UNCONDITIONAL STAY OF ARBITRAL AWARDS: A REGRESSIVE LEGISLATION AND A FLAWED DISPUTE SYSTEM DESIGN

S K Kashyap & Anagha Menon C, Advocate, High Court of Kerala

ABSTRACT

The automatic stay provision envisaged under the Indian arbitration regime has been a matter of debate for a very long time. In the case of India where arbitration awards rarely go unchallenged, such unconditional stays may put the award creditor in an onerous situation even though it may seem to be the perfect protection mechanism for any award debtor. The provision for automatic stay most often enables a party to successfully slow down the enforcement of the award thereby detaining the other party of their legal rights.

The Arbitration and Conciliation Act, 2021 amended Section 36 of the Arbitration and Conciliation Act, 1996 to enable unconditional stay of arbitral awards or proceedings if they are induced by "fraud or corruption" and the court is prima facie satisfied about such occurence. The 2021 amendment is a deviance from the 2015 Amendment to Section 36 of the Act, which provided that an automatic stay would not be granted with regards to the enforcement of an arbitral award by just filing an application under Section 34 of the Arbitration and Conciliation Act, 1996. Moreover, the research paper aims to understand the relevant stakeholders with regards to arbitration, their interests, and whether this provision complies with any of their interests in the Indian context.

The amendment and the provision with regards to automatic stays make it very easy for the losing party to allege fraud or corruption and thereby obtain an automatic stay on the enforcement of arbitral awards. Consequently, it defeats the entire purpose of the alternative dispute resolution mechanism. In short, the Amendment is a classic example of regressive legislation and represents a flawed dispute system design.

CHAPTER 1: INTRODUCTION

1.1.MEANING AND CHARACTERISTICS

Arbitration is believed to be one of the ancient mechanisms of alternative dispute resolution. In Collins v. Collins[1], Romilly M.R. defined arbitration as a "reference to the decision of one or more persons, either with or without an umpire, of some matter or matters in difference between the parties." Arbitration as an alternative dispute resolution mechanism is considered to be neutral, confidential, cost-effective, and when compared to litigation, capable of enabling settlement between the parties.

Arbitration in India is governed by the Arbitration and Conciliation Act, 1996. The Act is considered to be a self-contained code as:

- ➔ It deals with the substantial and procedural aspects of arbitration in India
- ➔ It explicitly excludes the application of the Code of Civil Procedure, 1908 and the Indian Evidence Act, 1872.
- ➔ It empowers the Tribunal to follow its procedure to determine the issue before the Tribunal.
- ➔ It lays down the detailed procedure for various stages in an arbitral proceeding.

The Act has been subjected to amendment on various occasions and for this research paper, the study pertains to the Arbitration and Conciliation (Amendment) Act, 2021 and the provision for unconditional stay of arbitral awards when such award is induced by fraud or corruption.

1.2. OBJECTIVE OF THE STUDY

- ➔ To understand whether the Arbitration and Conciliation (Amendment) Act, 2021 is regressive legislation.
- ➔ To understand whether the Arbitration and Conciliation (Amendment) Act, 2021 represents a flawed disputes system design.

1.3. RESEARCH QUESTIONS

- ➔ Whether the provision for unconditional stay of arbitral awards when such awards are induced by fraud or corruption defeats the arbitration mechanism in India?

[1] *Collins v. Collins* [1858] Beav. 26 (Court of Chancery), p.306.

- ➔ Whether the provision for unconditional stay of arbitral awards when such awards are induced by fraud or corruption protect the interests of the stakeholders?

1.4.HYPOTHESIS

The Arbitration and Conciliation (Amendment) Act, 2021 with regards to the unconditional stay of arbitral awards is regressive legislation and represents a flawed dispute system design.

1.5.RESEARCH METHODOLOGY

This research paper is analytical, descriptive, and doctrinal in nature.

1.6.CHAPTERIZATION

This research paper is divided into five chapters.

