



## Judicial intervention in enforcement of international arbitral awards: A critical study

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### Abstract

The researcher has made an attempt to analyze the judicial response in respect of International Commercial Arbitration. In this chapter, it has been explicitly examined Indian viewpoint in addition to other jurisdictions in respect of arbitral awards and its enforcement under Geneva and New York Conventions. Special emphasis has been made to analyze judicial interpretations on the doctrine of Public Policy with the support of landmark judgments with a special reference to UNCITRAL Model Law. The researcher has a study on Judicial Intervention in Enforcement of International Arbitral Awards. The researcher made an attempt to analyze the judicial response in respect of International Commercial Arbitration.

The judiciary plays an important role in support of the arbitration process, where there is a gap or a failure in the arbitration mechanism; where there is a need to make provisional arrangements pending an award; to enforce the award. The main objective of the Arbitration Act is to reduce the role of courts through decision-making in the arbitral process. The evident from the insertion of Section 5.

**Keywords:** international arbitration law, geneva and new york conventions, uncitral model law

### 1. Introduction

#### Review of Literature

The review of literature is an important part of the research in any field. It gives an account of various studies conducted in the research topic selected i.e., Recognition and enforcement of arbitral awards in international commercial arbitration: a study with reference to Indian legal regime. Sanders <sup>[1]</sup> in his work entitled *New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and other Institutions* was emphasized on the role that the global arbitrations are playing by formulating arbitral procedure and supporting the business community at the international level.

Sumeet Kachwaha <sup>[2]</sup> in his work titled *Enforcement of Arbitration Awards in India*, This work points the worldwide enforcement of awards is an advantage of arbitration but the Indian enforcement mechanism for foreign awards has referred inefficient and uncertain.

Jean-Georges Betto & others <sup>[3]</sup> in their article on "International Arbitration: New Trends", concentrated only on four issues that are emerging in the International arena of Commercial Arbitration.

Ihab Amro <sup>[4]</sup> in his book *Recognition and Enforcement of Foreign Arbitral Awards in Theory and Practice: A Comparative Study in Common Law and Civil Law Countries*.

Bermann, George <sup>[5]</sup> A. In his book, *Recognition and Enforcement of Foreign Arbitral Award*, The explanation, and application of the New York Convention by National Courts, focused on how the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Jujjavarapu, Aparna <sup>[6]</sup> Devi In her research work titled "Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India" emphasized on India was not recognized many non-statutory standards for review arbitral award.

Ray Turner <sup>[7]</sup> in his book *Arbitration Awards: A Practical*

Approach provides clear and practical guidance on the method of preparing or writing an award.

#### Scope and limitations of Study

Accordingly, keeping in view of these limitations, the researcher confines herself to the following areas-

1. A review of International Commercial Arbitration regime developed under the auspices of UNCITRAL Model Law, the Geneva Convention, and New York Conventions.
2. The institutional framework of International arbitral institutions such as London Court of International Arbitration (LCIA), London Maritime Arbitral Association (LMAA), International Chamber of Commerce (ICC), and American Arbitration Institution (AAA).
3. A study on the Indian legal framework dealing with Recognition and enforcement of the arbitral award.

#### Research Methodology

The Scholar has followed the doctrinal method and non-empirical method of research which did not require any field data or sample collection to investigate and analyze the recognition and enforcement of arbitral awards in international commercial arbitration: a study with reference to Indian legal regime. As a part of the Doctrinal study, the researcher has examined both primary and secondary sources of information on the topic which includes the relevant provisions of Arbitration and Conciliation Act 1996, provisions of constitutional law for conducting this research with a combination of critical, comparative, historical and analytical approaches.

#### Collection of Data

Data Collection is a process of collecting information from all the relevant sources to test the hypothesis and to evaluate the outcomes. The collection of data was basically divided

into two categories they are: primary source and secondary source.

### Primary Data

Every effort has been made to collect material from appropriate and authoritative sources of information. Certain data has also been obtained from International Law Office an online library and Kluwer Law International Library. The researcher has also personally elicited the views of some sitting and retired Judges of Singapore, United Kingdom and the Courts of Dubai International Financial Centre. That apart, views expressed by International Commercial Arbitration practitioners in London, Singapore, Dubai, and Switzerland has been gathered apart from appearing at various international seminars. However, this information from various dignitaries was disclosed subject to maintaining confidentiality.

