

# ARBITRATION & CONCILIATION (AMENDMENT) ACT, 2021: RETURN OF THE UNCONDITIONAL STAY ON ENFORCEMENT OF AWARDS- A RETROGRADE STEP?

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## I. INTRODUCTION

The Arbitration and Conciliation Act has been subjected to multiple amendments by the Parliament in an effort to make India a pro-arbitration hub. ‘With the multitude of amendments being made in short intervals, one would expect them to iron out any ambiguities and make the arbitral process smooth’.<sup>1</sup> However, some of these amendments have been severely criticized for failure to promote the cause of arbitration in India. The most recent Arbitration and Conciliation (Amendment) Act, 2021 is a step in a similar direction and much like its predecessors, the Act seems to have dissociated itself from its primary intent. ‘The chief offender in this regard is the fresh introduction of the fraud or corruption standard allowing unconditional stay on the ever so difficult and exacting, enforcement of domestic awards pending challenge under Section 34 of the Arbitration and Conciliation Act, 1996’.<sup>2</sup> Oscar Wilde once famously said: *Experience is simply the name we give our mistakes* and perhaps as a lesson from the constant horrors faced by the litigants while enforcing domestic arbitral awards, the Arbitration and Conciliation (Amendment) Act, 2015 was enacted to bring about a major pro-enforcement revolution through cessation of automatic and unconditional stay on enforcement of domestic awards pending challenge proceedings under Section 34 of the Act’.<sup>3</sup>

Regretfully however, in 2019, the Arbitration and Conciliation (Amendment) Act, 2019 was brought into force which sparked a vital debate in the arbitration circles for

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<sup>1</sup> Sumitra Bose, ‘*Unconditional Stay on Arbitral Awards: A Step back for Arbitrations in India*’, THE LEGAL 500.COM, Accessed on: 10 March 2022, <<https://www.legal500.com/developments/thought-leadership/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/> - ~:~text=In that light, Section 36,the contract on which such-india>.

<sup>2</sup> Naresh Thacker & Samarth Saxena, ‘*Arbitration and Conciliation (Amendment) Act, 2021: The Final Word On Unconditional Stay On Enforcement Of Challenged Domestic Awards?*’, Vol.4, IALR (2021).

<sup>3</sup> *Ibid.*

striking a discordant note. ‘Amongst the major pitfalls of the amendment was the provision that made the 2015 Amendment Act only prospectively applicable, thereby, diluting the removal of automatic and unconditional stay on enforcement of domestic awards’.<sup>4</sup> ‘Fortunately, this setback of the 2019 Amendment Act was short-lived and soon the course was corrected by the Supreme Court in *Hindustan Construction Co. Ltd. v. Union of India* [“**Hindustan Construction Co**”] wherein the relevant provisions of the 2019 Amendment Act were struck down as unconstitutional’.<sup>5</sup> Just as it appeared that the dust seemed to have settled over this debate, the legislature introduced the Arbitration and Conciliation (Amendment) Ordinance, 2020 which came to be the Arbitration and Conciliation (Amendment) Act, 2021.<sup>6</sup> “The 2021 Amendment Act retrospectively amended Section 36 of the Act and introduced ‘fraud or corruption’ as a yardstick to seek an unconditional stay on the enforcement of domestic awards”.<sup>7</sup> The paper intends to highlight the ongoing shifts in legislative interpretation surrounding the recognition and enforcement of arbitral judgements in India and show how unsettled the situation still remains.

The paper attempts to shed light on the interaction between the Indian arbitration regime and the unconditional stay on implementation of contested arbitral rulings. It elucidates the ramifications that the 2021 amendment will have in great detail and also makes certain plausible arguments/ recommendations to rectify the amendment. The paper presents an analysis of the correctness of the retrospective application of the ‘fraud or corruption’ standard by the 2021 Amendment Act and the effect of the unconditional stay on the enforcement of awards under section 36 as well as under section 34 whilst a setting aside application is still pending. Lastly, the author will put forth their concluding remarks, recommend certain measures that maybe used to overcome this setback and delineate the troubles which still lie ahead when seeking enforcement of challenged domestic arbitral awards.

