# Analysis of recent amendments in Arbitration and Conciliation Act, 1996 from the perspective of their impact on access to speedy justice

**Ushma Nitinkumar Thaker**

**B. Com., LL.M., NET (Law)**

Assistant Professor, Sarvajanik College of Law, Surat and

Research Scholar, VNSGU.

E-mail Id –**ushma1thaker@gmail.com**

**(M) 96383 73793**

# Analysis of recent amendments in Arbitration and Conciliation Act, 1996 from the perspective of their impact on access to speedy justice

**Abstract**

Access to speedy justice is an inevitable fundamental right and the foundation stone of all the rights and due to rigours of traditional judicial system, alternative dispute redressal mechanism is developed in the form of arbitration, conciliation, mediation, Lok Adalat and so on. Arbitration and Conciliation Act, 1996 governs the domestic and international arbitration regime in India. In this research paper researcher attempts to analyse the effects of various recent amendments in arbitration act of 1996 viz. amendment act of 2015, 2019 and 2021 on arbitration process. Though these amendments are brought to streamline arbitration process and to make an India hub for international arbitration, their effects and ground realities can be adverse which requires study and analysis to further systematize the arbitration regime in India and make justice speedy and effective.

Keywords: Arbitration – Arbitration and Conciliation Amendment Acts of 2015, 2019 and 2021 – analysis - speedy and effective justice.

## 1. Introduction

Due to the problem of docket explosion and expensive, lengthy and cumbersome process of justice in ordinary law courts, judicial system is on the verge of collapse. Speedy and inexpensive justice to people is very important and this fundamental right of timely access to justice is based on the latin maxim "Ubi jus ibi remedium" (where there is a right there must be remedy). Further it should also be kept in mind that "Justice hurried is justice burried", so the speedy justice mechanism has to be very well thought of and based on principles of natural justice. Focus should be on the ultimate and final resolution of dispute and not just a case. Search for the solution to this problem led to the advent of Alternative Dispute Redressal system to reduce the workload of main justice delivery system. One of the major mode in alternative dispute redressal mechanism is arbitration. The major law governing domestic and international arbitration in India is Arbitration and Conciliation Act, 1996 which is based on UNCITRAL Model law of arbitration and rules of conciliation. After two decades from the enactment of this Act, government has introduced series of amendments in this Act vide 2015, 2019 and 2021 amendment acts with a view to make India

a convenient place for international arbitration and business and to make arbitration speedy method of alternative dispute resolution. Even after fixing the time limit for resolution of disputes through arbitration method by arbitrator or arbitral tribunal, arbitral award can be challenged under various wide and vague grounds stated under amended Section 34 of Arbitration Act or under amended Section 36 of the Act at the time of enforcement of awards also where the matter remains pending in courts for years thereby nullifying the effect of speedy dispute redressal and depriving the parties to dispute from the fruits of arbitral award. Hence, an attempt is made to analyse whether these amendments will speed up the process of dispute redressal or make it more complicated and similar to regular dispute redressal mechanism of law courts. For this purpose researcher will conduct doctrinal and non-doctrinal research based on interview of leading lawyer practicing in this field to understand the difficulties faced by them in matters relating to arbitration.

- **Literature Review**

Researcher has referred the online latest bare Act of Arbitration and Conciliation Act, 1996, Amendment Acts of 2015, 2019 and 2021, website links of which are mentioned in the list of references and cited at relevant place in this research paper. Besides this, researcher has referred following online research articles by various legal experts to analyse the impact of 2015, 2019 and 2021 amendments:

1. Article entitled "A Critical Analysis of Arbitration Law in India" by Amrita Sony in which the author has critically analysed Arbitration act, 1996 from the view point of speedy justice, cost effectiveness, judicial intervention covering analysis of series of judgments of Supreme Court from Renusagar to BALCO, 2015, 2019 and 2021 amendments in the Act.

2. Article entitled "India: Arbitration and Conciliation (Amendment) Act, 2021: What it holds for foreign investors" by Shri Shubham Sharma Dt. 08 March, 2022 available on https://www.mondaq.com, article entitled "Arbitration and Conciliation Amendment Act 2021: Will it interfere with arbitral awards?" by Arindam Shit wherein the authors focus on detailed critical analysis of 2021 Amendment Act especially the amendment in Section 36(3) of the Act and its adverse impact on right to access to speedy justice and making India an international hub of arbitration due to the undefined terms of prima facie case of fraud and corruption with various judgments of Supreme Court interpreting these terms of fraud and corruption.

3. Article entitled "India: Critical Analysis of the Arbitration and Conciliation (Amendment) Act, 2015 by Lomesh K. Nidumuri Dt. 25th May, 2016 available on https://www.mondaq.com wherein

author very exhaustively analyses series of amendments introduced by 2015 Amendment Act which has helped the researcher a lot in summarizing and analyzing the 2015 amendment act.

4. Article entitled "Discussion on the 2015 amendments vs. the 2019 amendments to the Act" Dt. 07th May, 2020 by Ranjit Shetty wherein the author solely focuses on scope of judicial intervention at the time of appointment of arbitrator under Section 11 of the Act prior to 2015 amendment act vide Section 11(6A) and possible effects after 2019 Amendment Act establishing arbitration council of India through various judgments of Supreme Court determining the scope of judicial intervention at this stage.