- ➔ Chapter 1 deals with Introduction, Objective of the Study, Research Questions, Hypothesis, Research Methodology
- ➔ Chapter 2 deals with Tracing the Ambiguity with regards to the evolution of the provision pertaining to unconditional stay of arbitral awards and proceedings over the years
- ➔ Chapter 3 deals with the analysis of national legislation of arbitration-friendly states
- ➔ Chapter 4 deals with Dispute System Design, the various stakeholders with regards to arbitration, and their interests
- ➔ Chapter 5 deals with findings and recommendations

CHAPTER 2: TRACING THE AMBIGUITY

2.1. EVOLUTION OF THE PROVISION

Section 36(2) which provided for an automatic stay on the execution of award on the filing of an application under section 34 of the Arbitration Act has been a cause of dispute since the inception of the Act in 1996 and has paved way for varied judicial interpretations, consequent amendments spanning over more than 16 years.

This provision has been evolving over these years as following:

- **2004**

The issue was raised before the Hon'ble Supreme Court in NALCO[2] case where the court observed that automatic suspension of execution of an award once an application is filed under section 34 defeats the objective of the alternate dispute resolution system. It was further observed by the court that necessary steps may be taken by the authorities to bring a change in the point of law.

- **2014**

Subsequently, the 246th Law Commission[3] chaired by Justice A.P. Shah quoted the abovementioned 2004 judgment and recommended that amendments be made to section 36 of the act to rectify the mischief in the provision leading to an automatic stay on the execution of the award.

- **2015**

The Law Commission Report gave way to the Arbitration and Conciliation (Amendment) Act 2015 which came into effect on 23rd October 2015 bringing forth major amendments to the 1996 act including an amendment to section 36 by adding clause 2 and 3 which laid down that an application under section 34 shall not render an arbitral award unenforceable unless the court grants an order of stay on a separate application made for the same.

- **2018**

Based on the recommendations made by the committee, the legislature drafted the Arbitration

[2] National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr., 2004 1 SCC 540
Law Commission Of India, 2014. 246th Law Commission Report. [online] Available at: <https://lawcommissionofindia.nic.in/reports/report246.pdf> [Accessed 21 March 2021].

and Conciliation Amendment Bill proposing to introduce section 87 to clarify that the 2015 amendment act was applicable only prospectively with regards to court proceedings and arbitration and thereby expressly repeal section 26.

Meanwhile, the Hon'ble Supreme Court in *BCCI v. Kochi Cricket Private Limited*[4] laid down that although the 2015 amendment act will be prospectively applicable to arbitration proceedings commenced after the effective date whereas the amended section 36 will apply retrospectively to applications under Section 34 which were filed before the Amendment Act came into effect. The court further because of the proposed amendment cautioned that the introduction of section 87 shall will have the effect of putting the 2015 amendment act in 'backburner'.

- **2019**

I. Despite the forethought, the legislature relied on the Srikrishna Committee Report and passed the Arbitration and Conciliation Amendment Act 2019 with Section 87. This caused great injustice to the companies that banked upon the BCCI verdict to claim compensation as awarded in the arbitration. Certain companies filed writs (*Hindustan Construction Company Limited and Anr. v. Union of India and Ors*)[5] challenging the constitutional validity of section 87 arguing that the provision is in violation of Article 14, 19(1)(g), 21, etc.

The apex court overruled its judgments that held that there shall be an automatic stay of an arbitral award upon an application by a party under section 34 of the Act[6] and also held that the automatic stay provision serves as a "double-whammy" for companies who were award holders. Even though these companies got the arbitral award in their favor, they could not enforce the same because of the automatic stay provision under Section 34.

It also posed a danger to the company being declared insolvent under the Insolvency and Bankruptcy Code, 2016. The apex court also observed that it would take many years to resolve this in court, thereby defeating the object of the arbitral mechanism in our country.

