AUTOMATIC STAY AND ACCREDITATION OF ARBITRATORS: A CRITICAL ANALYSIS OF THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

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Abstract

Since 2015, the Arbitration and Conciliation Act, 1996 has been amended three times. These amendments, enacted within a span of six years, have introduced several significant changes to the operability of the Principal Act. Considerable focus of these Amendment Acts has been on provisions relating to the automatic stay on an arbitral award, and on the accreditation of arbitrators. Both the aforesaid elements have been equally contentious. Uncertainties, as regards the forenamed conceptions, have plagued the practice area of arbitration for a substantial stretch of time, owing to the rapid enactments of Amendment Acts altering the provisions of the Principal Act, and the varied—often inconsistent—interpretations of the same, by the courts of this country. The exercise by the Parliament and the courts of India, of their inherent legislative and interpretative powers respectively, thereby seeking to assert their immanent authority, has further facilitated the development of the said uncertainties. The Arbitration and Conciliation (Amendment) Ordinance, 2020 which was subsequently replaced by the Arbitration and Conciliation (Amendment) Act, 2021, tried to bring about an end to the incertitude surrounding 'automatic stay' and 'accreditation of arbitrators' with finality. However, it remains to be ascertained whether the Act will succeed in establishing a concrete position as to the aforementioned conceptions, which is aligned with the

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judicial pronouncement(s) of the Supreme Court of India, and quell the ambiguity that existed prior to its enactment. This article will attempt to understand the changes introduced by the Amendment Act of 2021 into the Principal Act in light of the preceding amendments, judicial pronouncements, and committee/law commission reports.

Introduction

Over the years, India has seen rapid developments in diverse fields of law but none has been so radical as the last three amendments to the Arbitration and Conciliation Act, 1996[1] (hereinafter referred to as the 'Principal Act'). The legal fraternity of India appears to have been largely polarised on its opinions pertaining to these amendments. The judiciary of the country has, on several occasions, evinced its position, as regards such changes to the Principal Act. On 4th November 2020, the President of India, in the exercise of his legislative powers, promulgated the Arbitration and Conciliation (Amendment) Ordinance, 2020 (hereinafter referred to as the '2020 Ordinance'), which amended the Principal Act for the third time in the last six years.[2] The Government of India (hereinafter referred to as the 'Government'), in June 2019, released a statement wherein it tried to proclaim its position in trying to make India "the hub of International Arbitration".[3] To facilitate the fulfilment of this objective, the New Delhi International Arbitration Centre Act, 2019, was passed which was deemed to have come into force on 2nd March 2019.[4] Such frequent enactments of legislation and amendments thereto indicate a

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[1] Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996.

[2] Arbitration and Conciliation (Amendment) Ordinance, 2020, No. 14, Ordinance Promulgated by President, 2020.

[3] *The Quest for making India as the Hub of International Arbitration*, PMINDIA.GOV.IN (June 12, 2019), https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-as-the-hub-of-international-arbitration/ (last visited Aug. 5, 2021, 7:16 PM).

[4] New Delhi International Arbitration Centre Act, 2019, No. 17, Acts of Parliament, 2019.

gradual shift towards greater institutionalisation of alternative dispute resolution mechanisms in the country.

The Arbitration and Conciliation (Amendment) Act, 2021 (hereinafter referred to as the '2021 Amendment Act') passed by the Parliament, received the presidential assent on 11th March 2021, and consequently, assumed the force of law.[5] The 2021 Amendment Act stipulates that it is deemed to have come into force retrospectively with effect from 4th November 2020, i.e., the date on which the 2020 Ordinance was promulgated, while concurrently repealing the said ordinance.[6] The 2021 Amendment Act was enacted with the vision that it would address the concerns raised by the concerned parties bearing a vested interest in the matter, after the adoption of the Arbitration and Conciliation (Amendment) Act, 2019[7] (hereinafter referred to as the '2019 Amendment Act') and to ensure that all stakeholders get an opportunity to seek an unconditional stay on enforcement of arbitral awards where the underlying arbitration agreement or contract, or the making of an arbitral award, is induced by fraud or corruption.[8]

The 2020 Ordinance, subsequently replaced by the 2021 Amendment Act, introduced three significant changes into the Principal Act, viz., it amended Section 36 of the Principal Act which deals with the enforcement of arbitral awards; it amended Section 43J of the Principal Act which pertains to the norms of accreditation of arbitrators; and finally, it omitted the Eighth Schedule to the Principal Act which dealt with the experience and qualification of arbitrators.