### Secondary Data

The proposed research work includes a detailed analysis of the various secondary sources such as impressionistic books, research papers, articles and scholarly journals, new stores of literature on International Commercial Arbitration, web links.

### Introduction

The researcher has a study on Judicial Intervention in Enforcement of International Arbitral Awards. The researcher made an attempt to analyze the judicial response in respect of International Commercial Arbitration.

The judiciary plays an important role in support of the arbitration process, where there is a gap or a failure in the arbitration mechanism; where there is a need to make provisional arrangements pending an award; to enforce the award. The main objective of the Arbitration Act is to reduce the role of courts through decision-making in the arbitral process. The intention of the legislation to minimize the judicial influence in the arbitration regime is evident from the insertion of Section 5

Thus, it is clear that it is undesirable to entirely remove the courts' inherent jurisdiction in the arbitral process. The 1996 Act permits two broad mandates for judicial intervention in arbitral proceedings. The first is where provision is explicitly enumerated under Part I of the Act regarding judicial intervention. The principle of non-intervention in the words of Russell that "it has given to the court only those essential powers which I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or alternatively, in the direction of correcting very fundamental errors"<sup>[8]</sup>

". The alternative flagged in the above comment correcting very fundamental errors provides the second justification for judicial intervention in arbitral proceedings. This is only to occur in most exceptional of cases to ensure that an injustice is not suffered, however. To this end, the court may intervene where the grounds for doing so do not feature in Part I of the Act.

### Commencement of Arbitral Proceedings

Prior to the commencement of arbitral proceedings are enforcing the agreement to arbitrate and appointing an arbitrator or confirming the choice of law to such proceedings.

### Enforcement of Agreements to Arbitrate

Arbitration is established on a valid agreement to arbitrate. First, it must regulate whether an arbitration agreement is valid and then whether to enforce it or not. The enforcing of an arbitration agreement may proceed before a court by the most common way is for one of the parties to a contract disregard an arbitration clause in the contract, or bring a lawsuit in a court to enforce his alleged rights under the contract. Another way in which the question of enforcing an arbitration clause may come before a court is for a party to bring an action in court seeking an order compelling the other party to arbitrate. Another possible way that the question of enforcing an arbitration agreement may come before a court and it is possible for a party that wishes to contest the validity of an arbitration clause to bring an action in a court to enjoin the other party from proceeding with arbitration.

The obligation in the New York Convention which placed on the courts the requirement to compel parties to honour their agreements attained popularity with the judgment of American Court in *McCreary Tire & Rubber Co. v Ceat Sp*<sup>[9]</sup> A discharging an attachment of funds order obtained from a court because of the existence of a dishonored arbitration agreement, the court stated that "this complaint does not pursue to enforce an arbitration award by foreign attachment. It pursues to bypass the agreed-upon method of settling disputes. Such a bypass is prohibited by the Convention (New York)...which forbids the court of the contracting state from entertaining a suit that violates an agreement to arbitrate." In *Mitsubishi Motor Corp. v Soler Chrysler-Plymouth, Inc*<sup>[10]</sup> the American Supreme Court observed that "Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the settlement of disputes require that we enforce the parties agreement, even assuming a result contrary and the result would be approaching in the domestic context."

In *Great Offshore Ltd v Iranian Offshore Engineering & Construction Company*<sup>[11]</sup> the Supreme Court of India examined the written form of requirement and extended it to include fax communication. However, the court observed that if the courts were to add a number of extra requirements, it would merely enhance the courts' role and foil the parties' intention to arbitrate. In a more recent case *Indowind Energy Ltd v Wescare (I) Ltd*<sup>[12]</sup> the court held that in the absence of ratification, approval, adoption or confirmation of the agreement, a company could not be said to be a party to a contract containing an arbitration agreement when it did not sign the agreement, with reference to its subsequent conduct. The Supreme Court by an obiter in *Hindustan Petroleum Corporation v. Pink City Midway Petroleum* has held that where a court can take an action in a matter regarding an arbitration agreement, the court would not simply refer the matter to the arbitral tribunal (as it would have earlier). It would examine whether there is in existence a valid arbitration clause. The earlier interpretation of Section 8 of the Act was that the court would not entertain contentious issues, but would merely refer the parties to the arbitration and leave it to the arbitral tribunal to determine these. In contrast, Supreme Court in *N. Radhakrishnan v. Maestro Engineers & Ors*<sup>[13]</sup> upheld the decision of lower courts and reiterated that not