II. This position, however, was modified by The Arbitration and Conciliation (Amendment) Ordinance, 2020 which was promulgated on November 4, 2020, by the President

[4] (*2018) 6 SCC 287*

[5] Writ Petition (Civil) No. 1074 of 2019

[6] Ibid,.1, Fiza Developers and Inter-trade Pvt. Ltd. V. AMCI (India) Pvt. Ltd., (2009) 17 SCC 796 and National Buildings Construction Corporation Ltd. V. Lloyds Insulation India Ltd., (2005) 2 SCC 367

of India. The ordinance amended sections 36 reintroducing automatic stay provision clarifying that the court may grant the same, even during the pendency of setting aside application, if prima facie there it appears that the arbitration agreement or the award was induced by fraud or corruption.[7] Further, the ordinance brought forth an amendment to section 43J of the act dealing with accreditation of arbitrators and omitted the eighth schedule of the principal act which dealt with qualifications and experience of arbitrators.

- **2021**

III. The legislature has rolled out the Arbitration and Conciliation (Amendment) Act, 2021[8] which replaces the ordinance promulgated in November 2020. Akin to the ordinance, the Act has amended section 36(3) of the Arbitration and Conciliation Act, 1996 by legislating a provision which states that if the court is prima facie satisfied that the

a) Arbitration agreement or award or

b) Making of the award

IV. is induced by fraud or corruption, then the court shall unconditionally stay such award until disposal of such dispute under section 34. Further, the explanation to the proviso clarifies that the said insertion shall apply retrospectively.

V. Thereby the long-standing debate as to automatic stay was finally put to rest by the legislature with the present amendment, however opening fresh deliberations as to whether the amendment will hurdle India's efforts towards a pro-arbitration regime.

2.2. ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

VI. The Arbitration and Conciliation (Amendment) Act, 2021 replaced the Arbitration and Conciliation (Amendment) Ordinance, 2020. The statement of objects and reasons of the amendment act lay down that the aim is to protect stakeholder's interest by addressing corruption in securing contracts or arbitral awards and provide the losing party with a remedy

[7] The Arbitration And Conciliation (Amendment) Bill, 2021. Available at: https://prsindia.org/files/bills_acts/bills_parliament/Arbitration%20and%20Conciliation%20(Amendment)%20Bill,%202021.pdf. [Accessed 25 March 2021].

[8] The Arbitration And Conciliation (Amendment) Act, 2021. http://egazette.nic.in/WriteReadData/2021/225832.pdf [Accessed 14 April 2021]

to seek an unconditional stay of enforcement of awards if it is induced by fraud or corruption. Significant changes that were brought forth by the amendment act are as follows;

a) Reintroduction of automatic stay provision pertaining to arbitral awards as discussed above.

b) Substitution of section 43J, which was introduced by way of 2019 amendment act, with the words "The qualifications, experience, and norms for accreditation of arbitrators shall be such as may be specified by the regulations."

c) Omission of Eighth Schedule, also introduced by way of the amendment act of 2019 which laid out an exhaustive list of qualifications of an arbitrator.[9]

VII. The exclusion of the eighth schedule was stated to be a measure to encourage country International Commercial Arbitration in the country and attract eminent arbitrators since the present change will give the freedom to appoint foreign arbitrators for arbitrations taking place in the country reinstating the party autonomy principle, backed by the UNCITRAL Model Law provisions.

[9] Ibid., 17

CHAPTER 3: COMPARATIVE ANALYSIS OF NATIONAL LEGISLATION OF ARBITRATION FRIENDLY STATES

Arbitration-friendly states (such as UK, USA, France, Hong Kong, and Singapore) generally provide considerable freedom to the parties with regards to the arbitral procedure.[10] The role of courts in such states are generally limited to two functions such as, assisting the arbitral process and supporting the enforcement of the award.[11] To analyze the effective implementation of the provision with regards to unconditional stay of arbitral awards or arbitral process, it is, therefore, imperative to examine how such arbitration-friendly states have legislated on this aspect. Following are a few of the most arbitration-friendly states in the world and an analysis of their arbitration law with strict emphasis upon the setting aside and unconditional stay, if any, of awards and arbitral process:

