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Unlocking the Implications of Unconditional Stay on Enforcement of Domestic Awards: A Comparative Analysis of India's Arbitration and Conciliation Act Amendments

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ABSTRACT

In the last few decades, The Arbitration and Conciliation Act has been amended quite a few times. The 2021 Amendment Act is a recent change which has been done under the Indian Arbitration system. With such several changes in such a short amount of time, it is expected that the objective is to rather make the process swift and unambiguous. The 2021 Amendment Act has brought back the issue of Unconditional stay, which was eliminated by Amendment Act of 2015, but within certain limited situations. This has resulted in the courts being deprived of the ability to grant a conditional stay and instead, they are required to grant an unconditional stay if certain conditions are met, according to the new amendment. The objective of this article is to provide a structured analogy of the Arbitration and Conciliation (Amendment) Act of 2015, 2019, and 2021, as well as a brief overview of significant judicial rulings that have influenced the arbitration landscape in India. The main emphasis of this article is on issues regarding the automatic stay of arbitral awards in India.

Keywords: Automatic Stay, Domestic Awards, Unconditional Stay, Arbitration and Conciliation Act, Amendments.

I. INTRODUCTION

With the onset of liberalization in the year 1991, India was prepared to create a robust change in the mechanism of Dispute Resolution. Since the arbitration act of 1940 already existed but was not sufficient due to its vagueness. Therefore, to bring India closer to becoming pro-arbitration. The Arbitration and Conciliation act² was enacted in the year 1996. The said act was mirroring the UNCITRAL Model Law³ Although while during the enactment of the Act,

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² Arbitration and Conciliation Act (1996)

³ UNCITRAL Model Law on International Commercial Arbitration

certain changes were made, out which one was the elimination of article 36(2) of the model law⁴ while adopting it by India's legislature. The fact that such a provision as similar as article 36(2) was missing, 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 Act⁵. The Supreme Court emphasized that Section 34 of the Arbitration and Conciliation Act kept for an immediate and "unconditional stay" of domestic awards upon the filing of an appeal. However, the Court also acknowledged that such a practice contradicts the basic principles of arbitration, and legislative steps should be taken to address this issue. After all of this, the need for section 36 of the Act to be appropriately amended came into picture which was recommended in the 246th report of the Law Commission of India⁶ where to address the issue of "Automatic and Unconditional stay" on the enforcement of a domestic award undergoing challenge under Section 34, the 2015 Amendment Act added the sub-sections 36(2)⁷ and 36(3)⁸ to the Act. These provisions explicitly prohibited the granting of such a stay. On a later stage, the questions regarding the nature i.e. retrospectivity and prospectivity were born where The Supreme Court held that 'automatic stay of an award was incorrect.' Which supported the retrospective proposition. The Supreme Court, in the BCCI v. Kochi Cricket Ltd. & Ors⁹, explained how the amended section 36 of the Indian Arbitration and Conciliation Act applies. The Court clarified that the amended section 36 would be applied retrospectively to all applications filed in relation to section 34 of the Arbitration Act, whether they were filed before or after 23rd October 2015. As a result, the Automatic Stay on Arbitral Awards were eliminated by the 2015 Amendment and the BCCI judgement. Although, the Arbitration and Conciliation (Amendment) Act of 2015 was put into effect to promote the 'enforcement of domestic awards' in a pro-arbitration manner by eliminating the automatic and unconditional stay on their

⁴ *Ibid* at 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."

⁵ *National Aluminum Company Ltd v Pressteel & Fabrications (P) Ltd*, (2004) 1 SCC 540 *Fiza Developers and Inter-trade (P) Ltd v AMCI (India) (P) Ltd*, (2009) 17 SCC 796

⁶ Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996 (Law Com No. 246, 2014)

⁷ 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."

⁸ *Ibid* at s. 36(3), "(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)."

⁹ *BCCI v. Kochi Cricket (P.) Ltd. & Ors*, (2018) 6 SCC 287.

enforcement during challenge proceedings under ‘Section 34’ of the Act¹⁰. The Arbitration and Conciliation (Amendment) Act of 2019¹¹ caused controversy within the arbitration community due to its numerous flaws. However, this problematic amendment was short-lived, as it was declared unconstitutional on November 27, 2019, where the Supreme Court issued a significant ruling in *Hindustan Construction Company & Anr. v Union of India & Ors*,¹² in which it was decided that the mere filing of such an Application to challenge an Arbitral Award under Section 34 of the Arbitration and Conciliation Act 1996 does not automatically result in a stay on the “enforcement of the award” under Section 36. Hence, such provisions of 2019 Amendment were struck down as unconstitutional.

