

12th February, 2021

DECODING: THE ARBITRATION AND CONCILIATION (AMENDMENT) ORDINANCE, 2020 VIS-À-VIS SECTION 34(2)(B)(II) OF THE ARBITRATION & CONCILIATION ACT, 1996

Introduction

Section 34, the only provision under Chapter VII of Part I of the Arbitration and Conciliation Act, 1996 [hereinafter referred to as '**the 1996 Act**'], deals with the recourse that a party has against an arbitral award.

The recourse that has been provided under the sub-section (1) of section 34 can be made only by way of an application for setting aside arbitral award in accordance with sub-sections (2) and (3) of section 34.

Section 34 has been subjected to amendment 2 times till today i.e., in the years 2015 and 2019.

Recently section 36 of Chapter VIII of the 1996 Act was amended by way of the 2020 Ordinance, which deals with the enforcement of the arbitral award and under what circumstances the court can grant stay of the same.

The Arbitration and Conciliation Amendment Ordinance, 2020 [hereinafter referred to as '**the 2020 Ordinance**'] inserted, inter alia, a second proviso to sub-section (3) of section 36 of the 1996 Act. This proviso was inserted retrospectively with effect from Oct. 23, 2015 which is the date on which the 2015 Amendment to the 1996 Act came into force.

This new proviso has effectively added 2 new grounds in which case the court can grant an unconditional stay on an arbitral award, on the application made under sub-section (2) of section 36, pending disposal of section 34 application.

The phrase "*the making of the award was induced or effected by fraud or corruption*" used in the new proviso is the same which is used to define 'public policy' under Explanation 1 to section 34(2)(b)(ii).

Therefore, it becomes pertinent to determine the scope, correlation, difference, inter-linkage between sections 34 and 36 after the 2020 Ordinance came into force to avert any confusion and mis-interpretation.

The inter-linkages between s. 34(2)(b)(ii) and second proviso to s. 36(3)

The scope of sections 34 and 36 are completely different. On the one hand section 34 deals with the setting aside of an arbitral award and on the other hand section 36 deals with the staying of an arbitral award. Both will operate only when the application to that

effect is duly made before the court.

Under section 34(2)(b)(ii) the court may set aside the award if it finds the award in conflict with the 'public policy' in India. Subsequently, Explanation 1 to s. 34 defines the scope of 'public policy'. Whereas, under second proviso to section 36(3) the court shall order unconditional stay of the arbitral award if it finds 'the making of the award to be induced or effected by fraud or corruption' which is just one of the components of 'public policy' ground for setting aside the award under section 34(2)(b)(ii).

Section 34(2)(b)(ii) on one hand uses the words '*the court finds that- ...*' (emphasis supplied) and the omission to use 'prima facie' suggests that the court has to see something more than prima facie evidences before it can set aside an award. Whereas, the satisfaction of the court under second proviso to section 36(3) is complete when the prima facie case is made out on the ground enumerated therein.

Further, as per the new proviso inserted into section 36(3) of the 1996 Act the award can be stayed unconditionally also '*if the arbitration agreement or contract which is the basis of the award was induced or effected by fraud or corruption*'. However, there is no such ground under section 34(2) for setting aside of the award in cases involving fraud and corruption. Therefore, here it is interesting to note that a ground which is not acting as a basis for setting aside the award can act as a basis for the applicant to stay the same award.

UNCITRAL Model Law on International Commercial Arbitration on 'Public policy'

The Preamble to the 1996 Act clearly states that the Act is drafted and enacted taking into account the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration which was adopted in the year 1985 [hereinafter referred to as '**the UNCITRAL Model Law**'].

Sections 34 and 36 of the 1996 Act were based on the articles 34 and 36 of the UNCITRAL Model Law respectively and the language used therein is almost similar. Also, both the provisions under the UNCITRAL Model Law uses phrase 'public policy'.



Neha Maniktala

Associate, MCO Legals
B.B.A., LLB
Symbiosis Law School
Noida

Expertise:

Corporate/Commercial Arbitration

✉ neha.m@mcolegals.co.in



Amit Singhal

Research Partner
B.A.
LLB (Hons)
National Law Institute University

The **Explanatory note** by the UNCITRAL secretariat on the UNCITRAL Model Law has noted the identical use of the grounds for setting aside the award and refusing enforcement of the award in the UNCITRAL Model Law. However, it explains the inherent difference that lies in the meaning of the phrase 'public policy' that can be given differently for different purposes. The same seems to have been done by the Indian Parliament which considered only one of the meanings of 'public policy' relevant for the purposes of grant of unconditional stay apart from an altogether different ground which in turn is not even a ground for setting aside the award.

Secondly, the UNCITRAL Secretariat further noted that the grounds for setting aside the award and the grounds for non-enforcement of the award have different impact. On the one hand, the setting aside of an award prevents enforcement of it in all the countries, whereas on the other hand, the grounds for non-enforcement is valid and effective only in the country where the non-enforcement is sought.

Conclusion

The fear that the new proviso inserted into the sub-section (3) of section 36 of the Act will overlap with the concept of 'public policy' under section 34(2)(b)(ii), after having above discussion, appears to be unfounded. The 2020 Ordinance, however, can be criticized for giving power to court to grant *unconditional* stay of the arbitral award on the ground of fraud or corruption by merely looking *at the prima facie facts*. The court in such a case has to adopt a cautious approach in granting stay of the award.

Looking at the positive side, the recent amendments to the 1996 Act in the past 5 years shows the positive attitude of the Indian Government which is bringing changes in the arbitration law while considering the concerns of the various stakeholders. Even the object and reason of the recent 2020 Ordinance makes it clear that it has been enacted to address the concerns of the stakeholders which were raised post 2019 amendments in the 1996 Act. This shows that the Central Government is making all efforts to encourage resolution of the disputes by alternative means and therefore committed to make changes in the law to remove difficulties and ambiguities in the law.