withstanding the existence of an arbitration agreement, where a case *inter alia* relates to claim or assertion of fraud and serious malpractices on the respondents, such a case “must be tried in court and the arbitrator could not be competent to deal with such matters which involved an detailed production of evidence to establish the claims relating to fraud and criminal misappropriation”. This judgment provides an escape from Section 8 of the Act, which requires a court to refer parties to arbitration if an action is brought in respect of a matter that formats the subject matter of an arbitration agreement. Nonetheless, the foregoing illustrates first and foremost, party autonomy is at the heart of this provision in that it sets out clearly that parties may agree as to the process of dispute resolution through arbitration to be adopted. Where there is a failure to agree between the parties, this may be intervened by the court upon request by the parties.

However, the 2015 Act amended Sec. 8 having made this provision more pragmatic allowing “persons claiming through or under parties”<sup>6</sup> to apply for a referral to arbitration which is in line with Sec. 45 however, the opinion of the judge is non-identical. The amendment widened Sec. 8(2) by presumed that, if the original agreement of arbitration or its copy which is duly certified is not available with the applying party for a reference to arbitration under sub-sec. (1) of sec 8, and the agreement said or duly certified copy is retained to that agreement by the other party, the applying party shall file such application along with petition and the agreement copy in court and inform the party to give before court the unique agreement of arbitration or its properly certified one<sup>[14]</sup>.

The amended Sec. 8 gives that the court can deny a reference to arbitration if it finds that no *prima facie* valid arbitration agreement exists. This power is different from the one stipulated by Sec. 11 and only prescribing examination of the existence of the agreement. Considering applications under Sec. 11 of this Act does not require searching into the issues of validity of such agreement. Different requirements assign by Secs. 8 and 11 of the Act open avenues for refined judicial interpretation. In case of denial of reference under Sec. 8, a judicial appeal is possible under Sec. 37 of the Act. If the court does not refer the parties to arbitration, the arbitral tribunal can still work *kompetenz-kompetenz* under Sec. 16. Such legal ambiguity runs the risk of weakening the *kompetenz-kompetenz* rule under Sec. 16 by taking aside the power of the arbitral tribunal<sup>[15]</sup>.

### Appointment of Arbitrators

Appointment of arbitrator(s) is the right of the parties which they appoint on mutual agreement. Another contentious issue in the principal 1996 Act was the provision regarding the appointment of arbitrator or arbitrators in case of a deadlock between the parties. In such cases, a party under Sec. 11 of that Act was allowed to move toward for domestic arbitration the Chief Justice of the High Court of India, and for commercial arbitration of International the Supreme Court Chief Justice, or the Chief Justice can select any person or institution.<sup>25</sup> There is a formal instance whereby a court may intervene in arbitral proceedings prior to their commencement. Courts have the power to make orders regarding the appointment of an arbitrator when one of the parties refuses to participate in the process<sup>[16]</sup>.

