Court in *HCC v. Union of India*.²⁸

In the said case, it was argued on behalf of the petitioners that the erstwhile interpretation of the 2019 Amendment Act which provided for an automatic stay, was itself fallacious since the Act even prior to the 2015 Amendment, did not allow the award debtor to have two bites at the cherry i.e. one at the stage of challenge under Section 34 and the other at the stage of the enforcement under Section 36. It was also argued by the petitioners that the newly introduced Section 87 of the Act was arbitrary and thus violative of Articles 14, 19(1)(g), 21 and 300-A of the Indian Constitution as it recreated the mischief sought to be done away with the 2015 Amendment Act.

Agreeing with the petitioner's contentions, the Supreme Court held that no automatic stay or conditional stay was ever contemplated even in the Act as it stood prior to the 2015 Amendment Act and the judgments²⁹ prior to the 2015 Amendment Act, which allowed an automatic and unconditional stay of the award, had laid down the law incorrectly. Thus, the amendments made by the 2015 Amendment Act being merely clarificatory in nature, were held to have retrospective application. The Supreme Court therefore held that the introduction of Section 87 by the 2019 Amendment Act resurrected the mischief sought to be corrected by the 2015 Amendment Act. Accordingly, the introduction of Section 87 by Section 13 of the 2019 Amendment Act was found to be unconstitutional.

The failure of the 2019 Amendment Act to withstand scrutiny in *HCC v. Union of India*,³⁰ does not appear to have deterred the legislature in its attempts to attenuate the requirements of a conditional stay on the enforcement of domestic awards. In terms of the 2021 Amendment Act, instead of yet again making the 2015 Amendment prospective, the 2021 Amendment Act has creatively introduced the "*fraud*" and "*corruption*" grounds for unconditional stay retrospectively i.e., to "*all court cases*

27. *Cabcom Cables Ltd. v. SBI Global Factors Ltd.* 2019 SCC OnLine Bom 2272; *Mangalam Chaudhary Co. v. Hindustan Construction Co. Ltd.* 2019 SCC OnLine Bom 2054; *Godrej Industries Limited v Darius Rutton Kavasmaneck* 2019 SCC OnLine Bom 12124 ; *Iqbal A. Parekh v. J.P.B. Developers LLP* 2019 SCC OnLine Bom 8377.

28. See (n 1).

29. See (n 7).

30. See (n 1).

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, 2021."³¹

It remains to be seen how the courts would interpret the introduction of fraud and corruption as grounds to allow unconditional stay from the perspective of the mischief test discussed in *HCC v. Union of India*. However, if considered solely from the propriety of retrospective application of above standards, the 2021 Amendment Act would be difficult to fault with considering the Supreme Court's own observations in *BCCI v. Kochi Cricket*³² where in it has been clarified that execution of a decree pertains to the realm of procedure and procedural law can operate retrospectively.

5. CONCLUSION

Having originated amid uncertainty and leaning dangerously towards precariousness, it is difficult to predict whether, if at all, the 2021 Amendment Act furthers the intent of its drafters. The immediate aftermath of the 2021 Amendment Act and its retrospective assent to unconditional stays on all Section 34 proceedings appears to be recalcitrant award-debtors alleging frivolous grounds of fraud and corruption in order to protract enforcement of their respective awards regrettably, the hapless victim of this would be the Indian dream of being an arbitration friendly jurisdiction.

31. See (n 15).

32. See (n 18).