



Research Paper

## The Arbitration & Conciliation Amendment Bill, 2021- A classic example of one step forward and two steps backward

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### ABSTRACT

With the introduction of the recent Arbitration & Conciliation (Amendment) Bill of 2021 in the Lok Sabha by Law minister Ravi Shankar Prasad where he intended to address misuse by “fly-by-night operators” who take benefit of the law to get favorable Arbitral Awards by fraud, India’s dream to be a global arbitration hub had shattered. This is not the first instance where the central government came up with Amendment in Arbitration and Conciliation Act, 1996. In the last one decade, the central government introduced Arbitration and Conciliation Amendment Act, 2015 which was based upon 249<sup>th</sup> Law Commission of India Report, Arbitration and Conciliation Amendment Act, 2019 which was based upon Justice Srikrishna Committee Report and Arbitration and Conciliation (Amendment) ordinance issued in November 2020 by the President of India. All these amendments were done with a prime objective to make India a global arbitration centre in a pursuit to compete with Singapore and London.

In this regard, India is the only country to bring back to back amendments in the Arbitration Act to assist the “ease of doing business” which directly would assist central government “Make in India” policy. The critical study and observations in this article are made exclusively while taking into consideration the aspect of “How to make India a global Arbitration Hub” and what would be the impact of amendment bill on arbitration in India.

**KEYWORDS:** Arbitration, Conciliation, Amendment, Hub, Report.

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### I. INTRODUCTION

India has gradually showcased the remarkable growth in the economy after experiencing the COVID-19 pandemic and the tightest lockdown which ultimately resulted in GDP contraction but its GDP (Gross Domestic Product) is escalating swiftly. In the last two decades the Central Government through its policy took several measures to endow with better investment opportunities and hassle-free trade mechanisms to attract more investors which would boost India’s “Make in India” policy.<sup>1</sup> Simultaneously, India is more focused to provide mechanism for enforcement of contracts and rapid dispute resolution mechanism.

As per the rating of World Bank on “ease of doing business” 2020, India was ranked 63 out of 190 countries as compared to 100 in 2018 which signifies in itself the global reputation of India which gradually improved.<sup>2</sup> Although bringing all kinds of economic reforms, India still did not have an efficient legal system. We cannot deny the inefficiency of various courts throughout India. As per the data of 2020, there were almost 4 crores cases spanning before Supreme Court, High Courts and numerous district and subordinate

<sup>1</sup> Report of the High-Level Committee to review the Institutionalization of Arbitration Mechanism in India (2017) p.3

<sup>2</sup>Doing business 2020 World Bank group, pp-4, (Feb. 19, 2021) <http://documents1.worldbank.org/curated/en/688761571934946384/pdf/Doing-Business-2020-Comparing-Business-Regulation-in-190-Economies.pdf>

courts.<sup>3</sup> According to World Bank, India's rank is 163<sup>rd</sup> in terms of enforcing contracts.<sup>4</sup> The average cost for resolution of the dispute in India is approximately 30% of the claim value. In terms of the quality of the judicial process which includes structure & proceedings of the court, management of cases, automation of court and alternative dispute resolution is also not up to the global standard, it is indexed at 10 out of 18.<sup>5</sup>

The above-mentioned data showcased the incompetence and flaw in the Indian Judicial system. Taking into consideration these aspects the foreign investors are not willing to invest in India. It is the need of the hour to address these issues and speed up the resolution of disputes. Due to these burning issues, diverse types of Dispute Resolution mechanisms came in to picture which includes Arbitration, Negotiation, Mediation, and Conciliation.

The then Arbitration Act of 1940 was heavily criticized due to excess intervention of judicial authorities and deficiency in arbitration proceedings which ultimately against the basic objective of Alternative Dispute Resolution mechanism.<sup>6</sup> Subsequently, the Arbitration and Conciliation Act, 1996 was passed by the central government which was based on United Nations International Commission on International Trade Law (UNCITRAL) model law and rules, 1985.

Among all the forms of ADR mechanism, Arbitration became the celebrated mechanism for resolution of dispute not only for the International trade disputes but also the domestic one due to its flexible and distinctive process. India is now willing to encourage arbitration in order to cope up with the global standard. In order to achieve these several efforts have been taken by the central government in the form of an amendment to address the practical problems associated with the Arbitration and Conciliation Act, 1996. In order to become a global arbitration center, vital changes were introduced by Arbitration and Conciliation (Amendment) Act, 2015.