In the UK the court in *R Durnnell and Sons v Secretary of*

*State for Trade and Industry*<sup>[17]</sup> noted that it could as in the jurisprudence which had preceded the 1996 Act refuse a remedy to a claimant who had for a long time neglected to take the required steps, it asserted that the means to settle the dispute which resulted in a fair and efficient resolution of the dispute should be that which prevails. If this entailed appointing an arbitrator to facilitate the arbitral process, then this course should be pursued. “The court considered that the exercise of the court’s residual discretion would depend on the circumstances of the particular case”. The second kind of law that a court must respond when it acts on a request to compel arbitration is the law of contracts applicable to the arbitration agreement. Under Article 8(1) of the Model Law, a pretend arbitration agreement will not be enforced if it is void, or unable to perform. The court will not enforce an agreement to arbitrate if, for example, under the governing contract law one of the parties lacked the capacity to make contracts. According to *Engalla v. Permanente Medical Group, Inc*<sup>[18]</sup> case it was held that almost certainly, the court will not enforce an arbitration clause that was induced by fraud, or that is so one-sided as to be void or voidable on the ground i.e., ‘unconscionable’. It has time and again been attached by a number of jurists in this country that the Supreme Court should curtail its wide jurisdiction and confine itself to a set of core issues. In several cases before the Supreme Court, it has often been observed that the area of controversy is limited, law well settled and does not require the attention of the Supreme Court to decide such matter. Yet, it has time and again been noticed that the Supreme Court adjudicates on the issue and delivers judgments that run into several pages where no great proposition of law requiring the recognition of the Supreme Court is laid down. One such area of concern is the field of arbitration which is now a growing and fertile field of litigation for lawyers especially for the appointment of an arbitrator under Sections 11(4), (5) and (6) of 1996 Act. This has been joining to the existing burden of the Court and in spite of that, a large number of appeals are filed in the Supreme Court.

The 2015 Amendment Act tries to nullify also the effect which was initiated by this case by the Supreme Court. The Act introduced a limitation in sub-sec. (6A) gives that the Supreme Court or the High Court shall limit its examination only with the existence of an arbitration agreement, and not with other issues such as e.g., live claim, qualifications, conditions for the exercise of power, etc<sup>[19]</sup>. In the case, i.e., the *Patel Engineering* case provided that hat the Chief Justice can delegate his/her power under Sec. 11 of the 1996 Act only to additional judge of that court but not to any other person or institution considered to have judicial powers as judicial power can only be delegated to a judicial authority. However, the 2015 Amendment Act took this feature into account and stated in a new sub-sec. (6B) that “[T]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court<sup>[20]</sup>.”

### Choice of Law

Once a request to enforce an arbitration clause is validly before a court, the court’s first task is to consider what laws it must apply in deciding whether and on what terms to compel arbitration. There is another aspect of arbitration law

that a court must examine when it is asked to enforce an arbitration agreement, namely, whether the dispute is of a kind that is arbitrable under the national arbitration law or whether it is non arbitrable.

It is possible that other national courts may adopt comparably broad readings of the writing requirement, although perhaps few courts in states that have adopted the Model Law's narrow definition of 'in writing' will find themselves free to do so. There is other aspect of arbitration law that a court must examine when it is asked to enforce an arbitration agreement, namely, whether the dispute is of a kind that is arbitrable under the national arbitration law or whether it is non arbitrable. A non-arbitrable dispute is a dispute of a kind that may be resolved only through procedures provided by another of the nation's laws. The courts must determine whether the dispute is within the scope of national arbitration statute, or whether the dispute must be resolved through another mechanism. In the international context, a court applying article 8(1) of the Model Law, and (if it is in a New York Convention state) the substantially identical language of the Convention, is faced with a amount of choice of law issues. The court must examine what nation's laws it should apply in deciding whether an arbitration agreement must be in writing, and, if there is such a requirement, whether that requirement has been satisfied.

House of Lords in *James Miller and Partners Ltd v Whitworth Street Estates Ltd* <sup>[21]</sup> of the view that where the parties have agreed that the governing law will be a foreign law, the question relating to the chosen arbitral tribunal will also usually be governed by such foreign law. This view was confirmed in *Chartbrook Limited v Persimmon Homes Limited* <sup>[22]</sup>.

In India in *Bhushan Steel Ltd v. Singapore International Arbitration Centre and Anr* <sup>[23]</sup> arbitration clause contained in a series of contracts made a reference to disputes being referred to arbitration in Singapore, as per international law. *Bushan Steel*, in a suit before Delhi High Court seeking, inter alia, a declaration that the arbitration clause in the contract was vague and indeterminate, and hence void and incapable of being enforced; and asked that the court issue a permanent injunction restraining Singapore International Arbitration Centre (SIAC) from continuing the arbitration proceedings. Rejecting the contention the court held that the law applicable to the arbitration was Singaporean law and, given that the clause clearly provided for Singapore as the seat of arbitration, therefore, the parties had excluded the provisions of 1996 Act.

