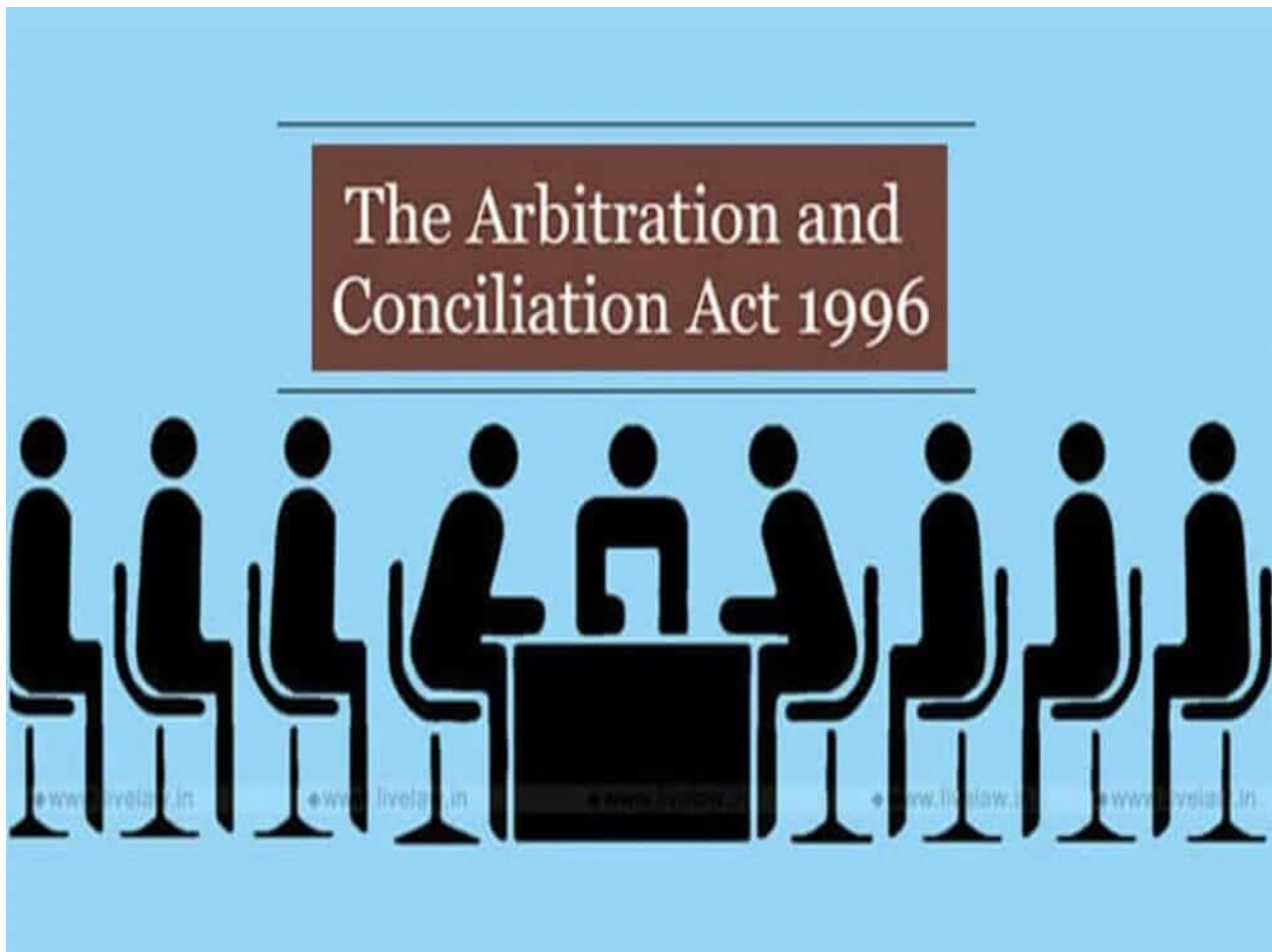


ANALYZING THE ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2021



INTRODUCTION

The President of India through an ordinance[1] dated November 4, 2020, made amendments to the Arbitration and Conciliation Act, 1996[2] (“the Act”), and on February 4, 2021, it was introduced as a bill in the Lok Sabha and was passed on February 12, 2021, by a voice vote. The bill[3] seeks to amend two sections, viz.: –

1. Section 36 (Enforcement of arbitral awards)[4], through which the Legislature seeks to ensure an unconditional stay on arbitral awards where *prima facie* the case of the arbitration agreement or making of the award induced by fraud and/or corruption is made out, and;
2. Section 43J (Limitations of arbitral awards), thereby omitting the Eight Schedule of the Act[5] which contains the necessary qualifications for the accreditation of arbitrators, to specify by way of regulations, the requisite qualifications, experience, and norms for the accreditation of the arbitrators.

