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I. Introduction

The Arbitration and Conciliation (Amendment) Act, 2021 ('**2021 Amendment**') was enacted in March, 2021. It repealed the Arbitration and Conciliation (Amendment) Ordinance, 2020 which was promulgated by the President in November, 2020. The 2021 Amendment introduced *two* significant changes to the Arbitration and Conciliation Act, 1996 ('**the Act**').

First, it amended Section 36 of the Act, which empowered the court to grant an unconditional stay of the enforcement of an award when a *prima facie* case of fraud or corruption is made out in the contract or the arbitration agreement or the making of the award.

Second, it amended Section 43J to vest the Arbitration Council of India with the power to decide the qualifications of arbitrators and repealed Schedule VIII of the Act, which hitherto provided a list of qualification and experience required to be an arbitrator in India. Section43J is included in

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Part I-A of the Act, which provides for the establishment of the Arbitration Council of India (Part I-A of the Act is yet to be notified).

These changes directly result from *two* previous amendments – the Arbitration and Conciliation (Amendment) Act, 2015 ('**2015 Amendment**') and the Arbitration and Conciliation (Amendment) Act, 2019 ('**2019 Amendment**'). In a two-step analysis, we closely examine the 2021 Amendment. First, we will delve into the background of the 2021 Amendment in context of the 2015 and 2019 Amendments. Second, we will explore what the 2021 Amendment means for the arbitration landscape in India and its possible lacunae in furthering a pro-arbitration framework.

II. Background and Controversies Leading up to the 2021 Amendment

A. Amendment to Section36

By virtue of Section34 of the Act, an arbitral award can be set aside by the court subject to any of the grounds provided in the said Section being satisfied.[1] Consequently, the award is rendered unenforceable. Mirroring the UNCITRAL Model Law,[2] these criteria are broadly based on the principles of party autonomy, procedural fairness and public policy.[3] In this regard, a question that arises often is whether the award rendered is enforceable *during* the pendency of the set aside proceedings before the court.[4] It is difficult to strike a balance between one party's right to procedural propriety and the other party's urgency to enforce the award. Moreover, there needs to be a mechanism to prevent a losing party to employ dilatory tactics to render the award infructuous. Given that a successful party in an arbitration might on an average spend about six years in defending challenges made to the

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1 At present, an award is set aside if a party proves that it was either under some incapacity, the arbitration agreement was invalid, it was not given proper notice or was unable to fully present its case, the award is beyond the tribunal's subject matter jurisdiction, or the procedure followed was not in line with the parties' agreement (s 34(2)(a) of the Act). An award may be set aside if a Court finds that if the subject matter of the dispute is not arbitrable or the award is in conflict with public policy of India (s 34(2)(b) of the Act).

2 UNCITRAL Model Law on International Commercial Arbitration 1985 (With Amendments as Adopted in 2006).

3 For a detailed discussion on the contours of public policy in India, *see*, Dushyant Dave, 'Recognition and Enforcement of Foreign and Domestic Arbitral Awards: Role of National Courts' in Dushyant Dave, Martin Hunter, and Fali Nariman (eds), *Arbitration in India* (Kluwer Law International 2021).

4 Gary Born, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2020) 4083-84. Professor Born infers that national courts in both common and civil law jurisdiction are vested with considerable discretion to grant suspension of a recognition action under Article VI of the New York Convention.

arbitral award,[5] it becomes even more significant whether the award should be enforced in the meantime Section36 of the Act empowers the court to grant stay against enforcement of arbitral awards during the pendency of set aside proceedings. Often, the central point becomes under what circumstances a stay is justified.[6]

On this contentious issue, the 2021 Amendment was preceded by the 2015 and 2019 Amendments to the Act.[7] Prior to the 2015 Amendment, the enforcement of an award was *automatically* stayed upon a Section 34 application being filed.[8] Almost always, the award-debtor would file a Section 34 challenge to delay enforcement. The 2015 Amendment demarcated a paradigm shift in the approach. It did away with automatic stay of enforcement of an award when an application to set aside is filed, and the court could grant a stay only in cases where it deems fit.[9] A separate application for grant of stay is to be filed and the court while granting a stay can direct the award debtor to provide a security.

While this was a forward-looking change, it gave rise to a debate as to its applicability and centred on whether the amendment would apply to Section 34 and Section 36 applications arising out of the arbitrations before 23rd October, 2015 (the date when the 2015 Amendment was implemented).[10] Section 26 of the 2015 Amendment provided that none of the changes brought about by the 2015 Amendment would apply to arbitral proceedings commenced before the Amendment came into effect.[11] However, in *BCCI*

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5 *Hindustan Construction Co Ltd v Union of India* (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520 [3] (Supreme Court of India).