In *Nandan Biomatrix Limited v. D 1 Oils Limited* <sup>[24]</sup> the Supreme Court of the view that where the parties do not prescribe any form for the purpose of arbitration agreement, the intention of the parties is required to gather as to whether they have agreed for resolution of disputes through arbitration as per Singaporean law; the parties unequivocally agreed to resolution of the disputes through institutional arbitration and not through an ad hoc arbitration; therefore, there exists a valid arbitration agreement between the parties and in the circumstances, all disputes and differences between the parties should be referred to Singapore International Arbitration Centre, which would nominate an arbitrator from its panel. In *Dozco India P Ltd v. Doosan Infracore Co Ltd*, <sup>[25]</sup> the Supreme Court refused to intervene in a dispute where the arbitration clause made a specific reference to arbitration under Korean law, with a seat of

arbitration in Seoul. It states that the designation of a foreign seat and an express choice of a foreign governing law amounted to a clear agreement to exclude the operation of Part 1 of Arbitration and Conciliation Act, 1996 and in the *Denel (Proprietary Limited) v Bharat Electronics Ltd* <sup>[26]</sup> the Supreme Court refused to interfere with an arbitration agreement, on the ground that the parties had undertaken into it with full knowledge and understanding of what they were agreeing.

### During the Arbitral Proceedings

Under this Section, the forms of judicial intervention once the arbitral proceedings have been commenced will be examined, in particular, the assistance that the court can provide to the arbitral tribunal in the form of interim measures and controversial inherent jurisdiction of the court to intervene.

### Interim Measures of Assisting the Process

The power to grant interim relief is an important one in the process of arbitration by the local courts. Article 9 of Model Law, recognizes that a party does not waive his right to arbitrate if he applies to a court for interim relief or if a court grants such relief. Most other modern arbitration laws do the same <sup>[27]</sup>. With respect to the courts' power to grant interim relief, for the rules and procedures governing the granting of interim relief, the courts must look, not to the national arbitration law, but to the laws and rules that govern national courts generally. In order to diminish court interventions and to restrict the courts' power to grant an interim injunction after the constitution of the arbitral tribunal, sub-clause 3 of Sec. 9 was introduced.

### Inherent jurisdiction of the Courts

Inherent jurisdiction in the context of arbitration process often considered as a controversial power of the court to intervene. Although this jurisdiction to intervene in arbitral proceedings has been carved out by the courts themselves, there would appear to be emerging a more deferential attitude towards arbitration on the part of the courts in its application.

In *Naval Gent Maritime Ltd Vs Shivnath Rai Harnarain* <sup>[28]</sup> taking the spirit of an English court's decision in *The Channel Tunnel Group Vs Balfour Beatty Construction Ltd & Ors* <sup>[29]</sup> that the English courts possessed inherent powers to grant interim relief even where the seat of arbitration was not in England, the Delhi High Court of the view that it has now acquired statutory sanction in terms of the English Arbitration Act; this is the ubiquitous view internationally; there is no reason to adopt a pedantic approach, thereby rendering the legal regime in India dissimilar to that prevailing in other parts of the world and held that so long as the territorial jurisdiction of the court is present, relief should not be declined on technicalities which are not representative of any equities in favour of the Respondent. Since the Respondent's properties are founded in India, the umbilical cord of territoriality is clearly visible .

In *NBCC Limited v. JG Engineering Pvt. Limited* <sup>[30]</sup> Supreme Court of India while recognizing the primacy of party autonomy in arbitration proceedings held that time limits, and provisions regarding extensions of time, provided for in an arbitration agreement must be adhered to and where the arbitration could not be completed within the time limit fixed in the arbitration agreement, the court held

that, although there are no provisions to extend deadlines under 1996 Act or the old Arbitration Act 1940, the appropriate court does have an inherent jurisdiction to extend time .

Inherent jurisdiction in the context of arbitration process often considered as a controversial power of the court to intervene. Although this jurisdiction to intervene in arbitral proceedings has been carved out by the courts themselves, there would appear to be emerging a more deferential attitude towards arbitration on the part of the courts in its application. It remains, in contrast to the Model Law, however, within the remit of the judge to restrain arbitral proceedings which, in theory at least, represents a significant power over arbitral proceedings with no significant restraints.

