

## Ever changing arbitration landscape in India, yet another attempt: Hit or a Miss!

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Yet another ordinance has been promulgated to amend the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). One fails to understand the teething hurry in passing the ordinance, without any deliberations or inviting public comments on the impact of amendments, which perhaps is the reason why we have had so many amendments to the Arbitration Act since 2015.

There are two important inclusions:

(a) Unconditional stay on the enforcement of an India seated arbitration award until the challenge to the award is determined, provided, there is prima facie finding by the Court that the arbitration agreement or contract which is the basis of the award, or the making of the award was induced or effected by fraud or corruption;

(b) Deletion of the much debated qualifications, experience and norms for accreditation of arbitrators stipulated under the Eight Schedule of the Arbitration Act.

While the amendments are well intended, prescribing the scope of the stay on the operation of an India seated arbitral award, may lead to unintended consequences and open the doors to a floodgate of litigations, ultimately delaying the enforcement of arbitral award. The provision of stay is broadly worded under the existing regime, and there was no need to specifically mention scenarios where a stay can be granted.

The amendment in relation to the provision of stay has been given a retrospective effect, as the explanation clarifies that it 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 23 October 2015. This is likely to be litigated by the parties before the courts.

The deletion of Eight Schedule is surely a praiseworthy development and was long awaited.

### I. Stay on Enforcement of the India seated arbitral award

Under the existing regime, the Court has the power to stay the operation of the arbitral award, subject to conditions as it may deem fit, having regard to the provision for grant of stay of a money decree under the provisions of the Code of Civil Procedure, 1908. Resultantly, a wide power is conferred on the Court to deliberate on a wide range of issues, including but not limited to issues such as the arbitration agreement or contract or the making of the award being induced or effected by fraud or corruption.

**(a) The arbitration agreement or contract which is the basis of the award being induced or effected by fraud or corruption:**

This issue could have been addressed by the parties in the specific stay application filed under Section 36 of the Arbitration Act (in the enforcement proceedings), and the Court has the wide power to pass appropriate directions as deemed fit in the case. With the new set of amendments, a Respondent to the arbitral proceeding will be tempted to plead that the underlying contract was induced by fraud and corruption, knowing fully that this can be used as a ground to seek a stay on the operation of the arbitration award.

A party always has the right to challenge the jurisdiction of the arbitral tribunal under Section 16 of the Arbitration Act, and such [jurisdictional challenges](#) are to be made before filing the statement of defence. In the jurisdictional challenge, a party can always plead that the underlying arbitration agreement was induced or effected by fraud or corruption, and the [arbitral tribunal](#) has to adjudicate on the jurisdictional challenge before continuing with the arbitral proceedings. The decision on the jurisdictional challenge is not appealable under Section 37 of the Arbitration Act, and as such, can be [challenged along with the final award](#) under Section 34 of the Arbitration Act, which has to be disposed of expeditiously, and in any event within a period of one year. Therefore, the existing position of law contemplated an effective remedy for the parties, and there was no need for any further amendments.

Assuming that a jurisdictional challenge was not taken before the arbitral tribunal, it is difficult to see how the court hearing enforcement of the arbitral award will determine whether the underlying contract was induced by fraud or corruption in absence of any evidence before the judge. It may be difficult to take a prima facie view on the aspect of fraud and corruption, on a mere reading of the documents and a detailed enquiry may be required for the purposes of adjudication. Importantly, a party who decided not to challenge the jurisdiction at the inception, should they be allowed to make additional plea at the time of enforcement of the arbitral award and stay its operation? Certainly, it will be extremely unfair if a party is allowed to agitate an issue of jurisdiction at such a belated stage.

**(b) The making of the award was induced or effected by fraud or corruption:**

The second leg of amendment to proviso of Section 36 of the Arbitration Act allowing unconditional stay on the operation of the award, if a prima facie case is made out that the making of the award, was induced or effected by fraud or corruption is at par with international standards. The global arbitral institutions are brainstorming on issues relating to transparency as well as significance of compliance with laws and been a bone of discussion in international arbitration landscape across the world in last few years. The International Chamber of Commerce (ICC) formed a Task Force in 2019 on “*Addressing Issues of Corruption in International Arbitration*”. The work of the Task Force is currently underway to determine issues that may be of significance for the Tribunal and the arbitral institutions while dealing with issues of corruption. The newly introduced LCIA Rules 2020 has added a provision on requirement for compliance with applicable laws to the party or LCIA relating to bribery, corruption, terrorist financing, fraud, tax evasion, money laundering and/or economic or trade sanctions to ensure that corruption cannot be pleaded as one of the grounds for setting aside of the award.

There can be many issues relating to fraud or corruption in making of the arbitral award. The making of the award being induced by fraud or corruption being a ground for stay, would entail greater responsibility on the role of arbitrators in adjudicating corruption related issues and also on the arbitral institutions. Such issues could result from the conduct of the parties, or the involvement of the arbitral tribunal. While the institutional rules seeks to address the conduct of the parties, there is little guidance if the allegations are against the arbitral tribunal, how the same should be adjudicated or if arbitral institutions should take an active role in determining issues of corruption. While there are general provisions to challenge the appointment of arbitrator before the arbitral institution, but that can be triggered on limited instances, and there is always a timeline attached to it. Therefore, it is important to stipulate such express requirements in the substantive arbitration law.