The first part of this article will discuss the concept of 'automatic stay' and how the newly amended Section 36 affects the traditional practice in the field. It will analyse the judgments of

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[5] Arbitration and Conciliation (Amendment) Act, 2021, No. 3, Acts of Parliament, 2021.

[6] Arbitration and Conciliation (Amendment) Act, 2021, §§ 1(2), 5(1).

[7] Arbitration and Conciliation (Amendment) Act, 2019, No. 33, Acts of Parliament, 2019.

[8] Arbitration and Conciliation (Amendment) Act, 2021, § 2.

the Supreme Court in *NALCO*[9], *BCCI*,[10] and *Hindustan Construction*[11]. It will then trace the history of the preceding amendments to the said provision and examine their impact on the realm of domestic arbitration. The second part of this article will delve into the issue apropos of the accreditation of arbitrators and what the implications of the 2021 Amendment Act are, on the arbitrators in India. The article will conclude with an inspection into the reason(s) behind the subsistence of the uncertainties in the sphere of arbitration, and how the 2021 Amendment Act might impact the practice domain of alternative dispute resolution in the country.

The Conception and Evolution of Automatic Stay

Section 36 of the Principal Act, as enacted originally, prescribed an 'automatic stay' on the enforcement of an arbitral award, once an application challenging that award was filed before the "Court"[12] under Section 34, and such a stay would be operative as long as the application was pending before the Court. These provisions, collectively, impaired the immediate enforcement of an arbitral award, and were said to have placed the decree holder at a disadvantageous position, since the proceedings would often take an enormous amount of time to draw to a close. The aforesaid problem was recognised by practitioners in the arbitration regime as being an impediment to the attainment of speedy justice, which is a primary tenet of arbitration. In 2015, the Government amended the Principal Act via the Arbitration and Conciliation (Amendment) Act, 2015 (hereinafter referred to as the '2015 Amendment Act') which came into force on 23rd October 2015.[13] Among an array of changes, the 2015

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[9] National Aluminium Company Ltd. v. Pressteel & Fabrications (P) Ltd. and Anr., (2004) 1 SCC 540.

[10] Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.

[11] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2019) SCC OnLine SC 1520.

[12] Arbitration and Conciliation Act, 1996, § 2(e).

[13] Arbitration and Conciliation (Amendment) Act, 2015, No. 3, Acts of Parliament, 2016.

Amendment Act provided that there would be no automatic stay on an arbitral award as was previously stipulated in Section 36 of the Principal Act.[14] This implied that the parties to an arbitral dispute would have to seek a specific stay order on the operation of the arbitral award. Before the enactment of 2015 Amendment Act, there was no clarity on whether or not there would be an automatic stay on the enforcement of a domestic arbitral award, if there was an ongoing judicial proceeding to set it aside under Section 34 of the Principal Act.

The Supreme Court considered the problem in *National Aluminium Company Ltd.* v. *Pressteel & Fabrications (P) Ltd and Anr.* (hereinafter referred to as '*NALCO*').[15] In connection with the automatic stay of arbitral award, N. Santosh Hegde, J. observed that a domestic arbitral award, when challenged under Section 34 within the prescribed time, automatically becomes unexecutable.[16] According to the Court, this automatic suspension would stay in force till the proceedings were concluded. Thus, automatic stay required an award holder to await the conclusion of the ongoing judicial proceedings before the said award could be enforced. Hegde, J. further asserted that the legislative intent behind the enactment of the Principal Act indicated that it was impermissible for the Court to direct the passing of an interlocutory order as regards an arbitral award, and that the Court could only adjudicate on the correctness of a claim made by an applicant under Section 34 of the Principal Act.[17] In *Afcons Infrastructure Limited* v. *The Board of Trustees, Port of Mumbai*, the Bombay High Court reiterated the same principle as was employed in *NALCO*, and applied it to the extent of powers of a "Court" under Section 9 of the Principal Act.[18]

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[14] Arbitration and Conciliation (Amendment) Act, 2015, § 19.