5. Article entitled "Critical Analysis of Arbitration and Conciliation (Amendment) Act, 2019" by Adv. Mayur Shetty and Adv. Dikshat Mehra, Rajani Associates wherein the authors explained the salient features and analysis of 2019 Amendment Act especially Section 87 of the Act regarding prospective application of 2015 Amendment Act overruling judgment of Supreme Court in case of BCCI v. Kochi Cricket Private Limited and subsequent striking down of this Section as unconstitutional in the case of Hindustan Construction Company v. Union of India.

All these research articles present the analysis of amendments from different perspectives; researcher has studied bare acts and the research articles to put forth the composite and comprehensive analytical study of all these amendments on arbitral process and their cumulative effect on access to speedy justice and scope of court's interference in arbitral process.

- **Hypothesis**

1. Whether these amendments are adequate and well defined to make India a hub of international commercial arbitration and to streamline domestic arbitration as well.

2. Whether there is adequate infrastructure and mindset of concerned stakeholders to implement these amendments thereby making access to speedy and effective justice no longer an illusion.

- **Objectives of research paper or Statement of Research problem**

1. To analyse these amendments and their overall impact on arbitration process.
2. To find out problems in implementation of such amended provisions due to vague terminologies and changing interpretation of such provision from time to time widening the scope of judicial intervention in arbitral matters.
3. To ascertain possible future challenges in implementation of such amended provisions and to find out and suggest possible solutions to face the same based on the doctrinal and non-doctrinal research in this regard.

- **Limitations of the study**

Arbitration as an effective tool of ADR mechanism is very vast topic but in this research paper its study is limited to only those provisions in Arbitration and Conciliation Act, 1996 which were amended or inserted vide amendment acts of 2015, 2019 and 2021 and various decisions of Supreme Court interpreting those provisions. Non-doctrinal work is limited to interview of leading High Court and Supreme Court lawyer Mr. Aspi Kapadia, and 2) analysis of various judgments of Supreme Court interpreting the effect of these amendments. Many lawyers are not interviewed due to limited time.

- **Research Methodology**

**Doctrinal research methodology** is adopted to study the aforementioned research problem. Primary sources like bare act of latest Arbitration and Conciliation Act, 1996 and amendment acts are accessed from government's official websites. Secondary sources like various research articles on the topic available on various authentic websites, authentic books of latest edition on ADR mechanism are also referred for the study.

**Non-doctrinal research methodology** is also adopted to analyse the impact of the amended provisions by analysing the judgment of Supreme Court interpreting these amendments from time to time and by interviewing leading Gujarat High Court and Supreme Court lawyer Mr. Aspi Kapadia practising in this field since last 30 years and having good knowledge on practical aspects of arbitration.

## 2. Concept of Arbitration and objectives of amendments in the Act[1]

Arbitration is not a new concept but the ages old concept which was reflected in the Panchayat system which was nice amalgam of mediation, conciliation, arbitration and then adjudication which system got washed away with the advent of British rule in India. Arbitration is the most popular method of dispute resolution at national and international level in various countries of the world. Hence to bring uniformity in laws relating to arbitration amongst various countries of the world, United Nations Commission on International Trade Law (UNCITRAL) has devised the Model Law on International Commercial Arbitration in 1985. To give effect to such UNCITRAL Model Law, Conventions and Protocols in Arbitration and to clarify and develop the concept of conciliation, Arbitration and Conciliation Act was enacted in 1996 which was implemented so far

[1] (Verma, 2013)

to the extent possible, but with the passage of time arbitration process started facing the same fate as ordinary litigation in law courts like heavy cost of arbitration wherein the each arbitrator charges fees sitting wise running in lakhs of rupees dependant on value of subject matter of dispute, time consuming arbitral process comprising of delay at various stages starting with the appointment of arbitrator or arbitral institution, no clarity regarding standard procedure resulting later on in challenge of arbitral awards in law courts where the matter remains dormant for years together, setting aside of arbitral awards due to changing interpretation of various grounds of challenge under Section 34 of the Act like public policy, appeal from such decision upto Supreme Court thereby ultimately converting alternative dispute redressal mode in regular adversarial mode of litigation. Due to these major roadblocks hampering smooth arbitration process, amendments of 2015, 2019 and 2021 were passed which are summarised and critically analysed below regarding fixing of time limit for completion of arbitral process, prescribing fee schedule of arbitrators, adding of grounds of challenge under Section 34 relating to challenge to arbitral awards viz. fraud and corruption and addition of similar grounds under Section 36 relating to enforcement of arbitral awards and automatic and unconditional stay on enforcement of award on that basis.

The concept of arbitration is based on following 3 fundamental principles:[2]

1) Object of arbitration is to obtain fair resolution of disputes by an impartial tribunal without unnecessary delay or expense.
2) Party autonomy regarding procedure of arbitration, arbitrator to be appointed which can be restricted only to the extent necessary for public interest.
3) Courts intervention should be restricted and should be very minimal only when necessary.

The amendments are introduced to realise and implement these principles fully and hence they are analysed from the viewpoint of how far these principles are realised by these amendments in the Act.

