



THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2021

Groundbreaking Change in Indian Arbitration Regime

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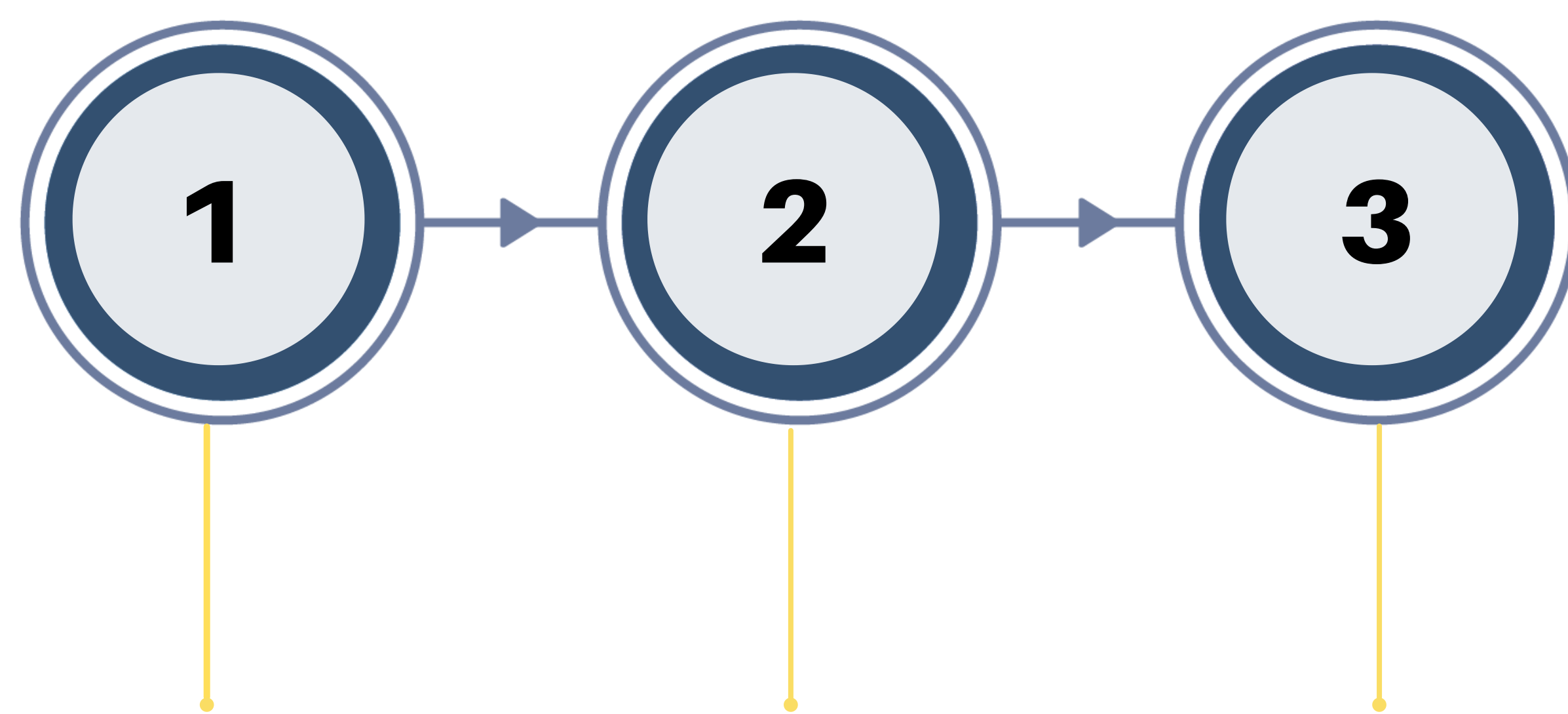
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Indian arbitration is governed and regulated by the provisions of the Arbitration and Conciliation Act 1996 ("Arbitration Act"), which is based on the 1985 United Nations International Commission on International Trade Law (UNCITRAL). Arbitration Act till now has been amended twice i.e. in the year of 2015 by way of the Arbitration and Conciliation (Amendment) Act, 2015 and then subsequently in the year 2019 through the Arbitration and Conciliation (Amendment) Act, 2019.

It is relevant to note that on March 10, 2021, the Arbitration and Conciliation (Amendment) Act, 2021 ("Amendment Act") gained Parliamentary assent and is deemed to have come into force on November 04, 2020, thereby replacing the Arbitration and Conciliation (Amendment) Ordinance, 2020 promulgated by the President of India on November 04, 2020. The Amendment Act has aimed to address the issue relating to corrupt practices in arbitral awards and ultimately securing contracts by such corrupt practice.