Nonetheless, there are certain issues still associated with the act which won't allow India to become a global arbitration hub was discussed in a conference organized by NITI Aayog on the topic "National Initiative towards Strengthening Arbitration and Enforcement in India". These three issues are following. Firstly, there is a need of the hour to reform the structure governing arbitration in India. Secondly, there is a lack of infrastructural support to boost international commercial arbitration. Thirdly, there is need to create awareness among the people at large about the advantage of arbitration.<sup>7</sup> In order to boost the resolution of dispute through arbitration and to make India an arbitration center, the government has to encourage institutional arbitration. As far as the global standard is concerned it is opposite to the practice of Singapore and London where most of the arbitration conducted through Institution like Singapore International Arbitration Centre (SIAC) and London Court of International Arbitration (LCIA). As per the data of 2019, 1073 cases were administered by Singapore International Arbitration Centre (SIAC) and out of that 485 cases involved Indians.<sup>8</sup> Taking into consideration these aspects in addition to Amendment Act, 2015, Arbitration and Conciliation (Amendment) Act, 2019 was also introduced to tackle International commercial dispute resolution ecosystem.

Now that the Arbitration and Conciliation Amendment Bill, 2021 has been introduced in Lok Sabha by the law minister Shri Ravi Shankar Prasad, this article critically analyses the provision of the Amendment Bill to comprehend the objective of the amendment and if it is, in fact, a positive step for India to become a global center for international commercial arbitration.

## **Critical analysis of some key provisions of the Arbitration and Conciliation Amendment (Bill) 2021**

### **Automatic stay on Awards (Section 36)**

#### **Present Scenario**

The Arbitration and Conciliation Act, 1996 permitted the party to prefer an appeal to the court for setting aside an arbitral award under section 34 (i.e., against the order passed by the arbitration tribunal). Court had interpreted this section to imply that an automatic stay was granted the moment an application for setting

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<sup>3</sup>National Juridical Data Grid ( Feb. 21, 2021 ), <https://www.bloomberquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts>

<sup>4</sup>World Bank Report on enforcement of contracts ( Feb. 21, 2021 ), [https://www.business-standard.com/article/economy-policy/hamstrung-judiciary-the-reason-why-india-falters-on-enforcing-contracts-119103101234\\_1.html](https://www.business-standard.com/article/economy-policy/hamstrung-judiciary-the-reason-why-india-falters-on-enforcing-contracts-119103101234_1.html)

<sup>5</sup> Supra Note 3

<sup>6</sup>Indian council of Arbitration, (Feb. 10, 2021) [http://www.icaindia.co.in/icanet/rules/commercial arbitration/arbitration conciliation/chapter 1a.html](http://www.icaindia.co.in/icanet/rules/commercial%20arbitration/arbitration%20conciliation/chapter%201a.html)

<sup>7</sup> Bibek Debroy and Suparna Jain, Strengthening Arbitration and its Enforcement in India – Resolve in India (2016).

<sup>8</sup>Singapore International Arbitration Centre (SIAC) Annual report 2019, (Feb 19, 2021) [https://www.siac.org.sg/images/stories/articles/annual\\_report/SIAC%20Annual%20Report%202019%20\(FINAL\).pdf](https://www.siac.org.sg/images/stories/articles/annual_report/SIAC%20Annual%20Report%202019%20(FINAL).pdf)

aside of arbitral award was made before a competent court. However, Arbitration and Conciliation Amendment Act, 2015 states that arbitral award won't automatically stay simply because the judgment debtor prefer an appeal and put an application before the competent court to set aside the arbitral award.

### **Proposed Amendment**

As per the new proposed Arbitration and Conciliation Amendment (Bill) 2021 an automatic stay on the arbitral award maybe granted even during the pendency of the setting aside of the application if the court prima facie satisfied that the relevant arbitration agreement or contract, or the making of the arbitral award, was induced or effected by fraud or corruption. This change will have a retrospective effect from October 23, 2015.