[15] (2004) 1 SCC 540.

[16] *Id.* at 10.

[17] *Id.*

[18] (2014) (1) Arb LR 512 (Bom).

For a considerable while, uncertainty loomed over the applicability of the provisions of the 2015 Amendment Act, even though Section 26 contained therein sought to make the position clear by providing that unless the parties to an arbitral dispute agreed otherwise, provisions of the Act would not be applicable to the arbitral proceedings that were instituted in keeping with Section 21 of the Principal Act, before the coming into force of the instant Act.[19] Section 26 of the 2015 Amendment Act also prescribed that the Act would be applicable only to arbitral proceedings that commenced on or after the date of coming into force of the Act. The primary issue as regards the aforementioned uncertainty pertained to the ambiguity over the applicability of the 2015 Amendment Act to the ongoing court proceedings that had commenced before 23rd October 2015, i.e., the date on which the 2015 Amendment Act was deemed to have come into force. Owing to the absence of a concrete authoritative position on this issue, the prevalent conditions facilitated the opening of floodgates for numerous differing judicial pronouncements by High Courts all over the country, which sought to clarify the unsettled position. This attracted the attention of the Law Commission of India which in its Two Hundred and Forty-Sixth Report, submitted in August 2014, criticised the subsisting state of affairs and recommended changes.[20]

Ultimately in *Board of Control for Cricket in India* v. *Kochi Cricket Pvt. Ltd.* (hereinafter referred to as '*BCCI*'),[21] the Supreme Court put the matter to rest by clarifying the applicability of Section 36 of the 2015 Amendment Act. In the immediate case, the Supreme Court was presented with the question as to whether or not Section 36 of the Principal Act as amended via the 2015 Amendment Act, was applicable to the challenge petitions filed under Section 34 of the Principal Act before the commencement of the 2015 Amendment Act. The judgment rendered by the

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[19] Arbitration and Conciliation (Amendment) Act, 2015, § 26.

[20] Law Commission of India, Amendments to The Arbitration and Conciliation Act 1996 (No. 246, 2014).

[21] (2018) 6 SCC 287.

Supreme Court provided for the applicability of the 2015 Amendment Act in the manner as stated under:

1. Court proceedings, in relation to arbitral proceedings, that had commenced on or after the coming into force of the 2015 Amendment Act;
2. Arbitration proceedings that had commenced on or after the coming into force of the 2015 Amendment Act.[22]

In connection with the matter, the Court asserted that the judgment debtor does not possess any substantive right either with regard to fulfilling the obligations of the decree passed against him, or a question concerning the executability of the decree. The Court also ruled that the amending provision regarding specific application by parties for stay on the operation of an arbitral award would be applied retrospectively to a pending case.[23]

Nullification of 'BCCI', the 2019 Amendment Act, and the Entailing Developments

The impact of the *BCCI* judgment was short-lived for while the case proceedings were underway before the Supreme Court, the Government tabled in the Lok Sabha the Arbitration and Conciliation (Amendment) Bill, 2018 which proposed the insertion of Section 87 in the Principal Act. This provision was reckoned to settle the incertitude surrounding the applicability of the 2015 Amendment Act. It provided that the 2015 Amendment Act would be applicable to arbitral proceedings, and court proceedings arising out of or in relation to the said arbitral proceedings, which began on or after 23rd October 2015. Therefore, it essentially meant that any arbitral award that was

[22] *Id.*

[23] *Id.* at 42.

challenged, where the arbitral proceedings had commenced before the stipulated date, would automatically be stayed.[24]