Feb 4, 2021

Introduced in
Lok Sabha

Feb 12, 2021

Passed in
Lok Sabha

Mar 10, 2021

Passed in
Rajya Sabha

AUTOMATIC STAY ON AWARDS

Section 34 of the Arbitration Act deals with filing of an application for setting aside an arbitral award. As per Section 34(2)(b)(ii) of the Arbitration Act, an arbitral award may be set aside by the Court if Court *inter alia* finds that the arbitral award is in conflict with the public policy of India. Arbitration Act by way of explanation further clarifies that an award is said to be in conflict with the public policy of India,

a. if the making of the award was induced or affected by fraud or corruption;

b. or it is in contravention with the fundamental policy of Indian law; or

c. it is in conflict with the most basic notions of morality or justice.

Moreover, Section 36(2) read with Section 36(3) of the Arbitration Act clearly mentions that where an application to set aside the arbitral award has been filed in the Court under Section 34 of the Arbitration Act, the filing of such an application shall not by itself render that award unenforceable, unless the Court grants an order of stay of the operation of the said arbitral award on a separate application made for that purpose. Henceforth, it was at the discretion of the Court whether to accept or not the application for grant of stay of the operation of such award. It can be observed that there was no provision in the Arbitration Act which provided that an automatic stay will be granted the moment an application under Section 34(2)(b)(ii) of the Arbitration Act has been filed by a party.

The Indian Courts have been taking same view during their interpretation of Section 34 read with Section 36 of the Arbitration Act vis-à-vis automatic stay in cases of fraud and corruption. Honorable Supreme Court of India in **Hindustan Construction Company Limited & Anr. Vs. Union of India & Ors., [2019 SCC Online SC 1520]** (“HCC Case”) has observed that there is no automatic stay on the enforcement of an Award, only because an Award is challenged by a party by filing a petition under Section 34 of the Arbitration Act.

Honorable Delhi High Court in **Indian Oil Corporation Limited. Vs. Toyo Engineering Corporation [O.M.P. (COMM) 316/2019 and IA 10900/2019]** has held that the Supreme Court of India in the said HCC Case has clearly held that an award holder must be able to reap the fruits of an award in its favour and should not suffer only because the other party has chosen to challenge the award, as it is a well-known fact that litigations can go on for a long time.

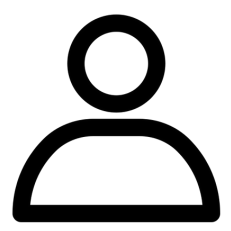
It is noteworthy that Amendment Act has amended Section 36 of the Arbitration Act and has inserted a new provision under Section 36(3) of the Arbitration Act which provides that where the Court is satisfied that a prima facie case is made out that, -- (a) the arbitration agreement or contract which is 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. Further, Amendment Act by way of an explanation clarifies that the said new provision to Section 36(3) shall apply to all court cases arising out of or in relation to arbitral proceedings, irrespective of whether the arbitral or court proceedings were commenced prior to or after the commencement of the Arbitration and Conciliation (Amendment) Act, 2015. In other words, the said new provision under the Amendment Act is being retrospectively applied and shall be deemed effective from October 23, 2015 i.e. from the date which was commencement date of the Arbitration and Conciliation (Amendment) Act, 2015.

It is significant to note that there is vital departure from the current interpretation relating to stay on arbitral award upon filing of an application under Section 34 of the Arbitration Act. The legislation by way of this Amendment Act has endeavored to ensure that all stakeholders get an opportunity to pursue an unconditional stay on enforcement of arbitral awards under the Arbitration Act where the arbitration agreement or contract is induced by fraud or corruption. Whilst, the intention of legislation is to give a ground breaking change to stakeholders by providing them unconditional automatic stay for applications filed on grounds of fraud or corruption against an arbitral award, it is the time that will indicate whether such automatic stay safeguards the interests of stakeholders or will it be used as an instrument to unnecessarily slowdown the enforcement of arbitral award and ultimately defeating the quick alternative dispute resolution objective of Arbitration Act.

OMISSION OF QUALIFICATIONS OF ARBITRATORS UNDER SECTION 43J READ WITH EIGHTH SCHEDULE OF THE ARBITRATION ACT

Arbitration and Conciliation (Amendment) Act, 2019 introduced Section 43J of the Arbitration Act which provided for norms for accreditation of arbitrators. Section 43J of the Arbitration Act stated that the qualifications, experience and norms for accreditation of arbitrators shall be such as specified in the Eighth Schedule of the Arbitration Act.