6 Ashish Dholakia, Ketan Gour, and Kaustub Narendran, 'India's Arbitration and Conciliation (Amendment) Act, 2021: A Wolf in Sheep's Clothing?' (*Kluwer Arbitration Blog*, 23 May 2021) <http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/> accessed 5 July 2021.

7 *See*, Lord Peter Goldsmith, 'International Commercial Arbitration in India: Some Reflections on Practice and Policy in Gourab Banerji and others (eds), *International Arbitration and the Rule of Law: Essays in Honour of Fali Nariman* (Permanent Court of Arbitration 2021) 379, 381; Subiksh Vasudev, 'The 2019 Amendment to the Indian Arbitration and Conciliation Act: A Classic Case of One Step Forward and Two Steps Backward' (*Kluwer Arbitration Blog*, 25 August 2019) <http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/> accessed 5 July 2021.

8 *Fiza Developers and Inter-Trade (P) Ltd v AMCI (India) (P) Ltd* (2009) 17 SCC 796 [20] (Supreme Court of India); *National Aluminum Co Ltd v Pressteel & Fabrications (P) Ltd* (2004) 1 SCC 540 [11] (Supreme Court of India).

9 The Arbitration and Conciliation (Amendment) Act 2015, s 19.

10 Subiksh Vasudev, 'The 2020 Amendment to the Indian Arbitration Act: Learning from the Past Lessons?' (*Kluwer Arbitration Blog*, 10 December 2020) <http://arbitrationblog.kluwerarbitration.com/2020/12/10/the-2020-amendment-to-the-indian-arbitration-act-learning-from-the-past-lessons/?print=print> accessed 5 July 2021.

11 The Arbitration and Conciliation (Amendment) Act 2015, s 26.

v Kochi Cricket (P) Ltd ('***BCCI Case***'),[12] the Supreme Court held that the new Section 36 was an exception to the rule set in Section26 of the 2015 Amendment. Consequently, Section 34 applications filed before the cut-off date and those applications filed in relation to arbitrations commenced prior to 23rd October, 2015 would now attract the new Section 36.

The Parliament, through the 2019 Amendment, introduced Section87.[13] Accordingly, the 2015 Amendment (including the amended Section36) would neither apply to the arbitral proceedings commenced before 23rd October, 2015 nor to the court proceedings arising out of such arbitrations. Effectively, the ruling in the *BCCI Case* was watered down. In November 2019, the Supreme Court in *Hindustan Construction Co Ltd v Union of India*,[14] struck down Section 87 holding it to be "*manifestly arbitrary*, *unreasonable*, *and contrary to public interest*".

Now, the 2021 Amendment has introduced new grounds for an 'unconditional stay' of the enforcement of the award. When the courts are satisfied that a *prima facie* case of either the arbitration agreement/contract or the award being induced by *fraud* or *corruption* is made out, an unconditional stay will be granted. The Section is accompanied with an explanation providing that this amendment shall also apply to all court cases arising out of or in relation to arbitration proceedings before the commencement of the 2015 Amendment.

B. Amendment to Section 43J and Abrogation of Schedule VIII

While India has witnessed a trend of its policy becoming pro-arbitration, many stakeholders expressed their dissatisfaction with the arbitral process. It was perceived that Indian arbitrators adopted the procedural and evidentiary provisions from the domestic civil procedure into the arbitral process.[15] To adequately deal with this, a High-Level Committee chaired by Justice B.N. Srikrishna was constituted in 2016 to review the institutionalisation of arbitration mechanisms in India. The Committee found that India could improve its pool of arbitrators by providing accreditation to arbitrators. Since accreditation would be provided by an independent professional institute

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[12] (2018) 6 SCC 287 (Supreme Court of India).

[13] The Arbitration and Conciliation (Amendment) Act 2019, s 13.

[14] (2020) 17 SCC 324 : 2019 SCC OnLine SC 1520 [7] (Supreme Court of India).

[15] 'Modi Makes Institutional Arbitration a Priority' (*Global Arbitration Review*, 2016) <https://globalarbitrationreview.com/modi-makes-institutional-arbitration-priority> accessed 30 June 2021.

whose grading would be based on a combination of stringent criteria, there would be a reliable standard of assessment for arbitrators.

In light of the recommendations of the Committee, the Parliament amended the Act in 2019. It established the Arbitration Council of India ('**ACI**') by introducing Part I-A to the Act and stipulated recognition of professional institutes providing accreditation of arbitrators as one of the essential duties and functions of the ACI. It also introduced the Eighth Schedule to the Act, prescribing an exhaustive list of requisite qualifications and experience for being appointed as arbitrators.