### **Prominent issues associated with the section 36 of proposed amendment (Bill)**

It is going to give an upper hand to the judgment debtor to contend corruption or fraud and taking undue advantage as automatic stay on enforcement of the arbitral award. Subsequently, the judgment creditor will have to wait for the enforcement of the arbitral award until the matters finally dispose of by the court. This provision under section 36 would dispose of the very essence of alternative dispute resolution mechanism by dragging the parties again to the same conventional judicial system and making them the victim of unnecessary delay. It is also going to make the court overburden.

1. On one hand, they added two grounds for nonenforcement of arbitral award under section 36 but in the Act nowhere defined which act would amount to fraud/corruption.
2. The Amendment (Bill) is going to have the retrospective application from the 2015 Amendment Act related to the automatic stay on awards which is going to open the floodgates of litigation.
3. The Amendment (bill) is directly going to have an adverse effect on the enforcement of contracts and which ultimately would affect the ease of doing business in India and the "Make in India" policy.

### **Pros**

The Arbitration and Conciliation Amendment (Bill), 2021 would bring uniformity among all the stakeholders of arbitration proceeding. This would give an opportunity to all the stakeholders to seek automatic stay on enforcement of arbitral awards in case of an agreement or the contract is induced by either corruption or fraud.

### **Cons**

India is way behind as far as the global norm with respect to arbitration is concerned. This amendment would drag India further because of practical difficulties associated with the enforcement of international contracts and agreements. This would gradually obstruct the spirit of "Make in India" and affect the ranking of India in the global ease of doing business index.

Throughout in the last decade, India is trying its best to bring reforms in Arbitration Act with a prime objective to make India a global arbitration hub but "automatic stay on enforcement of the arbitral award"<sup>9</sup> would lead to unnecessary delay and loner duration for resolution of disputes.

### **Qualifications of Arbitrators (Eighth Schedule and Section 43J)**

#### **Present Scenario**

The eighth schedule of the Arbitration and Conciliation Amendment Act, 2019 prescribes the express qualification, experience, and norms required to become an arbitrator in India.<sup>10</sup> It includes advocates, company secretaries, cost and chartered accountants. It also lays down nine categories and minimum qualifications to become an arbitrator in India.

This clause is vague and implies that foreign legal practitioner cannot become an arbitrator in India because of the prerequisite that the person should be an advocate within the meaning of the Indian Advocates Act, 1961 or an officer of the Indian Legal Service.<sup>11</sup> Moreover, the arbitrators must be acquainted with the provisions of Constitution of India. This clause ultimately discouraged foreign investors to opt-out India as the place of arbitration because the parties can not appoint a foreign legal professional as arbitrators as the choice of arbitrators are limited by nationality.

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<sup>9</sup> Section 36, Arbitration and Conciliation (Amendment) Bill, 2021

<sup>10</sup> Section 43J, Arbitration and Conciliation (Amendment) Act, 2019

<sup>11</sup> Section 43J, read with Eighth Schedule of the Arbitration and Conciliation (Amendment) Act, 2019

### **Proposed Amendment**

The Bill prescribes to omit the eighth schedule which stipulates the qualification and experience of arbitrator and further state that as far as “qualifications, experience, and norms for accreditation of arbitrators” is concerned, arbitration council of India will prescribe it.

### **Pros**

The central government amended the Arbitration & Conciliation Act, 1996 with the objective to make India an arbitration center for resolution of Commercial disputes but Schedule VIII won't allow India to become a global arbitration hub. Therefore, this is a positive step taken by the central government which would allow the foreign (Advocates, Company Secretaries, Cost and Chartered Accountants) to become an arbitrator in India which would ultimately encourage foreign investors to invest in India.

## **II. CONCLUSION**

This is going to be the fourth attempt by the lawmaker to make India an arbitration-friendly center for the resolution of commercial disputes. The Amendment Act, 2015 and 2019 aimed to endorse and build up institutional arbitration in India, but the Amendment (Bill) 2021 would force India to take two steps back. The Amendment (Bill) 2021 contains more misses than hits. It should be reconsidered because of serious lacuna associated with Section 36 related to the automatic stay on the arbitral award which would defeat the very essence of alternative dispute resolution mechanism by dragging the parties again to the same conventional judicial system and making them the victim of unnecessary delay. It is also going to make the court overburden. Moreover, the other amendment in Schedule VIII and Section 43J is a welcoming positive step to make India a global arbitration hub.