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Hindustan Construction Co. Ltd. v. Union of India*, (2020) 17 SCC 324.

<sup>6</sup> Nishith Desai Associates, ‘*International Commercial Arbitration: Law & Recent Developments in India*’, NISHITH DESAI.COM, Accessed on: 10 March 2022, <Available at: [https://www.nishithdesai.com/fileadmin/user\\_upload/pdfs/Research\\_Papers/International\\_Commercial\\_Arbitration.pdf](https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/International_Commercial_Arbitration.pdf)>.

<sup>7</sup> *Ibid.*

## II. EVOLUTION OF THE AUTOMATIC STAY PROVISION

The evolution of automatic stay provisions in the enforcement of arbitral awards in India has witnessed significant changes over the years. Initially, under the Arbitration and Conciliation Act, 1996, there was no automatic stay on the enforcement of arbitral awards. However, with subsequent amendments and judicial interpretations, the concept of automatic stay has emerged as it appears in the act today.

In 2012, the Supreme Court of India, in the case of *National Aluminum Company Ltd. v. Pressteel & Fabrications Pvt. Ltd.*, [“**NALCO v. Pressteel** ”]<sup>8</sup> introduced the principle of an automatic stay on enforcement by allowing award debtors to challenge arbitral awards before Indian courts. This decision enabled award debtors to seek a stay on enforcement by filing a challenge against the award.

Further developments took place with the enactment of the Arbitration and Conciliation (Amendment) Act, 2015. This amendment aimed to expedite the enforcement of arbitral awards and discourage unwarranted delays. It introduced strict timelines for the disposal of applications seeking the setting aside or enforcement of arbitral awards. However, the 2015 amendment did not completely eliminate the possibility of an automatic stay.

The issue of automatic stay provisions in India came to the forefront with the Supreme Court's decision in the case of *BCCI v. Kochi Cricket Private Limited*<sup>9</sup> [“**BCCI v. Kochi**”] in 2018. The court held that any challenge to an arbitral award would automatically result in a stay on its enforcement, unless the party seeking enforcement demonstrates exceptional circumstances that warrant lifting the stay. This decision caused concerns about delays and the impact on the efficacy of arbitration in India.

To address these concerns, the Arbitration and Conciliation (Amendment) Act, 2019 was enacted. This amendment aimed to strike a balance between the rights of award creditors and award debtors. It introduced changes to the automatic stay provisions,

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<sup>8</sup> National Aluminium Co. Ltd. v. Pressteel & Fabrications (P) Ltd., (2004) 1 SCC 540.

<sup>9</sup> BCCI vs. Kochi Cricket Pt. Ltd. & Others., (2018) 6 SCC 287.

emphasizing that mere filing of a challenge to an award would not automatically stay its enforcement. The court would have discretion to grant a stay on enforcement after considering the circumstances of the case.

However, the automatic stay provisions continued to be a topic of debate and concern. The latest amendment, the Arbitration and Conciliation (Amendment) Act, 2021, brought some modifications to the automatic stay provisions. It introduced a requirement for prima facie evidence of fraud and corruption to be examined by the court in execution or enforcement proceedings. This provision aimed to prevent frivolous challenges and protect the integrity of arbitral awards.

Overall, the evolution of automatic stay provisions in the enforcement of arbitral awards in India reflects the efforts to strike a balance between the efficient enforcement of awards and safeguarding parties' rights to challenge awards under exceptional circumstances.