3.1.FEDERAL ARBITRATION ACT OF 1925, UNITED STATES OF AMERICA

The Federal Arbitration Act of 1925 is enacted to enforce arbitration agreements and for the enforcement of awards in the United States of America. The Supreme Court has time and again observed that the national policy of United States to become an arbitration-friendly state calls for just the limited interference essential so as to maintain the fundamental value of arbitration, i.e., settling disputes at once.[12] The Act empowers the non-prevailing party to move the court to vacate an arbitral award when, among other grounds, the opposing party has secured the award by way of fraud[13] or the Arbitral Tribunal's corruption or evident partiality to one of the parties.[14]

However, the Act does not provide for an unconditional stay of an arbitral award when it is influenced by fraud or corruption.

3.2.ARBITRATION ACT OF 1996, UNITED KINGDOM

The Arbitration Act of 1996 governs the process of arbitration in the United Kingdom. Though the Act is not a comprehensive adoption, it brought the English law closer to the UNCITRAL Model Law.*[15]* Section 67 of the Arbitration Act, 1996 deals with challenging the award with regards to the substantive jurisdiction of the Tribunal. Section 67(2) states that when an

[10] https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017
[11] Ibid
[12] Hall St. Assocs., LLC v Mattel 552 U.S. 576, 588 (2008)
[13] 9 U.S.C.S. § 10(a)(1), See https://www.law.cornell.edu/uscode/text/9/10
[14] 9 U.S.C.S. § 10(a)(2), See https://www.law.cornell.edu/uscode/text/9/10
[15] https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/united-kingdom

application is filed by a party upon this ground, "*The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction."*[16]

Section 68 of the Act deals with challenging an arbitral award based on serious irregularity. Section 68(2)(g) of the Act states that *"a party to arbitral proceedings may, upon notice to the other parties and the Tribunal, apply to the Court challenging an award on the ground of serious irregularity if the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy*."[17]

The Arbitration Act, 1996 of the United Kingdom, therefore does not provide for an unconditional stay of the arbitral proceeding or an arbitral award upon any ground.

3.3.ARBITRATION ACT OF 2001, SINGAPORE

In the Queen Mary University of London International Arbitration Survey, 2018, Singapore is the most popular Asian seat for arbitration and the third most popular globally.[18] With an independent judiciary, deep respect for the Rule of Law and the presence of world-class facilities to host international arbitrations, Singapore has become an attractive arbitration destination.[19] Section 48 under Part III of the Singapore Arbitration Act deals with setting aside of an arbitral award by the Court. Section 48(1)(a)(vi) of the Act provides for setting aside an arbitral award upon application by a party if he proves to the satisfaction of the Court that "the making of the award was induced or affected by fraud or corruption."[20] Moreover, the way Singapore has evolved as a pro-arbitration state is noteworthy and it is pertinent to understand section 48(3) of the Act in that regard, which states that:

"When a party applies to the Court to set aside an award under this section, the Court may, where appropriate and so requested by a party, suspend the proceedings for setting aside an award, for such period as it may determine, to allow the arbitral tribunal to resume the arbitration proceedings or take such other action as may eliminate the grounds for setting aside an award."[21]

[16] https://www.legislation.gov.uk/ukpga/1996/23/section/67
[17] https://www.legislation.gov.uk/ukpga/1996/23/section/68
[18] http://www.arbitration.qmul.ac.uk/research/2018/
[19]https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)&firstPage=true
[20] https://www.jus.uio.no/lm/singapore.arbitration.act.2001/48.html
[21] Ibid

The Singapore Arbitration Act of 2001, as in the case of the Federal Act of USA and the Arbitration Act of UK, do not have any provision for the unconditional stay of arbitral awards when such awards are induced by fraud or corruption, or under any other ground.

3.4.CODE OF CIVIL PROCEDURE OF 1981, FRANCE

French law provides for a dualist approach with regards to arbitration, separating domestic and international arbitration.[22] Article 1484 and Article 1504 of the Code of Civil Procedure, France deals with grounds for setting aside an arbitral award in domestic arbitration and international arbitration respectively. The Code does not, in either of the cases, deal with an unconditional stay of the arbitral proceedings or an arbitral award.[23] Contrary to the other states mentioned before, surprisingly, France does not have an explicit provision for setting aside an arbitral award in the case of fraud.