In 2019, the Parliament passed the bill into law in the form of the 2019 Amendment Act[25] and thereby, omitted Section 26 from the Principal Act and inserted Section 87 therein. Section 13 of the 2019 Amendment Act sought to provide for the application of the 2015 Amendment Act, unless the parties otherwise agreed, in the following manner:

1. The 2015 Amendment Act was not to be applicable to arbitral proceedings that commenced prior to 23rd October 2015, i.e., the date of coming into force of the said Act. The non-applicability of the said Act would extend to all court proceedings arising out of or in relation to the aforesaid arbitral proceedings; it would be immaterial whether such court proceedings commenced before or after the coming into force of the said Act.
2. The 2015 Amendment Act was to be applicable to arbitral proceedings that commenced on or after the date the said Act came into force. The applicability of the said Act would extend to all court proceedings arising out of or in relation to the aforesaid arbitral proceedings.[26]

The 2019 Amendment Act, thus, nullified the judgment of the Supreme Court in *BCCI* as it made the amended Section 36 inapplicable to all court proceedings that had commenced after the date of coming into force of the 2015 Amendment Act, but which had arisen out of or in relation to an arbitral proceeding that had commenced prior to such date.

Subsequently, in *Hindustan Construction Company Limited & Anr.* v. *Union of India & Ors.*[27] (hereinafter referred to as

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[24] Arbitration and Conciliation (Amendment) Bill, 2018, Bill No. 100 of 2018, § 13.

[25] Arbitration and Conciliation (Amendment) Act, 2019.

[26] *Id.* at § 87.

[27] Hindustan Construction Company Limited & Anr. v. Union of India & Ors., (2019) SCC OnLine SC 1520.

'*Hindustan Construction*'), the constitutional validity of Section 87 was challenged before the Supreme Court. The counsel for the petitioner argued that due to the insertion of Section 87, Hindustan Construction Company Limited was being pushed into insolvency even though the National Highways Authority of India owed it a sum of INR 6070 crores.[28] A three-judge bench of the Court decided that the Court's interpretation in *NALCO* was bad in law.[29] The Court further declared the newly introduced Section 87 of the Principal Act to be unconstitutional on the ground of arbitrariness and reinstated the position affirmed by the Court in the *BCCI* judgment.[30] The Court referred to the report prepared by a high-level committee headed by Retd. Justice B.N. Srikrishna (hereinafter referred to as the 'Srikrishna Committee Report'), published on 30th July 2017, which had recommended the inclusion of Section 87 in the Principal Act because it believed that in relation to the question of applicability of the 2015 Amendment Act, the various views of the High Courts across the country had become inconsistent and conflicting. The bench held that whatever ambiguity had arisen in relation to the applicability of the 2015 Amendment Act had been taken care of in the *BCCI* judgment. R.F. Nariman, J., in writing the judgment, also pointed out that the Court had, even in the *BCCI* judgment, cautioned against the insertion of Section 87 in the Act, an excerpt of which is reproduced as under:

> *"The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons, '. . . have*

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[28]Arpan Chaturvedi, *Section 87: Supreme Court Strikes Down Provision Granting Automatic Stay On Arbitral Award*, BLOOMBERG QUINT (Nov. 27, 2017, 2:37 PM), https://www.bloombergquint.com/amp/law-and-policy/section-87-supreme-court-strikes-down-provision-granting-automatic-stay-on-arbitral-award (last visited Aug. 21, 2021, 5:03 PM).

[29] NALCO, (2004) 1 SCC 540.

[30] BCCI, (2018) 6 SCC 287.