### **III. THE CONTROVERSY SURROUNDING S.36(3): AN ANALYSIS**

The changes effected to S.36 by the 2021 Amendment are regressive measures which alter the pro-arbitration regime that is sought to be encouraged in India. 'The Amendment has introduced a second proviso to S.36(3) which stipulates that, where a court is prima facie satisfied that the Arbitration Agreement/ contract which is the basis of the arbitral award, was induced or effected by fraud or corruption, it shall grant an unconditional stay on the enforcement of such award'.<sup>10</sup> The court can exercise this power pending disposal of a challenge under S.34.<sup>11</sup> By way of an explanation, 'the Ordinance has further clarified that the newly inserted proviso to S.36(3) shall be applicable to all cases arising out of or in relation to arbitration proceedings, irrespective of whether the arbitration or court proceedings have commenced prior to or after the commencement of the 2015 amendment act'.<sup>12</sup> This would mean that the amendment will have a retrospective application.

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<sup>10</sup> Pooja Chakrabarti and Kunal Dey, 'The Story of Arbitral Meddling- Analysing the Arbitration & Conciliation (Amendment) Ordinance, 2020', (Argus Partners.com), Accessed on: 15 March 2022, <Available at: [https://www.argus-p.com/uploads/blog\\_article/download/1605776404\\_thesto~1.pdf](https://www.argus-p.com/uploads/blog_article/download/1605776404_thesto~1.pdf)>.

<sup>11</sup> the Arbitration & Conciliation (Amendment) Ordinance, 2020, § 2.

<sup>12</sup> *Supra* note 1 at 3.

There appear to be several drawbacks in the 2021 amendment act, which pose a question as to the true intent of the amendment. As a result of which, the amendment continues to receive constant criticism and backlash from the arbitration community for stifling the cause of arbitration in India. Therefore, some of the most pertinent of these stumbling blocks are discussed and critically analysed hereinafter-

#### **A. ABSENCE OF A STRICT TEST TO ESTABLISH FRAUD AND CORRUPTION**

The amendment has failed to offer a definition *stricto sensu* and does not even lay down any test or guideline to establish what constitutes fraud and corruption. This indicates that the standards are extremely vague and arbitrary to say the least. Furthermore, with the inclusion of these grounds of stay, parties unhappy with the outcome will take every opportunity to claim that their contract or the final award is vitiated by fraud and/or corruption<sup>13</sup>. In *'Swiss Timing Limited'*<sup>14</sup>, the SC held 'that allegations of fraud or corruption in the contract would not undermine the arbitration agreement and all matters including the issue as to whether the main contract was void/voidable can be referred to arbitration'<sup>15</sup>. In *Ayyasamy vs. Paramasivam*<sup>16</sup> and *Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd* the SC distinguished between *fraud simpliciter* and *serious allegations of fraud*, which destroy the entire contract, holding that only in the latter case would the dispute fall outside the competence of a tribunal.<sup>17</sup> From a cursory reading, it appears that the amendment failed to make allowance for these considerations by not offering any clarity as to what claims if any will fall within the broad ambit of fraud and cross the threshold to merit the award of an 'unconditional stay'. 'The Supreme Court in the case of *United Commercial Bank vs. Bank of India & Ors* has held a prima facie case

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<sup>13</sup> Ashish Dholakia and Ketan Gaur, Kaustubh Narendran, '*India's Arbitration & Conciliation (Amendment) Act, 2021: A Wolf in Sheep's Clothing*', (Kluwer Arbitration.com), Accessed on: 15 March 2022, <Available at: <http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/>>.

<sup>14</sup> *Swiss Timing Ltd. vs. Commonwealth Games 2010 Organising Committee*, (2014) 6 SCC 677.

<sup>15</sup> Himanshu Shembekar, '*Unconditional Stay of Arbitral Awards in India: A Regressive Step*', *The American Review of International Arbitration* (2022).

<sup>16</sup> *A. Ayyasamy v A. Paramasivam and Others*, (2016) 10 SCC 386.