Under the existing scheme of the Arbitration Act, a challenge to an arbitral award can be filed if making of the award was induced by fraud or corruption, as that would offend the [public policy](#). The decision of the Supreme Court in [Venture Global](#) has explained fraud in the context of making of an award, and held that suppression of facts before the arbitral tribunal may be construed as a fraud while making of the award, but the facts concealed must have a causative link, and if the concealed facts disclosed after the passing of the award have a causative link with the facts constituting or inducing the award, such facts are relevant in a setting aside proceeding and the award may be set aside as affected or induced by fraud.

The Delhi High Court in [Sandeep Kumar v. Dr. Ashok Hans](#), held that there is no requirement under the provisions of Section 34 for parties to lead evidence or it would completely [defeat the purpose](#). The record of the Arbitrator was held to be sufficient in order to furnish proof of whether the grounds under Section 34 had been made out. The Supreme Court in [Fiza Developers and Inter-Trade Private Limited](#) held that the application under Section 34 is in the nature of summary proceedings, an opportunity to the aggrieved party has to be afforded to prove existence of any of the grounds under Section 34(2) of the Act.

The scope of enforcement proceedings under Section 36 is further limited to only enforcing the arbitral award as the decree of the court. Resultantly, there needs to be a clarity on how a prima facie view can be taken on allegations of fraud and whether evidence has to be led in Section 36 proceedings. There appears to be no guidance on what may amount to corruption in making of an arbitral award, and again how a prima facie view can be taken. Therefore, the question is was there a need to introduce a specific provision for stay of the operation of the arbitral award. The court already had the power under Section 36 (3) to grant a stay after recording the reasons in writing, if required, pending the challenge to the arbitral award. The new insertion can potentially be abused by recalcitrant Respondents, who will make every endeavor to delay the enforcement of the arbitral award. Resultantly, we can expect endless applications seeking a stay on the operation of the arbitral award, along with the challenge to the arbitral award.

A possible solution to reduce the scope of the litigation would be to impose heavy costs on failed attempts to allege and seek a stay on the operation of the award, on the premise that the making of the award was induced by fraud or corruption.

## **II. Deletion of qualifications, experience and norms for accreditation of arbitrators stipulated under the Eight Schedule:**

The insertion of the Eight Schedule had been a bone of contention since its inception. Many have argued that it violates party autonomy, as it restricts the ability of the parties to choose their arbitrators. The Eight Schedule has been criticized widely due to imposition of unfair restrictions on the ability to nominate a non-Indian arbitrator in India seated arbitrations. It also discouraged foreign parties to seat their arbitration in India due to inability to appoint foreign legal professionals and restricting their choice of potential arbitrators by nationality, likelihood of lack of experience in handling international arbitrations. Similarly, the requirements that the arbitrator should be conversant with the Constitution of India, labour laws etc. did not help at all. Insertion of such a Schedule in a pro-arbitration regime led to India being perceived as adopting unnecessary restrictions on arbitral appointments. The Eight Schedule became a roadblock rather than aiding the cause of projecting India as a global hub of international arbitration.

While on the other end of the pendulum, certain practitioners and academicians felt that the Eight Schedule necessitating compliance with the basic standards were essential to improve the quality of arbitral appointments. While the debate continued, the Government had not notified the Eight Schedule, and therefore, while it was prescribed, it never had the force of law and was restricted to academic debates.

Party autonomy is the hallmark of arbitration. The amendment is a welcome step, and the removal of the Eight Schedule is in the right direction and clearly reflects India's message to the global arbitration community. While there can be informal guidance on the parameters the parties can keep in mind, while nominating the arbitrator, certainly, such provisions should not be made mandatory.

### **Conclusion:**

Overall, the amendment was well intended and praise worthy and yet another attempt to make India an arbitration friendly country, save and except, the stay on operation of the award in the event there is prima facie finding that the underlying contract or the making of the award was included by fraud or corruption.

There was no background to the amendment, and it is not clear why such an amendment was required at this stage. As set out above, this provision is likely to be abused by the parties, considering the existing provisions already had the ability to deal with such scenarios, and there was no need to specifically amend the law. The 2015 amendment clarified that fraud and corruption in making of arbitral award amounted to offending public policy of India and was part of the scheme of the provisions, and there was no need to make special references in relation to stay of the award.

The ordinance could have been utilized to clarify some of the adverse effects of the 2019 amendments to the Arbitration Act. First, the timeline stipulated under Section 29A of the Arbitration Act has been clarified not to apply to international commercial arbitration. The timelines worked well and should have been made applicable even on international arbitrations which are ad-hoc, and only institutional arbitration could have been kept outside the purview of the provision. Second, the limited exception to the confidentiality obligation notified in the 2019 amendments i.e., for implementation and enforcement of an award, poses serious challenges to the process of arbitration. For example, the provision does not take into consideration that disclosure of the arbitral proceedings may be required in case of seeking interim protections or several other court proceedings in relation to the conduct of the arbitration, in cases where experts are engaged to work on a dispute. While the provision obligates arbitrators, parties and arbitral institutions to maintain confidentiality, it is silent on the obligations of counsel, witnesses, transcribers, tribunal secretary etc. in this regard. These aspects could have been clarified in the ordinance.

Nevertheless, the deletion of the Eight Schedule certainly would come as a breath of fresh air for the foreign parties to seat their arbitrations in India and also allow distinguished foreign legal professionals to sit as arbitrators.