

Section 36 of the Arbitration and Conciliation Act, 1996, as Recently Amended

By Guest / April 5, 2021 / 9 Min read / Add comment

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The Central Government has notified the Arbitration and Conciliation (Amendment) Act, 2021 (the 'Amendment'), which was already in force as law by way of an Ordinance issued by President Ram Nath Kovind in November last year. By March 10, 2021, both Houses of Parliament had passed the enactment. The 2021 Amendment revamps the statutory provision on enforcement of arbitral awards under section 36 of Arbitration and Conciliation Act, 1996 (the 'Act'). Where a challenge to an arbitral award is pending, if it appears to the Court that the award was part of either an arbitration agreement or parent contract induced by fraud or corruption, the court must grant unconditional stay on the award's enforcement. Pertinently, the 2021 Amendment states that the amended provision on stay of enforcement will apply retroactively to disputes prior to the major amendments to the Act back in 2015. Although noble in its object, some problems arise.

It is no longer res integra that various provisions of the Act, most notably,

[sections 5](#) and [34](#) read together, have been interpreted by the Supreme Court so as to give the Act as a whole its true meaning, being a legislation enacted to enable the speedy resolution of commercial disputes. The Supreme Court, along with the various High Courts, have time and again reiterated the principle of minimal court interference in arbitral proceedings, and have strongly leaned in favour of the final and binding nature of arbitral awards, being an effective mechanism to bring a closure to contentious commercial disputes. It is against this backdrop that the recent amendments to section 36 seem particularly misguided, as they seek to revert us to the erstwhile regime wherein arbitral awards were reduced to unenforceable paper decrees, merely on the filing of applications under section 34 of the Act, till such applications were disposed of. Pertinently, in the light of the express statutory provisions of section 34, and the narrow and specific interpretation given to such provisions by the Supreme Court, a majority of these challenges eventually merited no interference with the award.

Interfering with the objective of minimal interference

The Act has previously undergone major legislative revisions aimed at keeping abreast with the legislative object to provide for expedited resolution and disposal of commercial disputes. The new proviso to section 36 convolutes the Act's [stated objective](#) of minimal interference by courts with party rights and obligations in arbitration matters, as also with the reform agenda that underlay the establishment of [commercial courts](#) in 2015, where the Government of India embarked on measures to improve investor confidence and reduce delays by disaggregating commercial disputes from the civil disputes and prescribing a timeline for their resolution. These efforts were directed at improving the ['ease of doing business in India'](#).

Automatic-stays are here to stay

The [2015 Amendment Act](#) had significantly altered [section 36](#) to clarify

that filing of a set-aside application under [section 34](#) would not in itself render an award automatically stayed or unenforceable. Stays on awards could only be granted subject to parties making applications before courts: it was not a matter of right, but rather the court's discretion on whether a stay is warranted at all and, if so, what kind. The latest Amendment allows award-debtors to be entitled to unconditional stays on enforcement should they plead that arbitral awards against them *prima facie* appear to be rooted in contracts or arbitral agreements induced by corruption or fraud – this, while they challenge the award under section 34's set-aside proceedings. The Amendment does not specify when exactly the occasion to do this may arise in a set-aside proceeding. Is it when an award-debtor merely alleges fraud or corruption in such agreements or the making of awards, or is it only after they discharge a certain threshold of evidence before the court in that regard? The Amendment's stipulation that it is when it '*prima facie appears to the Court does*' not offer much clarity. This may be detrimental to arbitral proceedings and the vital rights of parties involved.

Dangers of prima facie findings of fraud and corruption

The Amendment casts a dangerously low threshold for fraud and corruption. The outcome of the Amendment is that award-debtors may be tempted to plead 'fraud and corruption' in their contractual agreements or in the making of an award to obtain statutory and unconditional non-enforcement of it. A law which strictly mandates that fraud vitiates *all* may be more counterintuitive than it initially appears. The explanation to [section 34\(2\)\(b\)](#) of the Act, which provides for setting aside arbitral awards, already includes fraud or corruption as a facet within permissible set-aside ground of 'public policy of India'. Oddly, the Amendment brings under its purview broader contracts and agreements induced by fraud or corruption, even though comparative as well as Indian jurisprudence have ordained that arbitral agreements are autonomous and severable from their parent contracts. It introduces an added avenue for award-debtors to move Courts for a default non-enforcement of an award passed against

them, should their desire be to not pay up in the first place. This is not without problems.