## 3. Critical Analysis of the Amendments in Arbitration and Conciliation Act, 1996 vide Amendment Acts of 2015, 2019 and 2021 along with the judicial approach regarding the same

- **Amendment Act of 2015[3]**

[2] (David St. John Sutton, 2017)

[3] https://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf accessed on 28-11-2023 12:33 am

1. This was the first major amendment which came into force from 23-10-2015 after almost 2 decades from the enactment of the Act and it introduced series of amendments in various provisions of this Act incorporating various suggestions mentioned in the Law Commission Report No. 246 of August 2014 to improvise the arbitration regime in India and to develop arbitration friendly system in India.[4]

i) **Interim Relief-**

1) From Court – Post BALCO Judgment of Supreme Court[5], Part I of the Act related to domestic arbitration shall not apply to foreign arbitration i.e. Indian Courts cannot interfere when place of international arbitration is outside India, due to this litigants faced difficulty in enforcement of such foreign arbitral awards especially wherein the assets of any one party to the dispute are in India. This difficulty was addressed vide this amendment with the insertion of proviso to Section 2 (2) which provides that Section 9 relating to interim measures is applicable even in cases where seat of arbitration is outside India. It should not be noted that this does not include the cases wherein both the parties are Indian and they choose to arbitrate in foreign country. Moreover this amendment introduced the time limit of 90 days or further period as decided by Court to start the arbitral proceedings so that parties don't misuse this provision to avail ex-parte orders and aggravate the dispute or change the status quo.

Amended provision does not specify the time period from which these 90 days is to be reckoned whether from the date of filing of application or from the date of interim, ex-parte or final order pursuant to this application. Better approach is to clarify in the provision itself that arbitration proceeding must commence within 90 days from the date of filing of application so that no dilatory tactics are adopted by the parties.

2) From arbitral tribunal - Aforementioned provision of Section 9 can be used to avail interim measures only till the arbitral tribunal is constituted. Once the arbitral tribunal is constituted all interim measures can be availed of from only arbitral tribunal under Section 17 of the Act and the court cannot be approached for the same unless the remedies under Section 17 won't be effective.[6] Such orders will have the same effect as the order of civil court. This is really good amendment reducing the interference of court and making the enforcement of arbitral awards speedy and

[4] https://www.mondaq.com/india/arbitration--dispute-resolution/494184/critical-analysis-of-the-arbitration-and-conciliation-amendment-act-2015 accessed on 29-11-2023

[5] Bharat Aluminium and Co. v. Kaiser Aluminium and Co. [(2012) 9 SCC 552]

[6] Section 9(3) of the Act

effective at the instance of tribunal itself. Earlier such orders could not be statutorily executed under previous arbitration regime.

Previously as per 2015 amendment act, such interim measures can be passed by arbitral tribunal "even after passing of arbitral award but before it can be enforced under Section 36 of the Act" i.e. even after termination of mandate of arbitral tribunal with the termination of arbitration proceedings under Section 32 of the Act which was quite improper and inconsistent with Section 32 of the Act. This inconsistency was rectified by 2019 amendment act by removal of such words i.e. Hence, now the interim measures can be availed of from tribunal only during the continuance of arbitral proceedings and for interim measures prior to constitution of tribunal and after arbitral award, only court has got powers.

**ii) Judicial intervention minimised by adding of the words "irrespective of any judgment, order or decree of court" in Section 8 of the Act related to Reference to arbitration by court** where there exist valid arbitration agreement between the parties to the dispute. This means that judicial authority shall refer the dispute to arbitration if on prima facie basis they conclude the existence of valid arbitration agreement. However it should be noted that there is difference in powers of court to decide on arbitration agreement in Section 8 and Section 11 relating to appointment of arbitrator. Under Section 8, Court can also decide on validity or otherwise of arbitration agreement whereas the scope is very limited under section 11 to the adjudication limited to simply prima facie existence of arbitration agreement to appoint the arbitrator- This inconsistency is required to be rectified by adopting uniformity in both these provisions as per the 246$^{th}$ Law Commission Report.

Scope of judicial intervention was further minimised by adding sub-section (6A) in Section 11 which clearly provides that Court have got power to only examine the existence of arbitration agreement while deciding on application regarding appointment of arbitrator and cannot examine and decide on other issues unlike earlier notwithstanding any judgment, order or decree of any court.

As per the judgments of Supreme Court prior to this 2015 amendment in this Act in the case of National Insurance Co. Ltd. v. Boghara Polyfab Pvt. Ltd.[7], Supreme Court held that the Chief Justice of High Court or Supreme Court as the case may be can adjudicate upon other preliminary

[7] (2009) 1 SCC 117

issues over and above existence of valid arbitration agreement like whether the claim is time barred or existing one, whether the arbitrator is qualified, whether the applicant is party to the arbitration agreement, whether there is any concluded contract between the parties and jurisdiction thereby widening the role of courts in such matters. Moreover in the case of SBP & Co. v. Patel Engineering Ltd.[8], it was held that appointing arbitrator is judicial function and chief justice can delegate this to any other judge but arbitral institution cannot be given the powers of appointment of arbitrators.

