

Arbitration and Conciliation (Amendment) Bill 2021

February 25, 2021

Amidst the mayhem in Lok Sabha on account of the Farm Bills, the Law Minister Ravi Shankar Prasad on behalf of the Union Government introduced the Arbitration and Conciliation (Amendment) Bill 2021 in the Lok Sabha on 4th February 2021. The vision of the Government is to empower judicial courts to grant unconditional stays on the enforcement of arbitration awards tainted by fraud or corruption through the new bill.

In news: Lok Sabha Passes Arbitration & Conciliation (Amendment) Bill, 2021

Placing it in syllabus: Law & Policy

Dimensions

- Provisions of the Amendment Bill
- Importance and Drawbacks of the Amendment
- Provisions of Arbitration and Conciliation Act 1996
- Amendments of 2015
- Amendments of 2019
- Alternative Dispute Resolution System

Content:

Provisions of the Amendment Bill

- Lok Sabha has passed the Arbitration and Conciliation (Amendment) Bill, 2021 by voice vote.
- It seeks to amend the Arbitration and Conciliation Act, 1996 so as to
 - (i) enable automatic stay on awards in certain cases and

- (ii) specify by regulations the qualifications, experience and norms for accreditation of arbitrators.

Salient Features:

Grants Automatic stay on awards:

- In the present regime, a party may file an application before the Court under Section 34 of the 1996 Act for setting aside an arbitral award.
- However, after the 2015 amendment to (Section 36 of) the Act, an automatic stay would not be granted on operation of the award by mere filing an application for setting it aside.
- The Bill clarifies that a stay on the arbitral award may be granted by the Court, even during the pendency of the setting aside application, if it is prima facie satisfied that the relevant arbitration agreement or contract/ making of the award was induced by fraud or corruption.
- This shall be deemed effective from October 23, 2015.
- Stay on the award shall not be unlimited. It will operate only till disposal of application for setting aside under Section 34 of the Act, by the Court.

Omit Qualifications of Arbitrators:

- Schedule VIII to the principal Act specifies certain qualifications, experience, and accreditation norms for arbitrators.
- These requirements include that an arbitrator must be:
 - (i) an advocate under the Advocates Act, 1961 with 10 years of experience, **or**
 - (ii) an officer of the Indian Legal Service, among others.
- The **Bill seeks to omit Schedule VIII** and states that qualifications, experience and norms for accreditation

of arbitrators shall be specified by Regulations.

Importance of the Amendment:

Impetus to making India a hub of international commercial arbitration:

- Omission of Schedule VIII of the Act will give **greater flexibility to the Arbitration Council of India** and will help in promoting institutional arbitration.
- This will attract eminent international arbitrators to India

Addresses the issue of corrupt practices in securing contracts or arbitral awards:

- all the stakeholder parties get an opportunity to seek unconditional stay of enforcement of arbitral awards, if the underlying arbitration agreement or contract or making of the arbitral award is induced by fraud or corruption.

Drawbacks of the Amendment:

There was widespread opposition with respect to proposed amendment to Section 36, which provides automatic stay of award. The Chief among them include:

Prolongs Litigation Process:

- The bill does not define Fraud/ Corruption.
- So, it is very easy for the losing party to allege corruption and obtain an automatic stay on enforcement of the arbitral award.
- This defeats the very objective of alternate dispute resolution mechanisms by drawing parties to Courts and making them prone to prolonged litigation.

Affects Ease of doing business in India:

- Retrospective application of Amendment Act (from 2015)

with respect to automatic stay may open floodgates of litigation

- Amendment will affect enforcement of contracts and thus, affect ease of doing business

Ambiguous and Contradictory Provisions:

- Section 34 does not contain any express provision for setting aside an arbitral award, or refusing its enforcement
- It was also observed that Section 34 and Section 36 are not in consonance with one another, and that the languages of that Sections 36 is in conflict with that of Section 34.

Shows lack of legislative wisdom:

- Continuous piecemeal amendments to the Arbitration Act in 2015, 2019 and 2020 indicates that the Government lacks legislative wisdom.
- This may create doubts and apprehensions about the future changes to the Act and its retrospective application.

Provisions of Arbitration and Conciliation Act 1996:

- The 'Arbitration and Conciliation Act 1996' is an Act that regulates domestic arbitration in India.

The major provisions relating to Conciliation in the Act are:

- A party initiating the conciliation shall send a written notice to the other party, briefly identifying the subject of the dispute and inviting it for conciliation.
- The conciliation proceedings shall commence on acceptance of invitation by the other party.