<sup>17</sup> *Avitel Post Studioz Limited and Ors.v. HSBC PI Holdings (Mauritius) Limited*, (2020) SCC On Line SC 656.

to mean that in the facts and circumstances of the case, there is a bona fide contention between the parties and a serious question is to be decided'.<sup>18</sup>

The 2021 Amendment is likely to become a tool in the hands of award-debtors to thwart the award-creditors from reaping the benefits of the award due to the low and ambiguous standard of proof required to get an unconditional stay on enforcement, which will only add to the agony and misery of award creditors

### **B. TOOL FOR UNNECESSARY DELAY AND JUDICIAL INTERVENTION**

The amendment defeats the purpose of employing arbitration as a dispute settlement mechanism for its speedy disposal because the introduction of these additional grounds would empower the award-debtor to challenge the award on the grounds of fraud and prevent the award creditor from realizing his interest from the award since an unconditional stay amounts to a blanket stay thereby hurting the pro-arbitration regime. Moreover, 'it makes the award more susceptible to litigation and judicial interference by allowing a prima facie review of the contract and the award and judicial intervention is antithetical to the very spirit of arbitration as enshrined in Section 5 of the act'<sup>19</sup>. This would further add to the delay in enforcing arbitral awards in India making the whole process futile and counter-productive.

### **C. DILUTES THE EFFECT OF THE 2015 AMENDMENT ACT**

One of the major motivations behind introducing the 2015 amendment was the SC's observation in [*"NALCO"*]<sup>20</sup> that 'automatic stay jurisprudence left *no discretion in the court to put the parties on terms* which defeated *the very objective of the alternate dispute resolution system*'.<sup>21</sup> It notably altered section 36 to 'clarify that filing a set-aside application under section 34 would not itself render an award automatically stayed and stays could only be granted subject to parties making applications before

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<sup>18</sup> Sumitra Bose, 'Unconditional Stay on Arbitral Awards: A Step back for Arbitrations in India', (The Legal 500.com), Accessed on: 10 March 2022, <<https://www.legal500.com/developments/thought-leadership/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/>> - :~:text=In that light, Section 36,the contract on which such-india>.

<sup>19</sup> Shubham Joshi, 'Implications of the Arbitration & Conciliation (Amendment) Act, 2021: Ensuring (Un)Ease of doing Business in India?', (RGNUL Student Research Review), Accessed on: 18 March 2022, <Available at: <http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/>>.

<sup>20</sup> National Aluminium Company Ltd. vs. Pressteel & Fabrications Ltd. & Anr., (2004) 1 SCC 540.

<sup>21</sup> *Supra* note 4 at 4.

courts: it was not a matter of right, but rather the court's discretion on whether a stay is warranted at all and, if so, what kind'.<sup>22</sup>

Hence, it unduly permits award-debtors to unconditional stays on pleading that award is seemingly entrenched in contracts/ agreements secured by fraud — this, while challenge under section 34 is pending. It is silent as to at what stage may this challenge arise. Is it when one merely alleges fraud or corruption, or is it after furnishing strong proof to the court in that regard? The phraseology when it 'prima facie appears to the Court'<sup>23</sup> does not evidence the requisite clarity.

#### **D. IN CONFLICT WITH S.34**

The 2015 amendment to Section 34 (1)(b) clarified that awards would be regarded to be in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.<sup>24</sup>

However, Section 34 doesn't permit setting aside on the grounds of fraud or corruption. An applicant under Section 36(3), is anyway eligible to file an application seeking stay of the award pleading grounds already adumbrated under Section 34. The Ordinance additionally entitles an applicant to seek an unconditional stay under Section 36(3), during the pendency of Section 34 application, by pleading that the contract or arbitration agreement was induced by fraud or corruption.<sup>25</sup>

The Amendment brings within its ambit wide-ranging contracts and agreements effected by fraud or corruption, though they're dissociable from their parent contracts regardless of that, it provides for an alternative avenue for award-debtors to challenge and approach the Courts for a stay.<sup>26</sup>

#### **E. RETROSPECTIVE APPLICATION**

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<sup>22</sup> Raghav Kacker and Ruchi Chaudhary, 'Section.36 of the Arbitration & Conciliation Act,1996 as recently amended', (Indiacorplaw.in), Accessed on: 18 March 2022, <Available at: <https://indiacorplaw.in/2021/04/section-36-of-the-arbitration-and-conciliation-act-1996-as-recently-amended.html>>.

