

## The Arbitration And Conciliation Amendment Ordinance 2020

written by Krusch Antony | November 5, 2020



### The Arbitration And Conciliation Ordinance, 2020: Simplifying the Process of Alternate Dispute Resolution

The President of India has promulgated the Arbitration And Conciliation (Amendment) Ordinance, 2020 dated 4<sup>th</sup> November 2020 (“Ordinance”)[1] subsequent to the Arbitration & Conciliation (Amendment) Act, 2019 with respect to the grant of stay of enforcement of arbitral awards. This Ordinance further amends Sections 36 and 43J of the Arbitration & Conciliation Act, 1996 (“Principal Act”), and has come into force with immediate effect. We discuss in the succeeding paragraphs the modifications made in brief.

#### Power to grant unconditional stay in certain circumstances

The Ordinance in question firstly amends Section 36 of the Principal Act by incorporating an additional proviso that shall be deemed to have been inserted with effect from 23<sup>rd</sup> October 2015. Section 36 of the Principal Act had previously been substituted by the 2015 amendment and entails the provisions for enforcement of an arbitral award.

Section 36 up until now states that where an application to set aside the arbitral award has been filed in the appropriate court under Section 34, the filing of such application does not render the award unenforceable *per se* unless the court grants an order of stay. Proviso to the Section 36 lays down the condition for the grant of stay in the case of an arbitral award for payment of money and holds that courts may direct the appealing party to deposit part or full amount of the amount in question similar to a grant of stay in money decree under the Code of Civil Procedure, 1908.

By virtue of the present Ordinance being discussed herein, an additional Proviso has been added. This Proviso holds that in all cases where the court is satisfied that a *prima facie* case is made out that the arbitration agreement or contract which is the basis for the arbitral award or the making of the award itself is vitiated by fraud or corruption, the enforcement of the arbitral award shall be stayed unconditionally pending disposal of the challenge under Section 34 of the award. Hence, the condition of deposit of any amount awarded by the Arbitral Tribunal by the appealing party to obtain stay has been dispensed with.

It has been further clarified that the new proviso shall apply to all court cases arising out of arbitral proceedings irrespective of whether the

arbitral or court proceedings were commenced prior to or after the Arbitration & Conciliation (Amendment) Act, 2015.

#### Effect of the Amendment to Section 36

This addition will surely bring a sigh of relief to applicants challenging an award which is based on a contract which in itself is illegal and unenforceable and has been wrongly given enforceability and validity through an arbitral award that is likely to be set aside. Section 17 of the Indian Contract Act, 1872 establishes that all contracts which have been entered into on the basis of fraud or misrepresentation are voidable at the option of the party whose consent is so caused.

In such a scenario, if the party who made fraudulent representations somehow manages to obtain an arbitral award in their favour or even on the basis of a valid contract fraudulently obtains an arbitral award in their favour, the innocent party would be in jeopardy having to face the brunt of obtaining a conditional stay. Dispensation of this requirement will inspire confidence and reduce trepidation of contracting parties and further encourage the incorporation of arbitration clauses in business agreements.

#### Modification in the Norms for Accreditation of Arbitrators

The present Ordinance also substitutes Section 43J of the Principal Act. Previously, Section 43J stated that the qualifications, experience and norms for accreditation of arbitrators shall be as specified in the Eighth Schedule. However, the Ordinance has substituted Section 43J in its entirety and now states that the qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified in the regulations. Hence, as an obvious corollary, the Eighth Schedule of the Principal Act has been omitted.

The regulations referred to in the Ordinance are related to those which will be framed by the Arbitration Council of India ("ACI") to be established under Section 43B of the Amendment Act, 2015. However, enforcement of Section 43B is yet to be notified and hence, the Arbitration Council has not yet been set up. In March 2020, the Department of Legal Affairs under the Ministry of Law And Justice issued the "Draft Arbitration Council of India Rules" for public comments. Although the window for public comments has been closed, the final rules for the establishment of ACI are yet to be notified.

#### Effect of the modified Section 43J

In the absence of ACI, the above measure is, at present, redundant. However, post setting up of the ACI and framing of rules for accreditation of arbitrators it may be a welcome addition to the arsenal of the field of alternate dispute resolution. This is because the previous Section 43J read with the Eighth Schedule was unnecessarily restrictive leaving the door open for a challenge to the arbitral award under Section 34 by aggrieved parties on a mere technicality despite well-reasoned orders on merits. There is thus a hope on the horizon by virtue of the regulations to be issued once the ACI is established.

#### Conclusion

The Arbitration And Conciliation (Amendment) Ordinance, 2020 is a welcome move in the world of alternate dispute resolution. While Section 43J still lacks teeth, the provision seems promising and will hopefully yield a more effective application of the Principal Act. The amendment to Section 36 will surely be widely appreciated in terms of its practical applicability and simplicity.

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