Both these judgments were overruled by change in Section 11 vide 2015 Amendment Act as mentioned above in the form of subsection 6A further fortified by 2019 amendment act which seeks to establish arbitration council of India which will look into all these matters of appointment of arbitrators, their training, grading of such institutions and so on so the role of court is going to get further minimised once the arbitration council of India is established and subsection 6A will be omitted as proposed in 2019 Amendment Act as it will no longer be necessary. This is a welcome step if other criticisms are taken care of discussed later on regarding arbitration council of India and its inherent loopholes.

After this amendment, Supreme Court has taken different stands in interpreting the term "existence of arbitration agreement" in Section 11 (6A) of the Act. In the case of Duro Felguera S.A. v. Gangavaram Port Ltd.[9], Supreme Court explicitly clarified that scope of power under Section 11(6) which was widened by previous judgments in the case of SBP and Co.[10] and Boghara Polyfab[11] has become limited by virtue of Section 11(6A) and court is supposed to decide only on prima facie existence of arbitration agreement and not even its validity or otherwise and no other thing.

Then Supreme Court in the landmark case of Vidya Drolia v. Durga Trading Corporation[12] tried to settle the position regarding court's interference under Section 11 of the Act and held that Court can interfere beyond deciding the issue of existence of arbitration agreement and decide on the preliminary issues like arbitrability of the matter "for legitimate reasons" and "to prevent the wastage of public and private resources" on prima facie basis to help the arbitrator in his process and not the with intention to usurp his or arbitration tribunal's jurisdiction. Now the problem is

[8] (2005) 8 SCC 618
[9] 2017 (9) SCC 764
[10] See Supra Note 8
[11] See Supra Note 7
[12] (2021) 2 SCC 1

though the court intended to limit the court's interference and set the boundaries of it for Section 11 matters, but reverse is happening. In fact Courts started referring this judgment to widen the scope of court's interference at the stage of Section 11 in the cases of DLF Home Developers Ltd. v. Rajapura Homes (P) Ltd.[13] to include the decision as regards whether there is any valid arguable case and Indian Oil Corporation Ltd. v. NCC Ltd.[14] to include conducting the test of accord and satisfaction considering the matter to be debatable issue requiring detailed examination of facts and evidence on prima facie basis. These decisions wherein courts delved into merits of the case at the stage of reference or appointment of arbitrator are in sheer violation of Section 5 of the Act related to judicial intervention allowed to the extent provided in the Act and UNCITRAL Model Law on International Commercial Arbitration. This will prolong the adjudication process. Hence Supreme Court is required to clear the stand as regards ratio to be followed in Vidya Drolia case.

iii) **Addition and changes in Section 34 of the Act related to grounds for recourse against arbitral awards:**

Previously the words "public policy" were not defined in the Act. However explanations in this regard were introduced in Section 34 and Section 48 vide 2015 Amendment Act w.e.f. 23-10-2015. Explanation 1 defines and limits the scope of term "public policy" to the following 3 grounds i.e. the award can be said to be against public policy of India only if it falls under any one or more of the following three points:

1) arbitral award was tainted or induced by fraud or corruption or was passed in contravention of the provisions of Section 75 relating to agreement confidentiality and Section 81 of the Act relating to inadmissibility of certain matters in evidence as listed in the section.

2) arbitral award is violating the fundamental policy of Indian law. As per Explanation 2 while deciding the validity or otherwise of the challenge on this ground of public policy, Court is not supposed to review on the merits of dispute.

3) award is made ignoring the most basic notions of morality or justice like principles of natural justice, equity and good conscience thereby prejudicing the fairness and impartiality of the award.

- It should be noted that this amendment to the Act have inserted similar explanation to the words 'public policy' in Section 48 as given under Section 34 and especially the first ground leads indirectly to the introduction of the ground of patent illegality even in Section 48 which is clearly

[13] 2021 SCC OnLine SC 781
[14] 2022 SCC Online SC 896

against the distinction laid down in ONGC v. Saw Pipes case wherein SC recognized and explained the difference between the "public policy" as ground of setting aside arbitral award under Section 34 in respect of domestic arbitration and international commercial arbitration with seat of arbitration in India and public policy as ground of challenge at time of enforcement of foreign award which should be narrower and limited to 3 meaning as laid down in Renusagar's case[15] and Shri Lal Mahal's case[16] viz. fundamental policy of Indian Law, India's interest and justice or morality and has the effect of overruling the SC's judgment in the case of Shri Lal Mahal thereby again increasing Indian Court's interference at the stage of enforcement of foreign awards under the pretext of patent illegality. Hence amendment is required to be reconsidered as far as the similar explanation is inserted in Section 48 and first vague and wide clause of fraud and corruption is required to be replaced by the ground of "interests of India" thereby limiting the scope of judicial interference at the time of enforcement of foreign awards as laid down in series of previous judgments mentioned above.[17]

iv) **Amendment in Section 36 of the Act relating to no automatic stay on enforcement of arbitral award on filing of application challenging the arbitral award under Section 34 of the Act vide 2015 Amendment Act except under the prima facie case of fraud and corruption either in obtaining the award or making of arbitration agreement or contract which is the basis of arbitral award inserted vide 2021 Amendment Act.** This means that prior to this amendment in Section 36 in 2015, mere filing award objection application by the aggrieved party under Section 34 of the Act would entail automatic stay on enforcement of arbitral award resulting into further delay in devouring the fruits of the arbitral award. Now unless separate application for the stay of the arbitral award is made in the Court, Court cannot grant stay on execution of arbitral award without assigning valid reasons for the same. This is an add in aid in availing the right of access to speedy justice.