<sup>23</sup> Proviso to S.36(3) inserted by Arbitration & Conciliation (Amendment) Act,2021.

<sup>24</sup> Tariq Khan, Accessed on: 18 March 2022, 'Changing contours of Public Policy in India: Un-blinkering the unruly horse', (Bar and Bench), <Available at: <https://www.barandbench.com/columns/public-policy-india-arbitration-un-blinkering-unruly-horse>>.

<sup>25</sup> *Supra* note 1 at 1.

<sup>26</sup> Abhinaya Sharma and Lakshmi Iyer, 'Enforcement of Domestic Awards: Practical Realities', (SCC Online), Accessed on: 25 March 2022, <Available at: <https://www.scconline.com/blog/post/2021/05/17/enforcement-of-domestic-award-practical-realities/>>.

The latter part of the 2021 Amendment, which adds an explanation to the proviso to section 36 (3), declares that it is retrospectively applicable. “In essence, it allows the parties the liberty to file an application under Section 36(3) of the Act and invoke the grounds of fraud or corruption contemplated by the additional proviso to Section 36(3) of the act in all court cases arising out of or in relation to arbitral proceedings, regardless of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015”.<sup>27</sup> It entirely disregards the verdict of the SC in *Hindustan Construction Co.*,<sup>28</sup> holding ‘the retrospective application of 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 S.36 to award-holder to be reversed and is manifestly arbitrary’.<sup>29</sup> In *BCCI vs. Kochi*<sup>30</sup> the SC echoed the same sentiment holding ‘if there’s any amendment made to a substantive law and they affect the rights and liabilities of the parties or in any way impose disability, then it must be prospective in nature’. This amendment would be a gateway to reopening of matters already concluded and settled resulting in catastrophic consequences and a flurry of S.36(3) applications.

#### IV. AUTOMATIC STAY PROVISIONS IN OTHER JURISDICTIONS

Courts across the globe are consistently urged to approach the matter of stay on enforcement of arbitral awards with some trepidation. The significance of such a stance lies in recognizing the delicate balance between respecting the autonomy of arbitration and ensuring the fairness of the enforcement process. The international community recognizes the importance of upholding arbitral awards and promoting arbitration as a reliable dispute resolution mechanism. However, courts must exercise prudence when granting stays, as it can potentially undermine the finality and efficiency of the arbitration process. A careful assessment of the circumstances,

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<sup>27</sup> Vanshika Rajpal, ‘Critical Analysis of the Arbitration & Conciliation (Amendment) Act, 2021’, (bnwjjournal), Accessed on: 25 March 2022, <Available at: <https://bnwjjournal.com/2021/11/27/critical-analysis-of-the-arbitration-and-conciliation-amendment-act-2021/>>, Accessed on: 25 March 2022

<sup>28</sup> *Supra* note 5 at 4.

<sup>29</sup> Animesh Bordoloi and Hitoishi Sarkar, ‘Decluttering the 2020 Amendment to Arbitration & Conciliation Act, 1996’, (Indiacorplaw.in), Accessed on: 25 March 2022, <Available at: <https://indiacorplaw.in/2021/01/decluttering-the-2020-amendment-to-the-arbitration-and-conciliation-act-1996.html>>.

<sup>30</sup> *Supra* note 9.



including the grounds for setting aside the award, the potential harm to the parties involved, and the public interest, is essential. By embracing a measured approach, courts can strike a delicate equilibrium that maintains the integrity of arbitration while safeguarding the interests of justice.

The author recommends that Indian courts could obtain practicable insights from the development of law on this point in other jurisdictions. Discussed below are some state practices in this regard.