3.5.ARBITRATION ORDINANCE OF 2011, HONG KONG

Hong Kong has the reputation of being a well-recognized international arbitration hub. The Arbitration Ordinance of 1963 can be regarded as the beginning of the modern arbitral regime in Hong Kong.[24] Another Arbitration Ordinance was brought into effect in June 2011 to unify the domestic and international arbitral regimes based on the revised Model Law. Section 81 of the Hong Kong Arbitration Ordinance deals with grounds for setting aside an arbitral award, which incorporates Article 34 of the UNCITRAL Model Law[25]. Though there is no explicit provision to set aside an award based on fraud or corruption, courts have construed that fraud or corruption while obtaining an arbitral award comes under the ground of being contrary to the public policy of Hong Kong.[26]

After examining these acts, it is understood that these states have not envisaged a provision similar to Section 36(3) of the Arbitration and Conciliation (Amendment) Act, 2021. Such a provision can hence be identified to be against the efforts of making India an arbitration-friendly state.

[22] https://thelawreviews.co.uk/title/the-international-arbitration-review/france
[23] https://www.jus.uio.no/lm/france.arbitration.code.of.civil.procedure.1981/doc.html#122
[24] https://www.cityu.edu.hk/cshk/files/PolicyPapers/CSHK%20Policy%20Paper%208.pdf
[25] https://www.elegislation.gov.hk/hk/cap609
[26] *Hebei Import v Polytek Engineering* [1999] 2 HKC 205 at 233

CHAPTER 4: DISPUTE SYSTEM DESIGN

4.1. MEANING OF DISPUTE SYSTEM DESIGN

Dispute system design can be defined as the "applied art and science of designing the means to prevent, manage, learn from, and resolve streams of disputes or conflict."[27] Generally, dispute system designs come under one of the following categories:

- ➔ Third-party design for the benefit of the disputants.
- ➔ All disputants or parties jointly design the system.
- ➔ One party with stronger economic power designs it.[28]

For instance, the public justice system is considered to be the result of a third-party design – the judiciary with the backing of the legislature for the benefit of the disputants or parties.[29]

Dispute System Design is contrary to the traditional rule-making process as the latter often encompasses only the limited involvement of all the relevant stakeholders.[30] Even if traditional rule-making processes engage all the stakeholders, the advantages offered by dispute system design are significant. Using a dispute system design approach can be more effective in developing policies as it takes into consideration, the interests and problems of all the stakeholders for the implementation and evaluation of new policies. Alternative Dispute Resolution mechanisms vary according to who designs such mechanism, the purpose of such mechanism and its consequent design.[31] The control of dispute system design has a far-reaching consequence on the operation as well as structure of the resultant system.

---

[27]CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS (1996); WILLIAM L. URY, JEANNE M. BRETT & STEPHEN B. GOLDBERG, Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict (1988); Smith & Martinez, supra note 3, at 126

[28] Self-Determination in Dispute System Design and Employment Arbitration, 56 U. MIAMI L. REV. 873 (2002)

[29] For publications evaluating ADR programs in a variety of federal courts, see the website of the Federal Judicial Center, available at http://www.fjc.gov [Accessed 10 April 2021]

[30] According to Professor Jeffrey W. Stempel, "[t]hose outside the rulemaking process are not invited to brainstorm with the rulemakers but only to react to their product, often after an official proposal already supported by the Advisory Committee has gathered momentum." Jeffrey W. Stempel, New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform, 59 BROOK. L. REV. 659, 742 (1993)

[31] Naqvee, A. and Sikha, S., 2021. *Unconditional Stay On Arbitral Awards - Litigation, Mediation & Arbitration - India*. [online] Mondaq.com. Available at: <https://www.mondaq.com/india/trials-appeals-compensation/1042098/unconditional-stay-on-arbitral-awards#:~:text=The%20statement%20of%20object%20and,corruption%2C%20the%20stakeholder%20parties%20must> [Accessed 7 April 2021].