Since its introduction, the Eighth Schedule was widely criticised for being over-broad, its most common criticism stemmed from a common perception that the Eighth Schedule debarred a foreign national from being appointed as an arbitrator in an Indian seated arbitration.[16] For example, Entry (i) to the Eighth Schedule permitted the appointment of an advocate within the meaning of the Advocates Act, 1961 having ten years of experience. Only a person of Indian nationality could be an advocate under the Advocates Act (reciprocity being an exception).[17] If that were the case, this would not only militate against the widely accepted doctrine of party autonomy in arbitration but also the Act itself. Section11(1) and Section11(9) of the Act permit appointment of an arbitrator of any nationality in an international commercial arbitration. Even the Supreme Court recognised that there is no absolute bar in foreign lawyers conducting international commercial arbitrations in India on a fly-in and fly-out basis.[18] Therefore, the requirements of the Eighth Schedule were only meant to apply to arbitrators of Indian nationality.

However, in light of the widespread criticism, even before the provisions of the 2019 Amendment (Part I-A and Eighth Schedule) were notified, the President promulgated an Ordinance in November, 2020, which, among other things, provided that the qualifications, experience, and norms for accreditation of arbitrators be specified by regulations made by the ACI in

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[16] Ravi Shankar Sathiyamoorthy, 'Government of India Deletes Schedule VIII that Banned Foreign Legal Professionals from Sitting as Arbitrators in India Seated Arbitrations' (*Matin Dale,* 2020) <https://www.martindale.com/legal-news/article_law-senate_2534676.htm> accessed 30 June 2021; Ajar Rab, '2019 Amendment to Arbitration Law: Foreign Arbitrators in Indian Seated Arbitrations' (*IndiaCorpLaw,* 2020) <https://indiacorplaw.in/2020/09/2019-amendment-to-arbitration-law-foreign-arbitrators-in-indian-seated-arbitrations.html> accessed 30 June 2021.

[17] The Advocates Act 1961, s 24.

[18] *Bar Council of India v A.K. Balaji* (2018) 5 SCC 379 : AIR 2018 SC 1382 (Supreme Court of India).

consultation with the Central Government. This Ordinance provided for the omission of the Eighth Schedule to the Act vide Section 4 of the Ordinance.[19]

III. What the Amendment Means for the Arbitral Landscape in India

In this Section, we analyse the potential implications of the amendment. We look at the three facets: *first*, the introduction of new ground for a stay application—*prima facie* fraud and corruption; *second*, the applicability of the new ground—in terms of the standard of proof and retrospective application; and *third*, the replacement of Eighth Schedule with regulations to be made by the ACI.

A. Prima Facie Fraud and Corruption

The 2021 Amendment introduced a new ground for an unconditional stay of the enforcement of arbitral awards. This part of the paper will analyse whether it is wise to allow an unconditional stay on the enforcement of an arbitral award if the underlying contract (including an arbitration clause) or the arbitration agreement is tainted by fraud/corruption. This would be tested on primarily three grounds:

First, the amendment is not consistent with the doctrine of separability in arbitration. According to the principle of separability, the arbitration clause in a contract is considered separate from the main contract. Thus, if the underlying contract is invalid due to breach or termination, the arbitration clause will still survive. According to the Amendment, if the contract appears *prima facie* to have been tainted by fraud/corruption, then the award (that is based on the arbitration clause in the contract or an arbitration agreement) would be stayed unconditionally. However, the principle of separability mandates that despite the main contract being tainted by fraud or corruption, the arbitration clause would survive and the dispute must be referred to arbitration.[20] An exception to this principle was carved out by the Supreme Court in *A. Ayyasamy v A. Paramasivam*[21] and *Avitel Post Studioz*

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[19] 'Government Issues Ordinance to Amend Arbitration Law' *The Economic Times* (4 November 2020) <https://economictimes.indiatimes.com/news/economy/policy/government-issues-ordinance-to-amend-arbitration-law/articleshow/79045017.cms?from=mdr> accessed 30 June 2021.

[20] This has also found precedence with the Supreme Court in the case of *Swiss Timing Ltd. v. Commonwealth Games*. It can also be derived from a conjoint reading of Sections 15 and 16 of the 1996 Act.

[21] (2016) 10 SCC 386 (Supreme Court of India).

Ltd v HSBC PI Holdings (Mauritius) Ltd.[22] Here, a distinction was drawn between "fraud simpliciter" and "serious allegations of fraud," in that a serious allegation of fraud would permeate the entire contract *causing damage in the public domain* and the dispute would fall outside the competence of an arbitral tribunal. Where a party alleged fraud simpliciter, the appropriate forum is the Arbitral Tribunal and not the court at the stage of enforcement of the arbitral award.