2021 amendment act has majorly washed away the good effects of previous amendment of 2015. This can be witnessed in case of Section 36 of the Act.

[15] Renusagar Power Electric Co. v. General Electric Co. [AIR 1994 SC 860]
[16] Shri Lal Mahal Ltd. v. Progetto Grano Spa [2014 (2) SCC 433]
[17] https://www.scconline.com/blog/post/2019/07/23/extent-of-judicial-review-in-foreign-awards-whether-arbitration-and-conciliation-amendment-act-2015-expanded-the-scope-of-public accessed on 30th July, 2023

Criticisms as regards amendment in Section 36 of the Act vide 2021 amendment act with effect from 23-10-2015 i.e. retrospectively from the date of coming into force of 2015 Amendment act:[18]

1. 2021 Amendment Act changes the basic scheme of the Act by inserting the proviso to Section 36(3) introducing the extra grounds of prima facie examination of existence of fraud or corruption either in procuring the award or in making of arbitration agreement or the contract which is the base document of arbitral matter to pass the order of unconditional and automatic stay. This is very wide and vague provision restoring the position prevailing prior to 2015 Amendment. It should be noted that similar grounds are already inserted in Section 34 of the Act regarding challenge to arbitral award vide 2015 amendment act as mentioned earlier. **Introducing again this ground at Section 36 level is creation of double hurdle stultifying the arbitral award enforcement process.**

2. Moreover as per the explanation mentioned in Section 36, this proviso is to be interpreted as if it is applicable to all court and arbitral proceedings whether commenced before or after coming into force of 2015 Amendment Act i.e. 23-10-2015 meaning thereby it not only applies retrospectively w.e.f. 23-10-2015, but also to court and arbitral proceedings instituted prior to this date but still pending in order to give benefit of this proviso to the litigants of such pending matter. This explanation follows the judgment of Supreme Court in the case of BCCI v. Kochi Cricket Pvt. Ltd.[19], wherein Supreme Court held that the amended Section 36 is change in procedural law and hence can be applied to pending proceedings even though they are instituted prior to the date of coming into force of 2015 Amendment Act. There won't be automatic stay on enforcement of arbitral award on filing of challenge under Section 34 of the Act even in case of arbitral proceedings initiated prior to this amendment which is a very good step smoothening the arbitral process. With a view to give prospective effect to this amendment this decision was overruled by insertion of Section 87 in the Act vide 2019 Amendment Act w.e.f. 30-08-2019 which clearly provides that unless otherwise agreed between the parties, provisions of 2015 Amendment Act will not be applicable to any arbitral proceedings commenced before 23-10-2015 and any court proceedings which have arisen prior to or after 23-10-2015 in relation to such arbitral proceedings. However this section was declared unconstitutional by Supreme Court in the case of Hindustan

[18] https://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/ accessed on 29-11-2023.

[19] 2018 6 SCC 287

Construction Company v. Union of India[20], thereby restoring the original position as clarified in BCCI case.

3. It should be noted that there is no change in Section 48 dealing with enforcement of foreign awards with seat of arbitration in foreign country. As Section 36 falls in Part I of the Act and by virtue of Section 2(2), Part I also applies to international arbitration with seat of arbitration in India and applying the ratio laid down in BALCO case[21], only domestic arbitral award and foreign awards with seat of arbitration in India can be under the purview of doubt on the ground of alleged fraud or corruption i.e. this proviso will not apply to international awards with seat of arbitration in foreign nation. This provision is likely to be misused even when the award is genuine if one of the party applies for stay order on execution on the ground of fraud or corruption and as no clear definition or level of proof is defined to come to the conclusion of prima facie case of fraud or corruption, different judgments can arise giving different interpretation to these terms. This major defect of keeping the terms undefined can give rise to two extreme possibilities resulting in huge obstacle in enforcement of arbitral award thereby making entire exercise of speedy arbitration a futile attempt:

1) Simply stating that there is fraud or corruption in availing the award or in execution of contract may make party eligible to stay order if court adopts liberal view. The matter will remain pending in law courts for years.

2) Party alleging the fraud or corruption is required to prove the case properly to avail the stay i.e. court is expecting higher level of proof which means court will have to go into the merits of the case to decide the issue as it is the mixed question of law and fact – court does not have such power at the level of execution even in normal civil suits i.e. executing court cannot go behind the decree. If this is allowed in case of arbitral awards then it is against the summary nature of proceeding permitted under Section 36 of the Act. This can happen in every arbitral award and matter will remain dormant in law courts turning alternative dispute redressal mechanism into regular adversarial adjudication system.