To reduce issues and ensuring optimum efficiency, it is imperative to understand who the key stakeholders in an arbitral proceeding are and what their interests are. A policy or legislation must be designed in such a manner to consider all these stakeholders and their genuine interests. They are as follows:

4.2.THE PARTIES

Generally, the parties' satisfaction in a dispute resolution process is based on three factors and they are:

- ➔ Their expectations
- ➔ Characteristics of the Dispute Resolution Process
- ➔ The outcome of the case

The parties are generally satisfied if the dispute resolution process meets or exceeds their expectations, or if they feel that they have adequate opportunities to participate in the determination of an outcome, or if the process is fair, impartial, considerate of their interests, and private.

4.3.LAWYERS

Lawyers often appreciate arbitration as it is believed to be reducing the time and expense incurred if the matter went for litigation. It also enables them to manage and structure matters in such a way that they can be moved with foresight expeditiously. Arbitration also enables them to resolve complex problems that they face during litigation, such as possible tensions between them and their clients during litigation. Compared to litigation, arbitration enables the lawyers to maintain their relationships with the parties or the opposing counsels, to a greater extent. They often consider arbitration as a private, neutral, and civilized way of resolution of conflicts.

Arguably, every aspect of a dispute has the potential to be disputed, and nowadays, lawyers tend to use every available litigation procedure to stall an arbitral proceeding or the enforcement of an arbitral award even though, this cannot be considered as a 'genuine interest'. A disputes system should be designed in such a manner to prevent the inadequate opening of floodgates of litigation or stalling of cases just because the litigation procedure provided a loophole to do so.

4.4.COURTS

Courts value arbitration as a mechanism that enables the screening of disputes that do not necessarily need much judicial attention and can be effectively settled through an alternative mechanism. This will not only save the court's time but also enable them to focus on disputes that warrant judicial attention. In short, arbitration helps the courts to relieve their pressure from backlog and pendency of cases. However, they have been pertinent to ensure that the arbitral proceeding in no way deters the interests of any party and that the proceeding meets at least the minimum standards that it is expected to have. Oftentimes, courts refrain from unnecessarily intervening in the arbitration process unless they are required to.

4.5.ARBITRATORS

Arbitrators generally want matters to adhere to their economic interests and also maintain their reputation as successful and renowned arbitrators. This makes them very keen about the independence of the arbitration process from courts and litigation. They want the mechanism to be reflective of their professional ideologies. They ideally do not want to get involved in fraudulent or corrupt practices but follow legitimate approaches to settle disputes.

4.6.THE STATE

In the case of India, by the recent 2021 Amendment of the Arbitration and Conciliation Act, it can be seen that making India an arbitration-friendly state is a priority. In that regard, it is crucial to legislate fairly to protect the interests of all the relevant stakeholders, without defeating the spirit and essence of arbitration. The State has to evaluate promising policy options which enable their objectives without harming the other stakeholders and their genuine interests. The state has to provide for the necessary infrastructure to reach its end goal of creating an arbitration-friendly environment. The State should do away with regressive legislation and focus on adhering to international standards adopted and followed by other states who are considered to be arbitration-friendly states.

CHAPTER 5: FINDINGS AND RECOMMENDATIONS

5.1. FINDINGS

Section 34 of the Arbitration and Conciliation Act, 1996 has already covered arbitration awards that are induced by fraud or corruption. An analysis of the legislations of arbitration-friendly nations proves that the 2015 Amendment to the Arbitration and Conciliation Act, 1996, which did away with the provision for an automatic stay, is fair and thereby makes the addition of Section 36(3) in the 2021 Amendment a regressive law. The end game of arbitration is expedient and affordable justice and this provision can be understood to be frustrating that objective itself. The 2015 Amendment, to the extent of the impugned provision, is regarded as fair and in line with global practices and standards. Bringing continuous and recurrent amendments to the Act is not a good example of a healthy legislative process.