> *resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act', and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act."*[31]

In enacting the 2019 Amendment Act, the Government was thus found unable to take into consideration the aforementioned reasoning. The Court, therefore, in *Hindustan Construction*, found that the Parliament had deleted Section 26 from the Principal Act and inserted Section 87 therein without much deliberation, and consequently, rendered these sections unconstitutional on the grounds of being arbitrary and counterproductive to the ideal of public interest that should have been the objective of the enactment of the 2019 Amendment Act. The Court pointed out that whenever an appeal is filed against the judgment of a court in any civil suit, the operation of that judgment is not automatically stayed. Therefore, the Court said that Section 87 was arbitrary because the filing of a challenge should not lead to an automatic stay, which the provision sought to do. As was more pertinent to the case in question, the Supreme Court also noted that the Srikrishna Committee Report had not taken into account the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the 'Insolvency Code'). This was made obvious by the fact that the insertion of a provision like Section 87 in the Principal Act prevents the award holder from recovering their dues, and

[31] Hindustan Construction, (2019) SCC OnLine SC 1520.

because of this, they also face a threat of proceedings under the Insolvency Code.[32]

The impact of this judgment was that 'automatic stay' would be unavailable to award debtors even if the arbitral proceeding, in which the award was issued, took place prior to the commencement of the 2015 Amendment Act.[33] It also provided an opportunity to award debtors who had applied for a stay order on the operation of such award under Section 36 (after the pronouncement of the *BCCI* judgment) and were rendered futile by the insertion of Section 87 in the Principal Act, to file for fresh applications seeking a stay order on the award.

A Brief on the Recent Changes to Section 36 Effectuated by the 2021 Amendment Act

The 2021 Amendment Act addresses the issue of automatic stay once again. By virtue of Section 2 of the said Act, the following lines have been added to Section 36(3) of the Principal Act, retrospectively, with effect from 23rd October 2015:

"Provided further that where the Court is satisfied that a prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

(b) the making of the award,

was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."[34]

The proviso seems to be a step toward clarification of automatic stay with finality. However, there are a few pertinent points that

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[32] Insolvency and Bankruptcy Code, 2016, No.31, Acts of Parliament, 2016.

[33] Arbitration and Conciliation (Amendment) Act, 2015.

[34] Arbitration and Conciliation Act, 1996, § 34(2A).

have to be examined with regard to the 2021 Amendment Act. Only an applicant who has filed an application challenging the arbitral award under Section 34 of the Principal Act can benefit from the proviso, because the proviso itself depends on Section 36(2) which comes into play only if the application has been filed under Section 34. However, Section 34 itself does not provide for setting aside an arbitral award where the arbitration agreement or contract was induced by fraud, as noted in the proviso. The only scenario in which fraud is considered to be a ground for challenge is when the making of the award was induced with fraud.[35] Therefore, an inconsistency may exist with respect to the issue that, if the nature of fraudulent act as per Section 36(3) is not a ground for challenge under Section 34, then how the application for stay may proceed. Further, Section 34(2A) provides that an award shall not be set aside on the ground of reappreciation of evidence.[36] An arbitration agreement or contract being induced by fraud is a question of fact that would necessarily arise during court proceedings in connection with the arbitral proceedings. This proviso to Section 34 may bar a High Court from revaluating questions of such nature.

Accreditation of Arbitrators and the Eighth Schedule

The Srikrishna Committee Report,[37] submitted to the Law Minister in 2017, drew attention to the issue of accreditation of arbitrators in the country that would result in the creation of a well-trained and qualified pool of arbitrators. The committee, after having acknowledged the problems arising out of the unavailability of an accreditation mechanism under the Principal Act, went on to discuss, at length, the accreditation criteria and related practices prescribed by several arbitration institutions around the globe including those of the Chartered

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[35]Arbitration and Conciliation Act, 1996, § 34(2)(b)(ii).

[36]Arbitration and Conciliation Act, 1996, § 34(2A).

[37] JUSTICE B.N. SRIKRISHNA ET AL., REPORT OF THE HIGH LEVEL COMMITTEE TO REVIEW THE INSTITUTIONALISATION OF ARBITRATION MECHANISM IN INDIA (2017).