The revision of Section 36 creates circumstances where a court hearing a set-aside proceeding (which are *not* appellate in nature), will be compelled to direct an automatic non-enforcement of an arbitral award while merely attempting to arrive at *prima facie* findings of fraud in a private contract that embodies the arbitration clause. This abrogates the rights of an award holder which deserve primacy at the stage of execution. In being able to pass this interim unconditional stay-order, the court is given massive discretionary powers against which grounds for appeals do not even lie under the Act. It is predictable that the Supreme Court, being the court of last resort, will find itself saddled *inter alia* with a host of petitions seeking relief on this narrow point. The irony is that the 2021 Amendment opens up a window to protract arbitration mechanisms meant to be expeditious and final.

Section 34 proceedings are not appellate in nature

The Ordinance's requirements mandate courts to reckon with cases of *prima facie* fraud or corruption in parent contractual agreements when existing grounds and rules of adjudication in section 34's set-aside hearings already account for fraud and corruption-originated awards. This is at odds with key judicial decisions on section 34's scope that have time and again called for strictly circumscribing grounds for setting aside awards, and for restraint on judicial overreach in matters that stakeholders have autonomously chosen to settle outside of court.

It is settled law that proceedings under this section are not appellate. Courts are not given the liberty to "*sit in appeal over the award of an arbitral tribunal by re-assessing or re-appreciating evidence*" (*P.R. Shah, Shares and Stock Broker Ltd.* (2011)). Only narrow specific grounds like 'patent illegality' and 'against public policy of India' may warrant setting aside awards under Section 34(2) and 2A. The Supreme Court in

categorically stated that courts cannot interfere with an arbitral award on merits. *Dyna Technologies v. Crompton Greaves* (2019) cautioned against interference with awards using casual and cavalier bases — the thumb rule being respect for the finality of an arbitral award and for the parties who exercised their autonomy to avail of lawful arbitration avenues.

An arbitrary distinction?

Arbitral awards have the same status as a civil court's decree and must be enforced in the same manner as a decree of a court, once the time for a set-aside application under section 34 has expired, or been refused. Key Supreme Court judgments like *BCCI v. Kochi Cricket* (2018) have reiterated the sanctity of arbitral awards, and clarified that awards involving pecuniary sums are, in fact, money decrees enforceable under the Code of Civil Procedure ('CPC'). The Amendment creates a peculiar circumstance where no such window for unconditional stays at the stage of *prima facie* determination exists for money decrees under the CPC. Appellate courts under the CPC do not have similar powers to make similar directions against non-arbitral money decrees found to be associated with contracts induced by fraud and corruption. Here, vitally affected rights of an award-holder are distinguishable when the same may not be true of other similarly placed counterparts under the CPC.

Award-holders also stand to lose out on crucial interest components as arbitral proceedings involve massive interest amounts — generally, 15–18% of interest payable is the norm. During unconditional stays on awards, an award-debtor's liability to pay interest does not exist. On a balance of convenience, if an award is eventually set aside, the money paid simply reverts to the award-debtor. However, if the award does not end up being set aside, the interest component is lost for the duration that the award was automatically and unconditionally stayed due to allegations of fraud. The situation created by the Amendment detracts from the award-holder's lawful entitlement of being paid due interest for the window that an award

is unconditionally stayed.

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Conclusion

Both statutory and judicial pronouncements ordain that an arbitral award-holder's ability to enforce an award made in their favour is their entitlement in law — a corollary to the deemed finality of arbitral awards. Seminal changes in the legislation and landmark judicial pronouncements have time and again discouraged the automatic, unconditional-stay doctrine. The 2021 Amendment mandates an additional avenue for intervention by courts and adds yet another hurdle before the swift conclusion of arbitral proceedings for stakeholders. It brings in the less than desirable automatic and unconditional-stay doctrine through the backdoor.

– *Raghav Kacker & Ruchi Chaudhury*

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