The Amendment Act does not define fraud or corruption. Giving courts the power to grant an unconditional stay of arbitral awards when such awards are induced by fraud or corruption is highly ambiguous when terms such as fraud or corruption are not defined under the Act. This provision binds the courts to lean in favor of a *prima facie* aspect and it can lead to more and more arbitral awards getting unconditionally stayed on these grounds. Moreover, this provision goes against the UNCITRAL Model Law provision of Section 36(2) because the Model Law does not provide for an unconditional stay by the courts. This provision makes it easier for the award debtor to misuse the procedure and obtain a stay of the arbitral award. India has been performing well with regards to the ease of doing business and that is one of the primary reasons for the Amendment, as envisaged by the legislators, to make India an arbitration-friendly state. However, it is pertinent to note that India lags far behind at the 163rd position out of 190 countries for Enforcement of Contracts, which is one of the constituents of the Ease of Doing Business and this fact is not at all encouraging. In the case of all the arbitration-friendly states, as discussed before, there is maximum deference and minimum interference by the judiciary in the arbitral awards passed. This provision for unconditional stay of awards can therefore be considered to be against the objective of the amendment itself. Rather, the amendment and the unconditional stay provision is a weak system wherein the interests of all the stakeholders are not protected in the larger interests of the nation.

Indian courts are infamous for the pendency rates and backlog of cases and in such a scenario, this provision adds to the already existing burden of the courts and increases the time for dispute

resolution, which fundamentally defeats the purpose of an arbitration mechanism. The amendment cannot be perceived to be safeguarding the interests of any of the stakeholders.

Moreover, any issue of fraud is a blend of laws and factual circumstances and hence, it cannot be summarily decided until and unless it is proved by way of taking evidence from sources other than what was provided in the initial arbitral award. The implementation of this provision without actually reopening the entire case is quite doubtful and hence, defeats the very purpose of the 2015 Amendment as well as the arbitration mechanism in our country. The retrospective effect as underlined in the provision is also alarming as it is bound to open floodgates of litigation concerning awards that are passed and appeal is pending. Such a provision cannot be deemed arbitration-friendly because it will not encourage businessmen and investors to come to India due to the consequent delay of arbitration proceedings.

An initial attempt of the legislature in this regard is the introduction of Section 87 to the Arbitration and Conciliation Act, 1996 by way of an Amendment in 2019 and was heavily criticized and struck down by the Indian apex court[32], thereby observing that:

"*The retrospective resurrection of an automatic-stay not only turns the clock backwards contrary to the object of the Arbitration Act, 1996 and the 2015 Amendment Act, but also results in payments already made under the amended Section 36 to award-holders in a situation of no-stay or conditional-stay now being reversed.*"

Moreover, it can be understood that the unconditional stay provision as envisaged under the Amendment Act defeats the arbitral mechanism itself and hence, represents a flawed dispute system design. It fails to protect the interests of any of the stakeholders such as the parties, lawyers, the courts, the state, or the arbitrators.

5.2. RECOMMENDATIONS:

The provision for unconditional stay of arbitral awards is self-defeating in the sense that it defeats the purpose of the arbitration mechanism in India. There is no need for such legislation because the issues of fraud and corruption with regards to an arbitral proceeding or an arbitral award have been already dealt with under Section 34 of the Act. The provision empowers courts

[32] Hindustan Construction Company Ltd & Anr v. Union of India and Ors. WP (Civil) No. 1074 of 2019

to set aside the award on such grounds. However, if the provision is not struck down, it is pertinent to:

- ➔ Specify a limitation period within which the occurrence of a fraudulent or corrupt practice with regards to an arbitral proceeding should be brought up before the court.
- ➔ Set out a fine or sanction to prevent superficial challenges to an arbitral award by merely alleging fraud or corruption in the proceeding.[33]

[33] Naqvee, A. and Sikha, S., 2021. *Unconditional Stay On Arbitral Awards - Litigation, Mediation & Arbitration - India*. [online] Mondaq.com. Available at: <https://www.mondaq.com/india/trials-appeals-compensation/1042098/unconditional-stay-on-arbitral-awards#:~:text=The%20statement%20of%20object%20and,corruption%2C%20the%20stakeholder%20parties%20must> [Accessed 7 April 2021].