Recently in the case of Swiss Timing Ltd. v. Organising Committee, Commonwealth Games[22], Apex court held that issue regarding perpetuation of fraud in the contract will not affect the

[20] AIR 2020 SC 122
[21] Bharat Aluminium Co. Ltd. v. Kaiser Aluminium Technical Service Inc. [2012 8 SCALE 333]
[22] (2014) 6 SCC 677

arbitration agreement or clause related to it as that issue can also be decided by arbitral tribunal. Then in the case of A. Ayyasamy v. A. Paramasivam[23] and Avitel Post Studioz Ltd. v. HSBC PI Holdings (Mauritius) Ltd.[24], Supreme Court explained the difference between "fraud simpliciter" and "serious allegations of fraud" which makes the entire contract infructuous and held that arbitral tribunal cannot decide in case of "serious allegations of fraud" and it is outside its scope. These judgments are restricted to interpretation of fraud in contract and not related to fraud in availing award to reach the level of availing automatic unconditional stay on that ground which will give rise to various judgments of Supreme Court and confusing situations. It would be better if legislature had defined the scope of these terms to be decided at enforcement stage or else this provision was not at all required.

**v) Fixing of time limit for various stages of arbitration process and for disposal of applications relating thereto:**

- 2015 Amendment Act fixes the time limit for various stages of arbitration process as under:

1) **Proviso is added in Section 24** relating to hearings and written proceedings which mentions that oral evidence and oral arguments are permissible but **should be taken up on day to day basis and no adjournment should be granted without any reasonable cause** and provided for penalty to the party seeking adjournment unnecessarily.

2) **Section 29A Time limit for making arbitral award** in case of matters other than international commercial arbitration inserted vide this amendment act – 12 months from the date of receipt of notice by arbitrator regarding his appointment which can be further extended upto 6 months with mutual consent of parties and with the end of this time mandate of arbitrator comes to an end and further provision for extension of time is allowed if the court permits subject to maximum 5% reduction in fees of arbitrator for each month for such delay in case the court concludes that delay is attributable to the arbitral tribunal and court can even change the arbitrator while granting extra time for disposal of dispute. This is good step as at times arbitrator can prolong the matter to charge more fees per sitting and this provision will discourage such wrong practices. Even the application for extension of time period made by parties should be disposed of by the court within 60 days from the date of serving of notice to opposite party as per Section 29A(9) of the Act.

[23] (2016) 10 SCC 386
[24] 2020 SCC OnLine SC 656

Later on vide 2019 amendment act (w.e.f. 30-08-2019), provision is little bit changed - now it is 12 months from the date of completion of pleadings coupled with same provision for further extension for 6 months and 6 months time limit for completion of pleadings as per Section 23(4) – both for domestic and international commercial arbitration, but for international commercial arbitration adherence to prescribed time limit is directory and not mandatory unlike the case of domestic arbitration.

3) Challenge to arbitral award – 1 year from date of serving of notice to other party by the party challenging the arbitral award. [25]

This kind of amendment was the need of the hour and it would really eliminate the defect of delays in arbitration mechanism provided it is implemented properly. In an interview with Adv. Mr. Aspi Kapadia, he shared his experience that matter relating to challenge on arbitral award remains pending for years in High Court then aggrieved party go in appeal to Supreme Court so the parties are deprived of the fruits of award for very long period.

vi) Section 29B - Fast Track procedure - inserted in the Act by this amendment Act is a welcoming feature and indication of the fact that normal arbitration process is suffering from the same defect as that of normal adjudication system wherein arbitrator has to dispose of the dispute within 6 months only and proceedings will be held through written submissions majorly and oral evidence or oral arguments will be allowed sparingly with the consent of the parties. This provision will automatically become redundant if the arbitration process is followed as per the prescribed time limit or else legislators have to time and again bring alternative to the alternative.

vii) Section 31A introduced vide this amendment prescribes the cost regime and empowers the arbitral tribunal to award costs also to the parties by the unsuccessful party just like court and for this purpose prescribes the criteria for awarding costs and method to be followed to reach to any proper decision regarding the same. This is also encouraging feature for parties to opt for arbitration as all facets of court are covered under proper arbitration procedure.

viii) Cap on fees to arbitrator which is very good feature introduced vide this amendment to resolve the major defect of costliness highly prevalent in arbitral procedure making it worse than the courts but the major defect of this amendment is that cap on fees prescribed in Schedule 4 read with Section 11(14) of the Act is simply suggestive or directive and not mandatory and it is left to

[25] Section 34(5) of the Act

different High Courts to frame its own rules regarding the same and moreover this rate does not apply to even arbitral institution which can have their own standard of fees for the arbitrators allocated by them. Due to this major defect mostly it is not followed resultantly especially retired SC judges who are appointed as arbitrator deny to abide by this cost regime and charge upto 30 lakh Rs also per sitting if the amount or value of subject matter of dispute is that much high – This information is based on the interview with the eminent SC and HC lawyer practising in this field since last 30 years Advocate Shri Aspi Kapadia. **He further suggested that it will be better if High Courts are given ultimatum to frame the rules adopting this cost regime or completely removing the autonomy of High courts in this regard and making it uniform and mandatory all over India.**

- **Amendment Act of 2019[26]**

**Provisions amended or inserted vide 2015 Amendment Act and further amended vide 2019 Amendment Act are already discussed above and hence not reiterated below. Now, only those provisions which are newly introduced vide 2019 amendment Act are analysed below:**