Second, the 2021 Amendment can cause conceptual confusion by disturbing the existing jurisprudence on the intersection between Sections 34 and 36.[23] As per Section 36(2), for an application of unconditional stay, there must be a pending challenge under Section34 of the Act seeking an annulment. Interestingly, an arbitral award may be annulled when the "*making of the award* was induced or affected by fraud or corruption" as opposed to "*the arbitration agreement or contract which is the basis of the award*" was induced or effected by fraud or corruption. This gives rise to an incongruous situation. While the ground is not available for setting aside an award, it is available for an unconditional stay on enforcement.

Third, the courts of enforcement have a legitimate basis to scrutinise arbitral awards in certain cases, including fraud or corruption. Courts enjoy jurisdiction when an application to set aside an award is filed, as to whether proper procedure was followed and opportunity to present the case was given to the parties before the award was made. Since arbitral proceedings do not enjoy the same amount of state support as ordinary court proceedings, the proceedings or the award obtained may sometimes be prone to be tainted by fraud or corruption. Recognising this, the English High Court in *Federal Republic of Nigeria v Process and Industrial Developments Ltd* granted an unprecedented extension for filing an annulment application based on prima facie case of fraud.[24] These concerns are only further exacerbated in India because of the sheer diversity of sectors in which disputes are referred to arbitration and as the range of stakes involved vary from small matters to big ticket cases. Further, most arbitrations in India are *ad hoc*, with little institutional supervision. Therefore, allowing a strong case of prima facie fraud as a ground for unconditional stay may be legitimately required. That said, the amendment, in effect, allows the court wider discretion while considering an application for stay of enforcement of an award than the power

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[22] (2021) 4 SCC 713.

[23] Anahad Miglani and Gaganjyot Singh, 'Fraud in the Underlying Contract: A New Hurdle for Enforcement of India-Seated Arbitral Awards' (*Oxford Business Law Blog,* 2020) <https://www.law.ox.ac.uk/business-law-blog/blog/2020/12/fraud-underlying-contract-new-hurdle-enforcement-india-seated> last accessed 30 June 2020.

[24] [2020] EWHC 2379 (Comm).

the court has while considering an application for stay of enforcement of a decree under the CPC.[25]

B. Unconditional Stay and Retrospectivity

This Section of the paper analyses the application of the new ground for a stay application. *First*, it analyses the appropriate standard of proof required to make a case for *prima facie* fraud or corruption; s*econd,* it analyses the Explanation to Section 36 which provides for the application of the Amendment retrospectively.

Efficiency is the cornerstone of Arbitration and an unconditional stay may *prima facie* be antithetical to efficiency. An unconditional stay encourages the losing party to falsely allege fraud or corruption to stay the enforcement of the award. In doing this, it defeats the very purpose of the alternate dispute mechanism by drawing parties to courts and making it prone to litigation. This would not only overburden the courts but might also result in a further slip in ease of doing business reports. Further, an unconditional stay is tantamount to a pre-emptive decision that places the award-holder in a prejudiced position before the proceedings are completed. For these reasons, it may hurdle India's efforts towards a pro-arbitration regime.

One of the most crucial critiques of the automatic stay regime was that such a legislation takes away the court's discretion in the determination of whether a stay is justified. This led to mandatory judicial interference with the arbitral award in Section 34 challenges, and a similar system under the 2021 Amendment has certainly raised eyebrows. India's position is contrary to most Model Law countries[26] throughout the world who have vested their courts with a broad discretion in granting stays/suspensions to awards.[27]

On the one hand, it is imperative to provide relief to parties when the procedure is tainted with fraud and corruption; on the other, the judicial intervention should be minimal. Accordingly, the standard of *prima facie* case has to be balanced to account for the efficient enforcement of the award. A low *prima facie* standard would be antagonistic to the purpose of efficiency as it incentivizes losing parties to falsely allege fraud or corruption. What the

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[25] *See*, Dholakia, Gour, and Narendran (n 6).

[26] Model Law countries refer to countries that have adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (With Amendments as Adopted in 2006) as their national arbitration legislation. At present, the Model Law has been adopted in 118 jurisdictions. *See* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> last accessed 15 August 2021.

[27] Born (n 4) 4083.

prima facie enquiry is will have to be interpreted by the courts since there is little legislative guidance on this.

