



## ERGO

*Analysing developments impacting business*

### AMENDMENT TO THE ARBITRATION AND CONCILIATION ACT, 1996 - CONCEPT OF UNCONDITIONAL STAY INTRODUCED, SCHEDULE PERTAINING TO QUALIFICATIONS OF ARBITRATORS DELETED AND TO BE REPLACED WITH REGULATIONS

6 November 2020

The Government of India has been paying special attention to the law relating to arbitrations in India and has amended the Arbitration and Conciliation Act, 1996 (Act) in 2015 and thereafter again in 2019. These amendments have generally been pro-arbitration, however, some proposed amendments were criticized by the international and domestic arbitration community.

By the Arbitration and Conciliation (Amendment) Ordinance, 2020 (Ordinance), issued on 4 November 2020, the Government has, *inter alia*, amended Section 36 of the Act to provide for an unconditional stay of an arbitral award if the Court is satisfied that a *prima facie* case is made out that the arbitration agreement or the making of the award was induced or effected by fraud or corruption, pending disposal of the challenge under Section 34 to the arbitral award. The Ordinance has also omitted the Eighth Schedule (which related to qualifications and experience of arbitrators) from the Act. The Ordinance has come into force with immediate effect.

#### Position before the Ordinance

Prior to 2015, if a party challenged an arbitral award under Section 34 of the Act, there was an automatic stay against enforcement of such an award under challenge. Several parties would accordingly merely file challenges under Section 34 of the Act and then not pursue the matter, thereby effectively delaying the winning party's ability to enforce the award. Section 36 of the Act was amended by the Arbitration & Conciliation (Amendment) Act, 2015 (2015 Amendment Act) to provide that merely filing of an application challenging an arbitral award would not act as a bar on the enforcement of the award, and the court would be required to grant a stay of the operation of the award challenged on a separate application made for such purpose. The Act was also amended to provide that the court was entitled to seek that the parties challenging the award deposit amounts with the court pending the hearing and determination of the challenge to the award.

The effect of this provision proved to be salutary as unscrupulous litigants could not escape from enforcement of awards and award holders were able to proceed to enforcement directly after passing of the award unless a stay was specifically granted. Often, courts would direct parties seeking a stay on the award to deposit sums payable under the award as a condition for the stay.

#### Provisions of the Ordinance

##### A. Proviso in relation to unconditional stay of an arbitral award

The Ordinance has added a proviso to Section 36 of the Act, which in effect has provided parties with a ground to seek an unconditional stay of an award (without any

deposit). It provides that where the Court is satisfied that a *prima facie* case is made out:

- 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, the Court shall stay the award unconditionally, pending disposal of the challenge to the award under Section 34 of the Act.

It is clarified that this amendment will apply to all pending proceedings whether commenced prior to or after the commencement of the 2015 Amendment Act.

**B. Deletion of Eighth Schedule pertaining to qualifications and experience of arbitrators**

The Eighth Schedule to the Act had been introduced by the Arbitration and Conciliation (Amendment) Act, 2019. It provided detailed qualifications and experience that a person must have to be eligible to be appointed as an arbitrator. This Schedule was met with criticism from stakeholders due to the restrictive nature of the qualifications and eligibility criteria laid down. However, the Eighth Schedule had not been notified till date. The Ordinance has omitted the Schedule from the Act and provides that the qualifications, experience and norms for accreditation of arbitrators shall now be specified by regulations. The Government has not yet issued any such regulations, hence it remains to be seen what criteria will be laid down.

### Comments

It is pertinent to note that while the conditions mentioned in the Ordinance are some of the grounds for setting aside of the award under Section 34 of the Act, they are also grounds to seek an unconditional stay on the operation and enforceability of the award. Post the 2015 Amendment Act, Section 36 granted Courts the discretion to impose conditions. While the Ordinance appears to reiterate the court's discretion to impose conditions, it also requires courts to mandatorily stay awards unconditionally if the conditions specified in the Ordinance are met.

The deletion of the Eighth Schedule is a welcome move by the Government. However, the Ordinance amends the Act to state that the qualification, etc. of arbitrators will be as specified by regulations. Presently, no such regulations are notified. It remains to be seen what regulations in this regard will be introduced by the Government, and when.

- *Raj Panchmatia (Partner), Peshwan Jehangir (Partner) & Haabil Vahanvaty (Senior Associate)*

For any queries please contact: [editors@khaitanco.com](mailto:editors@khaitanco.com)

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#### Mumbai

One Indiabulls Centre, 13<sup>th</sup> Floor  
Tower 1 841, Senapati Bapat Marg  
Mumbai 400 013, India

T: +91 22 6636 5000  
E: [mumbai@khaitanco.com](mailto:mumbai@khaitanco.com)

#### New Delhi

Ashoka Estate, 12th Floor  
24 Barakhamba Road  
New Delhi 110 001, India

T: +91 11 4151 5454  
E: [delhi@khaitanco.com](mailto:delhi@khaitanco.com)

#### Bengaluru

Simal, 2nd Floor  
7/1, Ulsoor Road  
Bengaluru 560 042, India

T: +91 80 4339 7000  
E: [bengaluru@khaitanco.com](mailto:bengaluru@khaitanco.com)

#### Kolkata

Emerald House  
1 B Old Post Office Street  
Kolkata 700 001, India

T: +91 33 2248 7000  
E: [kolkata@khaitanco.com](mailto:kolkata@khaitanco.com)