1. Major change brought by this amendment act is establishment of arbitration council of India through insertion of Part IA in the Act. It is the body corporate institute which will handle the matters relating to appointment of arbitrators, grading arbitral institutes resulting into reduced court's interference. Major function of this institution is to promote arbitration, conciliation, mediation and other modes of Alternative Dispute Redressal Mechanism, grading arbitral institution and to frame guidelines for maintaining uniform professional standards in conduct of them.[27]

- Council consists of 1 chairperson who should be retired Supreme Court Judge or High Court Judge or Chief Justice to be appointed by Central Government in consultation with the Chief Justice of India, 1 member who shall be arbitration practitioner having knowledge and practice to deal with domestic and international institutional arbitration, 1 member who shall be leading academician having teaching and research experience in the field of arbitration, 2 ex-officio members – 1 of them should be secretary to the Government of India in the Department of legal affairs, Ministry of Law and Justice and the other should

[26] https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29-act-2019.pdf accessed on 28-11-2023 12:30 am
[27] Section 43D(1) of the Act.

be secretary to the Government of India in the Department of Expenditure, Ministry of Finance or their representatives not below the rank of joint secretary, one part-time member who should be representative of recognised body of commerce and industry chosen on rotational basis and Chief Executive Officer who will be ex-officio member secretary and their salaries are also as per the rules prescribed by the government.[28]

- Now it should be noted that though this amendment act is enacted with laudable objective of streamlining institutional arbitration in India and reducing court's interference to almost negligible but the way the provisions are enacted to constitute this council suffers with the inherent defect of bias and excessive control over quasi judicial body by executive i.e. central government which is quite against the principles of natural justice and very basic right of impartial justice covered Art. 21 Right to life to be read with Directive Principles of State policy Art. 50 Separation of executive from judiciary. Due to this in many disputes in which government is also the party and its predominant role in constituent body of Arbitration Council of India wherein all are nominated or appointed by government puts the big question mark on effective implementation of idea of access to speedy, impartial and effective justice. This can happen even in case of private parties having good connection with government which can lead to appointment of arbitrators based on partisanship, lack of fairness, rigid formalities favouring one of the parties to the dispute.[29]
- It should be noted that all other provisions introduced by this amendment act came into force on 30-08-2019 whereas this entire chapter came onto force from 23-10-2023 after almost 4 years from the date of enacting 2019 amendment act. Still there is no such arbitration council at Delhi and this information is based on the answer received from Adv. Aspi Kapadia. Though arbitration council of India's constitution may suffer from latent defect but if this defect is removed by making amendment to eliminate the element of impartiality, lack of transparency and restoring party's autonomy in choice of even ungraded arbitral institution which does very well work but does not want to fall within the clutches of rigid formalities of accreditation and gradation of arbitration council of India

[28] Section 43C(1) of the Act.
[29] https://rmlnluseal.home.blog/2019/10/14/the-arbitration-council-of-india-a-critical-analysis/ accessed on 01-12-2023 9:00 pm

then its establishment is really a welcome step and can help a lot in streamlining arbitration process throughout India.

- Under this chapter, with regard to qualification, experience and norms relating to accreditation of arbitrator, schedule 8 was inserted vide this amendment read with Section 43J of the Act which was omitted by 2021 Amendment due to the opposition from concerned stakeholders regarding restriction on party autonomy and norms regarding qualification as of now is left upon the regulations to be framed by Arbitration Council of India.[30] As Arbitration council is not yet established, at the present there are no regulations regarding qualification or accreditation of arbitrator. This is good step in direction to make India an international hub of arbitration as now foreign arbitrators can also be selected in panel of arbitrators unlike earlier which will inspire confidence in foreign parties to select India as a place of arbitration.

**2.** Besides this another good provision explicitly inserted vide this amendment act is the provision regarding the duty to maintain confidentiality of arbitration processes on part of arbitrators, arbitral institution and parties to arbitration agreement[31] and the provision regarding arbitrator immunity just like judges immunity which is very good step and can help arbitrator to take right decision without any fear of prosecution so far as he acts in good faith.[32]

Overall 2019 Amendment was a good step in streamlining arbitral process and bringing it at par with arbitration system prevalent in other developed countries of the world like America provided its criticisms mentioned above are tackled with.

- **2021 Amendment Act which came into force on 04-11-2020 (day of coming into force of Arbitration and Conciliation (amendment) ordinance, 2020)[33]**

  This act introduced 2 major amendments 1) adding of proviso under Section 36 (enforcement of award) of the Act relating to automatic stay just like situation prevalent before 2015 amendment act if court finds on prima facie basis that award or arbitral

[30] Section 43J amended by 2021 Amendment Act w.e.f. 04-11-2020
[31] Section 42A of the Act
[32] Section 42B of the Act
[33] https://legalaffairs.gov.in/sites/default/files/arbitration-and-conciliation%28amendment%29act-2021.pdf accessed on 28-11-2023 12:35 am

agreement is obtained by fraud or corruption 2) Removal of 8th schedule regarding norms for accreditation of arbitrator to be read with Section 43J of the Act.