### A. HONG KONG

In *L v. B*, the Hong Kong Court of First Instance granted a stay on the enforcement of the award pending set aside proceedings.<sup>31</sup> Though the matter was a foreign seated arbitration and proceedings were instituted to declare the award as a nullity, the court assumed jurisdiction over the pleas—one by the applicant seeking security for enforcement, and the other by the respondent seeking stay of enforcement of the award pending disposal of the challenge to the award at the seat (the Bahamas).<sup>32</sup> The Court took note of the following legal principles:

- i. The argument that the award is invalid—In cases where the arbitral award appears to be prima facie invalid upon initial examination, it is advisable to postpone proceedings and refrain from issuing any security orders. Conversely, if the award is valid and without any doubt, the court should either order immediate enforcement or require a significant amount of security to be provided and
- ii. Ease or difficulty of enforcement of the award— The court took into account the potential challenges in enforcing the award if there were any delays. It recognized that the objections raised by the respondent at the curial seat were relatively minor, thereby staying the enforcement proceedings for four months. However, this stay was contingent upon the respondent providing the requisite security within twenty-one days. Resultantly, the applicant was awarded security for costs on an indemnity basis.

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<sup>31</sup> Sai Ramani Garimella and Gautam Mohanty, 'The Faux Pas of Automatic Stay Under the Indian Arbitration Act, 1996- The HCC Dictum, Two-Cherry Doctrine, and Beyond', Vol.21 Iss. 1, Pepperdine Dispute Resolution Law Journal, <Available at: <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=1475&context=drlj>>.

<sup>32</sup> *Ibid.*

## B. U.K

In the case of *'AIC Ltd. v. Federal Airports Authority of Nigeria'*, an English court made the decision to postpone the enforcement of an award in England and require the provision of security while awaiting the outcome of a set-aside application in a foreign court.<sup>33</sup> The dispute involved an award made in Nigeria, sought to be enforced in England. The defendant requested an adjournment of the proceedings until a decision was reached in the Nigerian proceedings. Under Section 103(5) of the English Arbitration Act of 1996, the English court has the authority to delay a decision on enforcement when an application to set aside or suspend an award has been made in the country where the arbitration took place.<sup>34</sup> In such cases, the court also has the power to impose the condition of providing security as a prerequisite for the adjournment.<sup>35</sup> In considering the likelihood of the defendant's successful challenge to invalidate the arbitral award and the need to safeguard against the potential impairment of its enforcement prospects in England, the court ordered that the adjournment be dependent on the defendant providing security amounting to \$24 million, representing 50% of the award or approximately three years' worth of interest. This decision established an important framework for courts to follow when exercising discretion in determining applications for stay and adjournment.<sup>36</sup>

## C. CANADA

Once a commercial dispute has been resolved through an arbitral award, the parties involved possess restricted rights to challenge the award or apply for its nullification as per the Ontario Arbitration Act, 1991, S.O. 1991, c.17.<sup>37</sup> In situations where such an appeal or application is in progress, the Ontario Courts temporarily suspend the enforcement of the arbitral award, subject to certain conditions. A decision of the *'Ontario Court of Appeal, DAC Group (Holdings) Ltd. v. Fuego Digital Media Inc., 2018'*, per Benotto J.A., confirms that an appeal of the conditional stay of the arbitral award is interlocutory in nature.<sup>38</sup>

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<sup>33</sup> Melanie Martin, 'English Court Adjourns Enforcement of Nigerian Arbitral Award', KLUWER ARB. BLOG, <Available at: [http://arbitrationblog.kluwerarbitration.com/2019/10/14/englishcourt-adjourns-enforcement-ofnigerianarbitralaward/?doing\\_wp\\_cron=1591390468.7894361019134521484375](http://arbitrationblog.kluwerarbitration.com/2019/10/14/englishcourt-adjourns-enforcement-ofnigerianarbitralaward/?doing_wp_cron=1591390468.7894361019134521484375)>.

<sup>34</sup> *Supra* note 29 at 9.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> Arbitration Act, 1991, S.O. 1991, c.17.