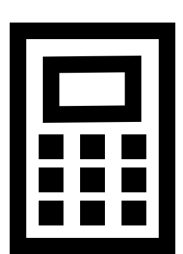
In line with Section 43J of the Arbitration Act, Eighth Schedule of the Arbitration Act was also inserted under Arbitration Act via Arbitration and Conciliation (Amendment) Act, 2019 which specially dealt with qualifications and experience of arbitrator. As per Eighth Schedule of the Arbitration Act, a person shall not be qualified to be an arbitrator unless he/she -



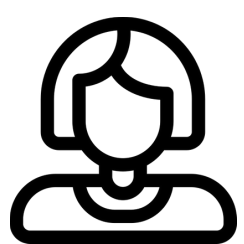
is an **advocate** within the meaning of the Advocates Act, 1961 (25 of 1961) having ten years of practice experience as an advocate; or



is a **chartered accountant** within the meaning of the Chartered Accountants Act, 1949 (38 of 1949) having ten years of practice experience as a chartered accountant; or



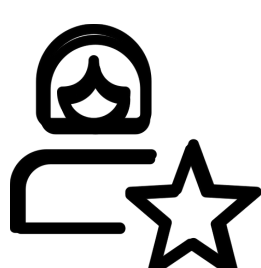
is a **cost accountant** within the meaning of the Cost and Works Accountants Act, 1959 (23 of 1959) having ten years of practice experience as a cost accountant; or



is a **company secretary** within the meaning of the Company Secretaries Act, 1980 (56 of 1980) having ten years of practice experience as a company secretary; or



has been an **officer of the Indian Legal Service**; or



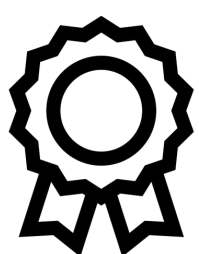
has been an **officer with law degree having ten years of experience in the legal matters** in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector; or



has been an **officer with engineering degree having ten years of experience as an engineer** in the Government, Autonomous Body, Public Sector Undertaking or at a senior level managerial position in private sector or self-employed; or



has been an **officer having senior level experience** of administration in the Central Government or State Government or having experience of senior level management of a Public Sector Undertaking or a Government company or a private company of repute;



is a person, in any other case, **having educational qualification at degree level with ten years** of experience in scientific or technical stream in the fields of telecom, information technology, Intellectual Property Rights or other specialised areas in the Government, Autonomous Body, Public Sector Undertaking or a senior level managerial position in a private sector, as the case may be.

FURTHER, EIGHTH SCHEDULE OF THE ARBITRATION ACT PROVIDED FOLLOWING GENERAL NORMS APPLICABLE TO ARBITRATOR



The arbitrator shall be a person of general reputation of fairness, integrity and capable to apply objectivity in arriving at settlement of disputes;



the arbitrator must be impartial and neutral and avoid entering into any financial business or other relationship that is likely to affect impartiality or might reasonably create an appearance of partiality or bias amongst the parties;



the arbitrator should not involve in any legal proceeding and avoid any potential conflict connected with any dispute to be arbitrated by him;



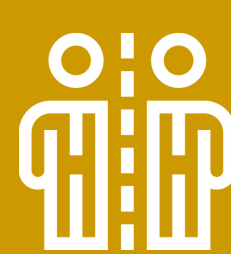
the arbitrator should not have been convicted of an offence involving moral turpitude or economic offence;



the arbitrator shall be conversant with the Constitution of India, principles of natural justice, equity, common and customary laws, commercial laws, labour laws, law of torts, making and enforcing the arbitral awards;



the arbitrator should possess robust understanding of the domestic and international legal system on arbitration and international best practices in regard thereto;



the arbitrator should be able to understand key elements of contractual obligations in civil and commercial disputes and be able to apply legal principles to a situation under dispute and also to apply judicial decisions on a given matter relating to arbitration; and



the arbitrator should be capable of suggesting, recommending or writing a reasoned and enforceable arbitral award in any dispute which comes before him for adjudication.

It is relevant to note that the Amendment Act has removed the said Eighth Schedule for arbitrators and states that the qualifications, experience, and norms for accreditation of arbitrations will be specified under the regulations framed by arbitration council. It is apparent from the 'objects and reasons' of the Amendment Act that it aims to promote India as a hub of international commercial arbitration by attracting eminent arbitrators to the country and has accordingly felt the need to omit the Eighth Schedule of the Arbitration Act. It is appreciable that Amendment Act aims at giving greater flexibility to the Indian Arbitration and helping in promotion of institutional arbitration by omitting the exhaustive list of qualifications for arbitrators under Eighth Schedule of the Arbitration Act. It is expected that above mentioned amendments introduced by Amendment Act, may prove fruitful to the stakeholders and overall helps in developing an enhanced arbitration regime in India.

Disclaimer: *The content of the article is intended to provide general guidance to the subject matter. Expert consultation should be sought about your specific requirements.*

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