Institute of Arbitrators, Singapore Institute of Arbitrators (SIArb), and the Resolution Institute. It examined prescribed criteria like age, qualifying examination, peer interviews, etc., and came up with a set of recommendations as regards the ongoing discourse, stated as follows:

1. The Arbitration Promotion Council of India (hereinafter referred to as the 'APCI'), whose creation was proposed in this instant report, was recommended to recognize professional institutions that would accredit arbitrators on the basis of the methods employed for such accreditation, training, review mechanism, etc.
2. The central and state governments were recommended to mandate the insertion of clauses in arbitration agreements stipulating that only institutionally accredited arbitrators were to be appointed.[38]

Subsequently, the Government introduced Section 43J into the Principal Act through the 2019 Amendment Act. The Act prescribed the institution of an independent body of arbitrators, the Arbitration Council of India (hereinafter referred to as the 'ACI'), based on the model of the recommended APCI. The ACI was to be responsible for identifying and acknowledging institutions which in turn would accredit arbitrators under Section 43J. Through Section 43J, the Eighth Schedule, which laid down general norms for the accreditation of arbitrators, was inserted. The relevant norms were as follows:

1. The arbitrators were required to be impartial and neutral while refraining from entering into financial or any other such relations that might affect their impartiality or suggest an impression of bias.
2. The arbitrators were expected to be well conversant with the provisions of the Constitution of India, principles of natural justice, commercial and labour laws, common and customary laws, law of torts, domestic and relevant international legal systems, among others.

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[38] *Id.* at 50.

3. The arbitrators should be able to recommend/suggest a reasoned arbitral award in a dispute that they may be adjudicating.

The primary criticism against the provision relating to the minimum qualification for arbitrators was that it would meddle with party autonomy, which is one of the fundamental tenets of arbitration. This criticism was particularly directed at the exclusion of foreign legal professionals who were made ineligible to practise as arbitrators in India. This had particular ramifications on the idea of India as an international arbitration hub.

Through the 2021 Amendment Act, Section 43J has been amended yet again. The amended Section 43J reads:

"43J. The qualifications, experience and norms for accreditation of arbitrators shall be such as may be specified by the regulations."[39]

The amendment also omitted the Eighth Schedule that was provided for in the original Section 43J, first inserted via the 2019 Amendment Act.

Ever since the Eight Schedule was inserted in the Principal Act, it had become a subject of controversy. The potential violation of party autonomy was a glaring question pertaining to the forenamed schedule. The criticism was primarily centered on the issue that it imposed restrictions that were unfair and arbitrary. The fact that with its operation it would have been impossible to appoint a foreign arbitrator to adjudicate in arbitrations seated in India was discouraging for many. However, there were also those who believed that these conditions and restrictions were indispensable if appointments to arbitration tribunals were to be improved. But, the schedule also sent mixed signals from the Government which had been trying to establish itself as a pro-arbitration regime. The schedule was never notified by the Government and hence,

[39] Arbitration and Conciliation (Amendment) Act, 2021, § 3.

never came into force. Now that it has been done away with, there is a clearer indication of its intent before the global arbitration community.

Conclusion

The origin and development of the incertitude as regards 'automatic stay' and 'accreditation of arbitrators', that afflicted the arbitration practice regime in India, may be attributed to the inconsonant exercise of powers by the Parliament and the Supreme Court. While it cannot be negated that such assertion of authority was legitimate, what enabled the rise of the said uncertainties was the absence of a shared vision between the forenamed organs of the Government. Before the enactment of the 2021 Amendment Act, arbitrators had, time and again, expressed their discontent against the ambiguity prevailing in the legal system pertaining to arbitration, thereby resulting in judicial pronouncements and amending enactments that sought to resolve the subsisting challenges. It may be acknowledged that when/where lacunae exist in any law, revisions are required to be made, if need be, repeatedly so, in order to meet the demands of the prevailing circumstances. The 2021 Amendment Act has been hailed as a well-intended step towards establishing a favourable legal arbitration framework. The proviso on conditional automatic stay in Section 36(3) has still made many question its necessity. Previous experiences with similar laws raise apprehensions of misuse and abuse of the vested power(s). However, the deletion of the Eight Schedule has found praise in all quarters of the arbitration community. Reasonably, it may be averred that this will help India's position as an international arbitration hub and encourage foreign arbitrators and parties to seat their arbitration in the country.

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