- If the party initiating conciliation does not receive a reply within 30 days from the date the invitation was sent or within the specified period, it may opt to treat this as a rejection and inform the same to the other party.
- If it rejects the invitation, there can be no conciliation proceeding. Unless otherwise agreed there shall be one conciliator.
- The parties may however, agree that there shall be two or three conciliators, who shall act jointly. The sole conciliator shall be appointed by mutual consent of the parties.
- In case of two conciliators, each party may appoint one conciliator.
- In case of three conciliators, each party may appoint one conciliator and the third conciliator may be appointed by mutual agreement of the parties who shall act as the presiding conciliator.
- However, the parties may agree that a conciliator shall be appointed or recommended by an institution or a person.
- The Act also explains about the conciliation proceedings shall be terminated when, a settlement agreement is signed by the parties

Amendments of 2015:

The following are the salient features of the new ordinance, introduced in 2015:

definition of expression 'Court':

- The amended law makes a clear distinction between an international commercial arbitration and domestic arbitration with regard to the definition of 'Court'.
- In so far as domestic arbitration is concerned, the definition of "Court" is the same as was in the 1996 Act, however, for the purpose of international

commercial arbitration, 'Court' has been defined to mean only High Court of competent jurisdiction.

Adds a proviso to Section 2(2):

- It envisages that subject to the agreement to the contrary, Section 9 (interim measures), Section 27(taking of evidence), and Section 37(1)(a), 37(3) shall also apply to international commercial arbitration, even if the seat of arbitration is outside India.
- The amendment tried to strike a kind of balance between the situations created by the judgments of Bhatia International and Balco v. Kaiser.

Amends Section 9 dealing with 'Interim Measures'

- if the Court passes an interim measure of protection under the section before commencement of arbitral proceedings, then the arbitral proceedings shall have to commence within a period of 90 days from the date of such order or within such time as the Court may determine.
- Also, that the Court shall not entertain any application under section 9 unless it finds that circumstances exist which may not render the remedy under Section 17 efficacious.

Amendments of 2019:

Established Arbitration Council of India:

- The amendments established an independent body called the Arbitration Council of India (ACI) for the promotion of arbitration, mediation, conciliation and other alternative dispute redressal mechanisms.

Relaxation of time limits:

- Under the earlier Act, arbitral tribunals are required

to make their award within a period of 12 months for all arbitration proceedings.

- The amendment removed this time restriction for international commercial arbitrations.
- It added that tribunals must try to dispose of international arbitration matters within 12 months.

Appointment of arbitrators:

- Under the 1996 Act, parties were free to appoint arbitrators. In case of disagreement on an appointment, parties could request the Supreme Court, or the High Court, or any person or institution designated by such Court, to appoint an arbitrator.
- This was amended. The Supreme Court and High Courts may now designate arbitral institutions, which parties can approach for the appointment of arbitrators.
- For international commercial arbitration, appointments will be made by the institution designated by the Supreme Court.

Written submissions:

- A new requirement was added that the written claim and the defence to the claim in an arbitration proceeding, should be completed within six months of the appointment of the arbitrators.

Alternative Dispute Resolution (ADR) Mechanisms:

- ADR is a mechanism of dispute resolution that is non adversarial, i.e. working together cooperatively to reach the best resolution for everyone.
- ADR can be instrumental in reducing the burden of litigation on courts, while delivering a well-rounded and satisfying experience for the parties involved.
- It provides the opportunity to “expand the pie” through creative, collaborative bargaining, and fulfill the interests driving their demands.

ADR is generally classified into the following types:

Arbitration:

- The dispute is submitted to an arbitral tribunal which makes a decision (an “award”) on the dispute that is mostly binding on the parties.
- It is less formal than a trial, and the rules of evidence are often relaxed.
- Generally, there is no right to appeal an arbitrator’s decision.
- Except for some interim measures, there is very little scope for judicial intervention in the arbitration process.

Conciliation:

- A non-binding procedure in which an impartial third party, the conciliator, assists the parties to a dispute in reaching a mutually satisfactory agreed settlement of the dispute.
- Conciliation is a less formal form of arbitration.
- The parties are free to accept or reject the recommendations of the conciliator.
- However, if both parties accept the settlement document drawn by the conciliator, it shall be final and binding on both.

Mediation:

- In mediation, an impartial person called a “mediator” helps the parties try to reach a mutually acceptable resolution of the dispute.
- The mediator does not decide the dispute but helps the parties communicate so they can try to settle the dispute themselves.
- Mediation leaves control of the outcome with the parties.

Negotiation:

- A non-binding procedure in which discussions between the parties are initiated without the intervention of any third party with the object of arriving at a negotiated settlement to the dispute
- It is the most common method of alternative dispute resolution.
- Negotiation occurs in business, non-profit organizations, government branches, legal proceedings, among nations and in personal situations such as marriage, divorce, parenting, and everyday life.

Mould your thought: Critically evaluate the recent changes made to the Arbitration and Conciliation Act.

Approach to the answer:

- Introduction
- Discuss the changes made in 2021
- Discuss the Importance of these changes
- Write the criticisms of these changes
- Conclusion