Even after the observation made by the Supreme Court for not in approval of Unconditional stay on the enforcement of Domestic award, The Arbitration and Conciliation (Amendment) Ordinance, 2020 (2020 ordinance)¹³ came into picture and before one could comprehend, it was replaced by the Arbitration and Conciliation (Amendment) Act, 2021.¹⁴ allowing the concept of Unconditional stay. The amended act of 2021 brought about 2 key reforms but only to the extent of Part I. The first change was regarding the retrospectivity of section 36 of the Act¹⁵ where “fraud and corruption” as a measure to obtain “Unconditional stay on Enforcement of Domestic Awards” was added.

“In the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the principal Act), in section 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.*
- (c) 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,*

¹⁰ Arbitration and Conciliation Act 2015, s 34.

¹¹ Arbitration and Conciliation Act 2019 (India).

¹² *Hindustan Construction Company & Anr. v Union of India & Ors* [2019] UKSC 20, [2019] AC 1175.

¹³ The Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14 of 2020 (India).

¹⁴ Arbitration and Conciliation (Amendment) Act, 2021 (2021, India)

¹⁵ *Ibid* at s.36.

irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015."

Essentially, the 2021 Amendment Act has revived the evil of unconditional stay that was put to rest by the 2015 Amendment¹⁶. The reason for introducing the mentioned amendment was to deal with the problem of corruption and fraudulent activities that could be present within Arbitration Agreements or during the process of passing the Arbitral Award. As a result, it was believed that the parties involved should have the chance to request an "unconditional stay" on the enforcement of the arbitral award. The introduced amendment can be viewed as adding an extra level of judicial review in interpretation of the said awards. Under the previous Arbitration Act of 1940, it was necessary to obtain court approval before enforcing an arbitral award. However, this requirement was eliminated when the new Arbitration and Conciliation Act of 1996 came into effect.

In the case of *Pam Developments Private Limited v. State of West Bengal*¹⁷, the Supreme Court emphasized upon the ulterior intention of arbitration, which is to give a swift and efficient method of resolving disputes. Allowing automatic stay on Arbitral Awards, especially for the cases where the government is the party against whom the award is being passed, would defeat this purpose. If a money decree or award is automatically stayed on the mere reason for filing of a complaint under section 34 of the Arbitration Act, the holder would be destitute from the benefits of the award, thus rendering the entire arbitration process futile. Therefore, unconditional stay on arbitral awards would be disadvantageous and not in line with the objectives of the arbitration process.

II. WHAT ARE THE ISSUES REGARDING UNCONDITIONAL STAY OF ARBITRAL AWARDS?

Despite all the good intentions behind incorporating the 2021 amendment to prevent fraud or corruption, there are several irregularities, doubts, and vagueness regarding how it should be interpreted and applied.

First, the bill lacks a clear definition, guideline or standard to determine what actions qualify as "fraud" or "corruption". This makes it challenging for Courts to determine if in a case involves fraud or corruption. As a result, it leads to unnecessary judicial involvement and requires further investigation by the court. The Supreme Court in the case of *Dalpat Kumar v.*

¹⁶ Naresh Thacker & Samarth Saxena, 'Arbitration and Conciliation (Amendment) Act, 2021: The Final Word on Unconditional Stay on Enforcement of Challenged Domestic Awards?' (2022) 4 Ind Arb L Rev 65

¹⁷ *Pam Developments Private Limited. v. State of West Bengal*, (2019) 8 SCC 112

Prahlad Singh, termed “prima facie” to be “a substantial question raised, bona fide, which needs investigation and a decision on merits.”¹⁸

According to section 16(1) of the Indian Arbitration and Conciliation Act¹⁹, an Arbitration Agreement is considered entirely separate from the other provisions of the Contract. So, if the Contract is deemed null and void by the arbitral tribunal, it does not necessarily mean that the arbitration clause is also invalid. Therefore, the ‘doctrine of separability’ is established by Section 16, which recognizes that an Arbitration Agreement has an independent stand when compared to the primary Contract. This principle was emphasized in the case of *Swiss Timing Ltd. v. Commonwealth Games*.²⁰

Thirdly, it is undeniable that the 2021 amendment has given the Award Debtor another reason to oppose the award. However, this amendment has the ability to cause undue delays and harassment to the award creditor. As a result, both parties may experience an increase in their financial burden, and court cases may take longer to be resolved. Unfortunately, the 2021 amendment runs counter to the very reason for arbitration, which is to plan an efficient and effective Alternative Dispute Resolution mechanism.

Another issue is ‘retrospectivity’ where the 2021 amendment has made the “unconditional stay” of Arbitral Awards applicable in retrospect nature.²¹ However, the purpose behind this amendment was to address ‘fraud’ and ‘corruption’ for the duration of the implementation of arbitral awards, and it is rather unclear how the retrospective application of unconditional stay would help in achieving this objective. Moreover, this could result in the reopening of already settled court cases, causing significant harm.²² It is crucial for them to understand that applying unconditional stay retrospectively could have negative consequences for procedural law and the rights of award creditors.