<sup>38</sup> Marco P. Falco, *'Appealing a Stay of Your Arbitral Award? Make Sure You're in the Right Place'*, <Available at: <https://www.lexology.com/library/detail.aspx?g=a61aa7e2-c304-4836-9009-2df73cb8bfcfb>>.

#### D. FRANCE

In France, prior to the implementation of Decree 2011-48, challenge to an arbitral award or appeal of an order for enforcement would suspend the execution of the award (formerly governed by Article 1506 of the Code of Civil Procedure). However, under the current law stated in Article 1526 of the Code of Civil Procedure, annulment proceedings against an award and appeals against an order for enforcement no longer result in a stay of execution.<sup>39</sup>

Neither filing an action to set aside an award nor appealing an enforcement order will halt the enforcement of the award. Nonetheless, the presiding judge in expedited proceedings (*référé*) or, once the case is assigned to them, the pre-trial judge (*conseiller de la mise en état*) has the authority, in exceptional circumstances where enforcement would significantly prejudice the rights of one of the parties, to suspend the enforcement of an award or impose conditions on its enforcement.<sup>40</sup>

Therefore, in accordance with Article 1526 of the Code of Civil Procedure, a party may request a French judge to suspend the enforcement of an award or impose conditions on its enforcement. To succeed in such a request, the petitioner must demonstrate that its rights would suffer severe harm if the international award were to be enforced. ‘The courts will evaluate such requests on a case-by-case basis. Since the concept of severe harm to a party's rights is not precisely defined, the courts exercise a certain level of discretion, and their interpretation of this concept has evolved over time’.<sup>41</sup>

From a careful reading of the practice followed in other major jurisdictions, it appears that Courts are more often than not extremely cautious and circumspect in granting an unconditional stay on enforcement of Arbitral Awards. An award creditors’ right to enforce is given primacy over an award debtors’ right to challenge and seek an unconditional stay on enforcement and granting security is a measure to ensure that the award creditors right by way of the award is secured.

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<sup>39</sup>Article 1526, Decree No. 2011-48 of 13 January 2011, <Available at: <http://parisarbitration.com/wp-content/uploads/2017/02/EN-French-Law-on-Arbitration.pdf>>.

<sup>40</sup> Luiza Saldanha, ‘*Seeking stay or amendment of enforcement of international awards: evolution of courts’ approach*’, <Available at: <https://www.lexology.com/commentary/arbitration-adr/france/freshfields-bruckhaus-deringer-llp/seeking-stay-or-amendment-of-enforcement-of-international-awards-evolution-of-courts-approach-1#article>>.

<sup>41</sup> *Ibid.*

## V. EFFECT OF UNCONDITIONAL STAYS ON THE INDIAN ARBITRATION LANDSCAPE

Unconditional stays in the Indian arbitration landscape have been a cause for concern for litigants, businesses and Arbitration experts alike as they can result in unreasonable delays and hinder the progress of the arbitration. Swift resolution of disputes is vital for businesses as it promotes efficiency and cost reduction. When a court grants an unconditional stay, it undermines the efficacy and efficiency of arbitration as a method for resolving conflicts.

The notion of an 'unconditional stay' represents a comprehensive halt, posing a hindrance to India's aspirations of being a pro-arbitration nation. This is due to the present amendment's automatic stay on the enforcement of arbitral awards where any award-debtor alleges corruption. By forcing parties to file a lawsuit, a circumstance like this contradicts the primary goal of alternative conflict resolution systems.

Rather than leading the path towards enhancements, the recent (Amendment) Act of 2021 has reintroduced obstacles in the rights of the award-holder. This interference not only undermines the fundamental purpose of the arbitration mechanism but also contradicts the 2015 Amendment and significant rulings such as *BCCI v. Kochi* and *Hindustan Construction Co.* Consequently, the responsibility of striking a harmonious balance between contract integrity and award enforcement has once again fallen upon the judiciary.<sup>42</sup>