It has also been pointed out that Section34 and the new Section36 will lead to a conundrum.[28] The Supreme Court, in *Ssangyong Engg & Construction Co Ltd v NHAI*,[29] held that Section 34 is a summary procedure and it is not within the court's ambit to reappreciate evidence or meticulously examine the award. However, the inquiry of whether there is a *prima facie* case of fraud will require some level of examination of the award or evidence.[30] Thus, the two Sections do not seem to be in consonance with each other. These doubts pertaining to the *prima facie* inquiry would have to be resolved by the judiciary in an appropriate case.

The controversy of retrospectivity of Section36 amendments seems to have been put to rest with the 2021 Amendment since unlike previous instances, the Legislature itself has clarified that the amendment will apply retrospectively. Notably, the Justice Srikrishna High Level Committee had endorsed the view against retrospective application of Section26 of the 2015 Amendment. The Committee opined that retrospective application would lead to uncertainty and inconsistency. When we look at the 2021 Amendment, parties are likely to file fresh applications on the new grounds. They may also possibly file applications for the variation of orders granting an unconditional stay on the new ground.

This might lead to a flurry of new applications and revival of already settled cases. This might burden the courts and increase the average time for disposal of Section36 requests for stay on enforcement.

Therefore, the introduction of unconditional stay that can be retrospectively applied requires careful consideration by the judiciary. It becomes extremely crucial to devise a correct touchstone against which all requests are tested, and frivolous requests should not prejudice the parties.

C. Eighth Schedule

After the Eighth Schedule was abrogated by the President's ordinance, the 2021 Amendment removed the Eighth Schedule altogether from the Act. The Schedule will be replaced by regulations made by the ACI. When the Amendment Bill was debated before the Lok Sabha, this move was widely

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[28] Dholakia, Gour, and Narendran (n 6).
[29] (2019) 15 SCC 131 (Supreme Court of India).
[30] *Svenska Handelsbanken v Indian Charge Chrome* (1994) 1 SCC 502 [88] (Supreme Court of India).

appreciated as it would attract eminent international arbitrators to the country, give greater flexibility to the ACI thereby promoting institutional arbitration, and reinstate the principle of party autonomy as parties may choose arbitrators of their choice.[31] It would be a step towards furthering the pro-arbitration stance adopted by India recently. However, as mentioned earlier, this acclaim received by the Amendment is premised on a misconception that the former Eighth Schedule prohibited foreign arbitrators from being appointed in India seated arbitrations.[32]

After the Amendment, the ACI is tasked to make a fresh set of regulations which will govern the accreditation of arbitrators. As of now, there is no clarity on what these regulations might be. The provisions relating to the ACI in Part I-A are yet to be notified.

As the Committee Report recognised, the regulations would benefit from adopting the best practices of arbitral accreditation institutions around the world. Accordingly, the regulations may, *inter alia*, include criterion such as experience in conducting arbitral proceedings, specialized knowledge in the arbitration and evidence of published writings in ADR journals or legal periodicals.[33] Finally, it is hoped that practitioners, experts and key stakeholders are consulted before making these regulations. Such consultation will prevent any further controversy on this issue and ensure that the regulations do not fall prey to the same criticisms as the Eighth Schedule. Anyway, all these would be of relevance only if the ACI is launched. It is hoped that when the ACI is launched and the regulations are released, it will increase the efficiency of the arbitral process in India.

IV. Conclusion

This paper examines the 2021 Amendment and highlights not only its attempt at a cleaner and more professional arbitration process but also possible lacunae that might need to be addressed by the Parliament or the courts.

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[31] Akshita Saxena, 'Centre Notifies Arbitration & Conciliation (Amendment) Act 2021' (*Live Law* 2021) <https://www.livelaw.in/news-updates/centre-notifies-arbitration-conciliation-amendment-act-2021-171079> accessed 7 July 2021.

[32] 'Government Issues Ordinance to Amend Arbitration Law' *The Economic Times* (2020) <https://economictimes.indiatimes.com/news/economy/policy/government-issues-ordinance-to-amend-arbitration-law/articleshow/79045017.cms?from=mdr> accessed 30 June 2020.

[33] Pooja Chakrobarty and Kunal Dey, 'The Glass Half Empty-Analyzing the Arbitration and Conciliation (Amendment) Act, 2021' (*Argus-p.com*, 2021) <https://www.argus-p.com/papers-publications/thought-paper/the-glass-half-empty-analyzing-the-arbitration-and-conciliation-amendment-act-2021/> accessed 7 July 2021.

While the 2021 Amendment is well-intentioned to effectively deal with the evil of fraud and corruption, it leaves a lot of potential for the judiciary and legislature to shape the law. This paper has attempted to highlight few areas of concern and suggests avenues for improvement.