Finally, under section 34(2) of the Indian Arbitration and Conciliation Act, an arbitration agreement is deemed invalid, and the arbitral award is set aside on the grounds that it is contrary to “public policy” of India if there was corruption or fraud through the making of the arbitral award. Although, in the recently amended section 36 of the Indian Arbitration Act, “the arbitration agreement or contract which is the basis of the award”²³ is founded on “fraud or

¹⁸ *Dalpat Kumar v Prahlad Singh*, [1993] 2 SCR 1, AIR 1993 SC 276, para 5.

¹⁹ Indian Arbitration and Conciliation Act, s 16(1)

²⁰ *Swiss Timing Ltd. v Commonwealth Games Federation* [2014] EWHC 1083 (Comm)

²¹ *Board of Control for Cricket in India v Kochi Cricket Pvt. Ltd.* (2018) 6 SCC 287.

²² *Monnet Ispat & Energy Ltd. v. Union of India & Ors*, [2012] INSC 578.

²³ Ashish Dholakia, Ketan Gaur, and Kaustub Narendran, ‘India’s Arbitration and Conciliation (Amendment) Act, 2021: A Wolf In Sheep’s Clothing?’ (2021) Kluwer Arbitration Blog, accessed 6 April 2023, <http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act->

corruption” in order to give any criterion for how more proof is required. As a result, there are two sections that require awards to be scrutinized at separate phases for the same reasons, namely after the arbitral judgement is passed and during the enforcement stage. Now, since there is already a mechanism for contesting the Arbitral ruling based on “fraud and corruption”, there is no valid justification or necessity to include the identical issue at a later point. In reality, such a change has rendered the procedure superfluous, irrational and difficult.

III. CONCLUSION

The legislators might support the idea of allowing arbitral awards to be enforced without conditions, to ensure fairness and justice in cases where fraud or corruption is involved. However, without a proper set of guidelines, it could be a challenging task for the courts to handle such situations. As compared to India, the legal systems of England, Singapore and Hong Kong, and the UNCITRAL Model Law on International Commercial Arbitration don't have any provisions that permit the automatic suspension of arbitral awards.²⁴

The current enforcement issues in India with regards to judgements and arbitral awards are already causing problems for businesses. It appears that the policymakers did not anticipate the intricacies and issues that could arise from the recent amendment. Any laws related to setting aside arbitral awards should only allow judicial interference when there are reasonable grounds, otherwise the purpose of having Arbitration as an Alternative Dispute Resolution would stand thrashed. Furthermore, applying the unconditional stay retrospectively could lead to further problems, as award debtors could challenge the award since fraud or corruption, undermining the expectations of the arbitral process. To become a “pro-arbitration” country for India, it would be best to eliminate the retrospective application of unconditional stay. If policymakers decides to allow “unconditional setting aside” of awards on the basis of fraud or corruption, it should only be done prospectively. A few suggestive measures which can be taken into account:

There shall be an availability of definitions for both ‘fraud’ and ‘corruption’ to prevent any mistake and lag in court when these terms are being considered in an application. This will help ensure that the process is efficient and straightforward for all parties involved.

If a court finds that an objection in a legal proceeding was raised on frivolous grounds (i.e., with no legal merit), it may impose penalties on the party who raised the objection. Penalties

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²⁴ Joshi, S, 'Implications of The Arbitration and Conciliation (Amendment) Act, 2021: Ensuring (Un)Ease Of Doing Business In India?' (2021) RGNUL Student Law Review, <http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/> accessed 8 April 2023.

can include fines, reimbursement of costs, or even damages. The purpose of imposing penalties is to deter frivolous objections and to ensure that the legal system operates fairly and efficiently. However, the court will only impose penalties if it is convinced that the objection was truly frivolous, based on a careful examination of the facts and the law.²⁵

To avoid confusion and ambiguity in regard with the amount of time an arbitral award will be placed on hold, it's important to properly define the term "unconditionally." Additionally, there needs to be clarification on the timeframe for raising objections regarding fraud or corruption after the arbitral award has been passed.

Since the 2021 amendment was brought about in such an uncertain manner, it is rather complicated to predict if this will be the last of it all. There could be a possibility that more amendments are on the way which might take a dangerous turn on certain grounds towards the scope of 'stay'. Although for now the 2021 amendment is what we have in store but if there are more amendments, hopefully it will be friendly and would lead India to Pro-Arbitration regime.

²⁵ Naqvee, A and Shika, S, 'Unconditional Stay on Arbitral Awards' (2021) Mondaq <https://www.mondaq.com/india/trials-appeals-compensation/1042098/unconditional-stay-on-arbitral-awards> accessed 7 April 2023.