Both of these amendments are already discussed while discussing the effects of 2015 and 2019 Amendment Act and hence not reiterated here. However it can be summarised here that if prior two amendments took our arbitration regime two steps ahead, then this amendment especially with regard to amendment in Section 36 mentioned above is two steps backward and has the water shedding effect making our arbitration regime slow, tedious, increase in court's interference and put us back to square one.

## 4. Conclusion and suggestions

It should be noted that purpose of all these amendments was to make India an arbitration friendly country and not to make arbitration long process dependant on changing interpretation of courts of these amendments which can lead to increased court interference in future. From the analysis of various judgments of Supreme court, researcher concludes that Supreme court has changed its stands time and again depending on the case thereby still keeping the arbitral process difficult one and India not a convenient place for speedy arbitration. However Supreme Court and High Courts have tried to to keep court's interference minimal and legal position is quite clear in this regard that Courts cannot go into merits of the case and change arbitral award, at the most they can set aside arbitral award completely or partially and direct the de novo arbitral procedure or remand the matter to be heard and decided on the aspects directed as the case may be.

From the above doctrinal and non-doctrinal research, researcher arrives at following conclusion to the 2 hypothesis:

1. Whether these amendments are adequate and well defined to make India a hub of international commercial arbitration and to streamline domestic arbitration as well – No, 2015 and 2019 Amendment Act were steps in right direction to major extent, but 2021Amendment Act nullifies the 2015 Amendment with regard to Section 36 of the Act.

2. Whether there is an adequate infrastructure and mindset of concerned stakeholders to implement these amendments thereby making access to speedy and effective justice no longer an illusion – **No,** due to the vagueness in the terms of fraud or corruption in Section 36, every party is likely to resort to clever drafting to bring the case within fraud and nullifying the entire arbitration process and keep approaching the court in every case. Moreover as the provisions regarding fixing of fees

are suggestive, arbitration process will be costly and less preferred by poor people or small businesses. Moreover even after fixing the time limit for completion of arbitral process and time limit for disposal of various applications relation to arbitration in law courts in cases of appointment of arbitrator, challenge to arbitral award in 2015, it takes more than 5 to 7 years to decide the challenge on arbitral award as per the information received from Adv. Shri Aspi Kapadia. Parties to dispute should strictly adhere to the fixed time limit, sensitisation and training of judicial officers and arbitrators is needed for this. Moreover even after 4 years from the passing of 2019 amendment act and even after 2 months of notifying this amendment in the act, no infrastructure is developed to establish arbitration council of India as contemplated in the Act. Moreover due to inherent defect of being partial and its full possibility of favouring the government, its success is questionable.

**Suggestions:**

Various suggestions to achieve the very objective of amendments of access to speedy and effective justice by making robust arbitration regime in India were mentioned in concerned point discussed above but they are summarised as under:

1. 2021 amendment with respect to Section 36 related to addition of vague and undefined grounds of fraud and corruption to entail unconditional automatic stay is required to be repealed as explicit expression of such grounds is the depiction of distrust towards arbitral process.
2. Instead of suggestive provision for fixing the fees of arbitrators, it should be made mandatory to eliminate the demerit of huge cost in arbitration process which was not prevalent in earlier.
3. Provision regarding constitution of arbitration council is required to be thoroughly amended to eliminate the control of executive i.e. government over quasi judicial process. Instead of appointment by government it should be appointment by Chief Justice of India and senior most judges of High Court and Supreme Court and legal experts of the field and entire process of appointment of members in arbitration council of India should be transparent.

- **List of References:**


1. David St. John Sutton, J. G. (2017). *Russell on Arbitration* (23rd ed.). Sweet & Maxwell Ltd.
2. Verma, D. J. (2013). *Alternative Dispute Resolution* (1st ed.). Nagpur: All India Reporter.
3. https://www.legalserviceindia.com/legal/article-7554-a-critical-analysis-of-arbitration-law-in-india.html#:~:text=The%20Act's%20major%20goal%20was,to%20achieve%20its%20intended%20goals accessed on 29-01-2023 08:00 pm

4. https://rmlnluseal.home.blog/2019/10/14/the-arbitration-council-of-india-a-critical-analysis/ accessed on 01-12-2023 9:00 pm
5. https://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/ accessed on 29-11-2023.
6. https://www.lawstreetindia.com/experts/column?sid=334 accessed on 29-11-2023
7. https://argus-p.com/papers-publications/thought-paper/discussion-on-the-2015-amendments-vs-the-2019-amendments-to-the-act/ accessed on 29-11-2023
8. https://www.scconline.com/blog/post/2022/12/08/supreme-court-post-vidya-drolia-reconsidering-referral-jurisprudence-in-india/ accessed on 02-12-2023 04:30 pm
9. https://www.mondaq.com/india/arbitration--dispute-resolution/494184/critical-analysis-of-the-arbitration-and-conciliation-amendment-act-2015 accessed on 29-11-2023
10. https://legalaffairs.gov.in/sites/default/files/arbitration-and_conciliation%28amendment%29-act-2019.pdf accessed on 28-11-2023 12:30 am
11. https://lawmin.gov.in/sites/default/files/ArbitrationandConciliation.pdf accessed on 28-11-2023 12:30 am
12. https://legalaffairs.gov.in/sites/default/files/arbitrationandconciliationamendmentact2021.pdf accessed on 28-11-2023 12:35 am