PREVIOUS AMENDMENTS

The Arbitration and Conciliation (Amendment) Act, 2015[6] had revolutionized the alternative dispute resolution process, as it introduced minimal interference of the Court in arbitration proceedings, completion of the arbitration process in a time-bound manner and speedy disposal of the matters[7]. The Arbitration and Conciliation (Amendment) Act, 2019[8] sought the introduction of the Arbitration Council of India and also inserted the Eight Schedule, which would enlist the qualifications and experiences of an arbitrator.

WHAT ARE THE AMENDMENTS?

The first amendment is inserting the following proviso in sub-section (3) of section 36 of the Act[9]–

“Provided further that where the Court is satisfied that a prima facie case is made out, -(a) that the arbitration agreement or contract which is the basis of the award; or (b) the making of the award, was induced or affected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award.”.

This provision has been inserted into the Act to take retrospective effect from October 23, 2015. This is due to the inclusion of section 36(2)[10] in the Arbitration and Conciliation (Amendment) Act 2015, removing an automatic stay on an arbitral award. It provides for filing applications for requesting a stay in the enforcement of an award. The Arbitration and Conciliation (Amendment) Act, 2015⁸ came into effect on 23rd October 2015, and this is the reason why the Act has retrospective applicability.

The second amendment is to substitute section 43J of the Act[11], which now reads as follows:

“43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations”

Accordingly, the Eighth Schedule to the Act also stands omitted. The burden of formulating a test that would be used to grant an unconditional stay of the enforcement of the award, and the interpretation of the *prima facie* case of corruption or fraud in arbitrary proceedings[12] will fall on the courts since the Act does not define these terms. The courts may accept the *part materia* definitions of these terms; Section 17 of the Indian Contract Act[13] defines fraud as an act committed by a party as an intent to deceive the other party or to induce him to enter into a contract. The amendment to section 36(3) of the Act would be retrospective in nature, as previous amendments have been held to take effect retrospectively as well, as was seen in ***Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors***[14], where the 2015 Amendment[15] were applied. The *Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors* was a dispute where the Supreme Court allowed retrospective applicability.

CONCERNS REGARDING PROPOSED AMENDMENTS

1. Procedural Concerns:

In light of the amendments made to Section 36[16], there are a few procedural concerns. Delays are likely to occur in the enforcement of the arbitral awards, complemented by an increase in the costs, since applicants who already have a pending adjudication before the court, might file new applications, or request amendments to the existing applications based on the new proviso[17]. The Bill could open ‘floodgates of frivolous litigation’[18], by wasting the courts’ time, as alleged by Adhir Ranjan Chowdhury of the Indian National Congress.

1. Other Concerns:

There are other concerns relating to Section 36 amendments which were deliberated upon in the Parliament. Firstly, since an unconditional stay will be awarded in cases of fraud or corruption, the losing party to the dispute might use baseless allegations to be granted a stay by claiming fraud/corruption, and this would be redressed by the Court. This would unnecessarily elongate the period of redressal, thereby destroying the purpose of an alternate dispute resolution mechanism. To this concern, the Government responded by saying that the stay would be operational only till the disposal of application to be set aside under section 34 of the Act[19], and the parties are free to file applications for setting aside the stay orders. However, filing new applications to set aside a stay would not only be a time-consuming process but procedural delays would be likely to affect the applicants. Secondly, the fact that Explanation 1(1) to Section 34(2)(b) of the Act[20] extends to fraud/corruption disputes, the Amendment creates unnecessary complications as there would allegedly be two sections dealing with the same issue, as there might be confusion in filing applications relating to fraud/corruption. The government justified it by saying that Section 34 does not provide an unconditional stay on the award. This means that applications filed under Section 34 of the Act would not be awarded an unconditional stay of awards, but those filed under the new amendments, would be granted. This is why the new amendment would be beneficial to help applicants request an unconditional stay.