As a result of the 2021 Amendment Act, any execution/enforcement proceedings under the Act would in most cases compel the Court to examine if there is prima facie evidence of fraud and corruption in securing the contract or in the making of the award. The 2021 Act thus reintroduces judicial confirmation for enforcement of awards, which adds an extra layer of judicial scrutiny, thus being a regressive step for the Indian arbitration regime.<sup>43</sup>

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<sup>42</sup> Preetika Duggal, <Available at: <https://www.linkedin.com/pulse/operation-automatic-stay-arbitral-awards-india-preetika-duggal/>>

<sup>43</sup> Soumitra Bose, ' Unconditional Stay of Arbitral Awards: A Step back for Arbitrations in India', <Available at: <https://tmtlaw.co.in/unconditional-stay-of-arbitral-awards-a-step-back-for-arbitrations-in-india/>>.

## VI. RECOMMENDATIONS

In the light of the discussion above concerning the role and impact of the Arbitration & Conciliation (Amendment) Act, 2021 in India's arbitration and award enforcement landscape, the following recommendations may be made.

- i. Provide a strict test to establish Fraud and Corruption: offering a concrete definition and threshold of the terms fraud and corruption can go a long way in making the amendment a workable one and would be a welcome move inasmuch as it would aid in doing away with the ambiguities and controversy surrounding the unconditional stay of enforcement based on such vague standards and terminologies.
- ii. Judicial Legislation: Albeit, law making is the solemn duty and domain of the legislature, many a times the legislature fails to keep pace with the needs of the legal fraternity or there might be circumstances where the laws made by the legislature may be inadequate and/or hurt the cause of the particular statute. In such cases, the judiciary must step in to fill the gap in the law. Similarly, in the present instance the judiciary must step in to propose changes to the 2021 amendment act and address lacunae in the same or declare that it is not good law.
- iii. Legislative Amendment/Striking Down: The legislature must by way of an amendment do away with the unconditional stay on enforcement based on indeterminate grounds such as fraud and corruption and also ensure that it is not applied retrospectively to the disadvantage of award holders, thereby frustrating the purpose and aim of arbitration as a method of dispute resolution. Furthermore, it may even be wiser to entirely strike down the provisions introduced by the 2021 amendment act in order to revert to the pro-arbitration framework that India sought to foster for the longest time.

## VII. CONCLUSION

It is therefore safe to conclude that the 2021 amendment appears to do more harm than good to the cause of arbitration in India. It is in conflict with the most basic tenets of arbitration as a method of dispute resolution and is a self-defeating piece of legislation. Not only does it disregard fundamental principles like Res-judicata by

allowing retrospective application but also acts as a tool for unnecessary delay and judicial intervention by permitting unconditional stay on the grounds of fraud or corruption. Far from fulfilling its objectives of curbing fraud and corruption in contracts and arbitration agreements, it fails to inspire confidence and is a recipe for disaster to say the very least, defeating the very purpose for which arbitration was introduced.

The Amendment Act has fundamentally revived the problematic unconditional stay provision that was finally done away with by the 2015 Amendment Act albeit on limited grounds. This has resultantly dispossessed the courts of their solemn obligation to grant a conditional stay and has expressly declared a mandate in favour of them to grant an unconditional stay upon the fulfilment of the fraud and corruption standards. Furthermore, the perils of this ambiguous provision of the 2021 Amendment are discernible due to the lack of any guidance as regards the terms fraud and corruption. This further encourages judicial intervention to decide any and all allegations and nature of claims raised on these grounds.

An unexpected and unwarranted shift from Indian courts' pro-enforcement approach to allowing the courts to grant an unconditional stay on the enforcement of an arbitral award is detrimental to the positive presumption in favour of enforcement, finality, and binding nature of an arbitral award for a jurisdiction like India, where the enforcement regime of arbitral awards is already quite problematic and rife with inconsistencies. This has an effect on the contracts' enforceability as well as the businesses' ability to conduct business in an environment where the litigants are forced to engage in yet another unnecessary and unwarranted round of litigation when the arbitral award is enforced, depriving them of their right to receive the benefits of the award.