BIBLIOGRAPHY

CASE LAWS:

a. Collins v. Collins (1858) 26 Beav.306, 312

b. National Aluminum Company Ltd. (NALCO) v. Pressteel & Fabrications (P) Ltd. and Anr., 2004 1 SCC 540

c. Fiza Developers and Inter-trade Pvt. Ltd. V. AMCI (India) Pvt. Ltd., (2009) 17 SCC 796

d. National Buildings Construction Corporation Ltd. V. Lloyds Insulation India Ltd., (2005) 2 SCC 367

e. Hall St. Assocs., LLC v Mattel 552 U.S. 576, 588 (2008)

f. Hindustan Construction Company Ltd & Anr v. Union of India and Ors. WP (Civil) No. 1074 of 2019

REPORTS:

a. Law Commission Of India, 2014. 246th Law Commission Report. [online] Available at: <https://lawcommissionofindia.nic.in/reports/report246.pdf> [Accessed 21 March 2021].

b. 2017. Report of the High Level Committee to Review the Institutionalisation of Arbitration Mechanism in India. [online] Available at: <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf> [Accessed 24 March 2021].

c. https://globalarbitrationreview.com/insight/know-how/commercial-arbitration/report/united-kingdom

ARTICLES

a. Chhabra, G., 2017. Automatic Stay Of Arbitral Award: Pre And Post Amendment Act, 2015 - Litigation, Mediation & Arbitration - India. [online] Mondaq.com. Available at: <https://www.mondaq.com/india/arbitration-dispute-resolution/575962/automatic-stay-of-arbitral-award-pre-and-post-amendment-act-2015> [Accessed 21 March 2021].

b. Khan, M., 2016. 'India's Arbitration Act: The turbulent teenage years'. [online] Nishithdesai.com. Available at: <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20Hotline/India_s_Arbitration_Act_The_turbulent_teenage_years.pdf> [Accessed 22 March 2021].

c. Arora, M., Howard, A. and Oulepo, A., 2020. Indian Supreme Court Strikes Down Automatic Stay Provisions for Good - Kluwer Arbitration Blog. [online] Kluwer Arbitration Blog. Available at: <http://arbitrationblog.kluwerarbitration.com/2020/02/15/indian-supreme-court-strikes-down-automatic-stay-provisions-for-good/#:~:text=and%20Anr%2C%20the%20Supreme%20Court,setting%20aside%20of%20an%20award.> [Accessed 25 March 2021].

d. https://www.lw.com/thoughtleadership/guide-to-international-arbitration-2017

e. https://uk.practicallaw.thomsonreuters.com/3-381-2028?transitionType=Default&contextData=(sc.Default)&firstPage=true

f. Naqvee, A. and Sikha, S., 2021. *Unconditional Stay On Arbitral Awards - Litigation, Mediation & Arbitration - India*. [online] Mondaq.com. Available at: <https://www.mondaq.com/india/trials-appeals-compensation/1042098/unconditional-stay-on-arbitral-awards#:~:text=The%20statement%20of%20object%20and,corruption%2C%20the%20stakeholder%20parties%20must> [Accessed 7 April 2021].

STATUTES

a. The Arbitration And Conciliation (Amendment) Bill, 2021. Available at: https://prsindia.org/files/bills_acts/bills_parliament/Arbitration%20and%20Conciliation%20(Amendment)%20Bill,%202021.pdf. [Accessed 25 March 2021].

b. The Arbitration And Conciliation (Amendment) Act, 2021. http://egazette.nic.in/WriteReadData/2021/225832.pdf [Accessed 14 April 2021]

c. Federal Arbitration Act, USA

d. Arbitration Act, 1996, UK

e. Hong Kong Arbitration Ordinance, 2011