BENEFITS OF THE AMENDMENTS

An issue acting as a roadblock for arbitration in India was that foreign nationals were not allowed to be appointed as arbitrators in India, as provided in the Eighth Schedule to the Act[21] and as seen in *Reliance Industries Ltd. & Ors v. Union of India* [22], wherein the apex court prohibited the appointment of foreign nationals as arbitrators in India. Due to the Amendment[23], this issue is likely to be resolved, as the accreditation of arbitrators would be based on ‘regulations’ and these regulations are expected to be inclusive of foreign nationals as well, as the motive of the government is to make India the hub of international corporate arbitration. Therefore, the amendment to omit the Eighth schedule has been appreciated across party lines and is seen as the furtherance of the government’s goal to make India the hub of international corporate arbitration[24]. Although the amendment is seen in good light, it is the Arbitration Council of India that will draft the regulations to the Act, and the fact that foreign nationals would be allowed to be arbitrators is open for speculation[25], as there has not been any definite statement from the government.

CONCLUSION

The new amendments have both pros and cons, the pros mostly belonging to the benefits of the Eight Schedule amendments, and the cons belonging to the amendments made to section 36. While the omission of the Eight Schedule might be beneficial for Alternate Dispute Resolution as it allows foreign nationals to become a part of the arbitrary proceedings in India, the amendment to section 36 might not be as productive as expected by the Government, owing to numerous concerns, like those concerning to the procedure, brought to light. I believe that although the amendment concerning the 8th schedule provides immense opportunities and is justified, and there was no urgent requirement of the section 36[26] amendment, as it has various concerns relating to it as well.

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References:

[1] The Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14, 2020 (India).

[2] The Arbitration and Conciliation Act, 1996, No. 26, Acts of the Parliament, 1996 (India).

[3] The Arbitration and Conciliation (Amendment) Bill, 2021, No. 16, 2021 (India).

[4] *Supra* note 2, at s.36.

[5] *Supra* note 2, at s.43J.

[6] The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of the parliament, 2016 (India).

[7] Vijaya Singh, *Highlights Of The Proposed Amendments To The Arbitration And Conciliation Act, 1996*, Monodaq (March 26, 2019), <https://www.mondaq.com/india/arbitration-dispute-resolution/792842/highlights-of-the-proposed-amendments-to-the-arbitration-and-conciliation-act-1996>

[8] The Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of the parliament, 2019 (India).

[9] *Supra* note 2, at s.36.

[10] Section 36(2) of The Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of the parliament, 2016 (India).

⁸*ibid.*

[11] *Supra* note 2, at s.43J.

[12] Faranaaz Karbhari, *Arbitration and Conciliation (Amendment) Ordinance, 2020*, Mondaq (March 4, 2021), <https://www.mondaq.com/india/arbitration-dispute-resolution/1002868/arbitration-and-conciliation-amendment-ordinance-2020> .

[13] Section 17 of the Indian Contract Act, No. 9, Acts of the Parliament, 1872 (India).

[14] *Hindustan Construction Company Ltd. & Anr. v. Union of India & Ors*, Writ Petition (Civil), No. 1074 of 2019 (India).

[15] *Supra* note 6, at s.36 (2).

[16] *Supra* note 2, at s.36 (3).

[17] Subhiksh Vasudev, *The 2020 Amendment to the Indian Arbitration Act: Learning from the Past Lessons?*, Kluwer Arbitration Blog (Dec. 20, 2020), <http://arbitrationblog.kluwerarbitration.com/2020/12/10/the-2020-amendment-to-the-indian-arbitration-act-learning-from-the-past-lessons/> .

[18] *Lok Sabha gives nod to Arbitration and Conciliation (Amendment) Bill 2021*, News On Air (Feb. 12, 2021), <http://newsonair.com/Main-News-Details.aspx?id=409739>.

[19] *Supra* note 2, at s.34.

[20] *Ibid.*

[21] *Supra* note 2, at Schedule 8.

[22] *Reliance Industries Ltd. & Ors v. Union of India (2014)*, Arbitration Petition, No. 27 of 2013 (India).

[23] *Supra* note 3.

[24] Akshita Saxena, *Lok Sabha Passes Arbitration & Conciliation (Amendment) Bill, 2021*, Live Law (Feb. 12, 2021), <https://www.livelaw.in/news-updates/lok-sabha-passes-arbitration-and-conciliation-amendment-bill-2021-169792?infinitescroll=1>.

[25] Ananya Singh, *Analysis of the Arbitration and Conciliation (Amendment) Bill, 2021, Accord Global ADR Centre (Feb. 18, 2021)*, <https://accordglobaladr.org/2021/02/18/analysis-of-the-arbitration-and-conciliation-amendment-bill-2021/>.

[26] *Supra* note 2.