### **After Arbitral Proceedings**

This aspect of judicial intervention represents the most contestable interference in the arbitral procedure. From a critical perspective court interference at this stage necessarily entails an undermining of the meaning of arbitral awards. Where parties are able to challenge, appeal or overturn the outcome of the arbitration, the finality and currency that such an award is compromised. The relative merits and demerits of court interference after the conclusion of arbitral proceedings will henceforth be examined.

The function of enforcing legally valid arbitration awards being an essential function that the court must perform, if a system of arbitration is to succeed and the obligation to recognize and enforce arbitral awards is not absolute, however. The Scholar, therefore, discuss in the following Section the grounds on which the courts may set an award aside or decline to recognize or enforce it.

### **Setting Domestic Awards aside and Refusing Recognition and Enforcement of Foreign Awards**

The judicial scrutiny of awards in various aspects for domestic as well as international arbitrations has been described below.

#### **Domestic Awards**

There are two ways that a failing party in a domestic <sup>[31]</sup> arbitration may challenge the award. First, the failure may bring an action in a competent court in the jurisdiction where the award was made to have the award set aside under Article 34 of the Model Law. Another way that the losing party in arbitration may challenge a domestic award is by entering a defense in a court action brought by the winner seeking recognition or enforcement of the award.

The new amendments firstly pursue to clarify the meaning of public policy under Sec. 34 of the 2015 Act regarding the extent of review that courts should enter in, which persisted a matter of concern for the last few years. Particularity after the decision in *ONGC v. Saw Pipes Ltd.* <sup>24</sup> and *ONGC v. Western Geco* <sup>25</sup>, the explanation to Sec. 34(2) (b) explained as an award which is against the Indian public policy, firstly, the award making was affected by fraud or corruption or in violating the provisions of Sec. 75 or Sec. 81, secondly, it contradicts or conflicts the fundamental policy of Indian law; thirdly, it contradicts the concepts of morality or justice. Furthermore, an explanation states that in order to avoid any doubts, in law of India law the fundamental policy has certain denial then it cannot appraise

dispute on merits. Awards in arbitrations only between Indian parties can be challenged on the ground of patent illegality but only if it is “on the face of the award” and without entering into a merits review and without re-appreciation of evidence.<sup>26</sup> A time limit has also been fixed to dispose of the application filed under sub-sec. (6) of Sec. 34 of the 2015 Amendment Act<sup>27</sup> to reduce the delay in the disposal of such applications <sup>[32]</sup>.

### **Foreign Awards**

Generally, the challenge to a foreign award will occur when the party that has succeeded in arbitration in one country applies to a court in another country for a judgment recognizing or enforcing the award. The other party may oppose the application by asserting <sup>32</sup>that one or more of the grounds for denying recognition or enforcement specified in article 36 of the Model Law or article 5 of New York convention are present <sup>[33]</sup>.

### **Enforcement of Foreign Arbitral Awards – It is Judicial Intervention**

The recognition and enforcement of arbitral awards in foreign nature are of fundamental importance in the arbitral process. Sub-sections (1) and (2) of Section 48 of 1996 Act, gives discretion power to the courts that they may refuse to enforce a foreign award or overrule the defense put up by a party even if such party has proved the existence of one of the grounds listed in this section. The ruling of the Supreme Court in *Badat & Co v. East India Trading Co* <sup>[34]</sup> stated that “foreign awards and foreign judgments based upon awards are enforceable in India on the same ground and in the same circumstances in which they are enforceable in England under the common law on the grounds of justice, equity and good conscience” In this case the supreme court *Venture Global Engineering v. Satyam Computer Services, Ltd* <sup>[35]</sup> broadly interpreted public policy considerations that were previously grounds for challenging only domestic arbitration awards are now appropriate grounds for challenging foreign arbitration awards and upheld a challenge in India to a foreign arbitration award .

### **Judicial Scrutiny of Awards: Error of Jurisdiction**

According to this rule, parties may challenge either the arbitral tribunal’s ruling because it lacked jurisdiction; or its award on the merits on the ground that it did not have jurisdiction and apply for an order that it does not affect award.

#### **Bhatia International Overruled**

But in recent cases, the Supreme Court is adopting a positive approach by distinguishing its decision from earlier cases. In *Dozco India (P) Ltd v. Doosan Infracore Co. Ltd* <sup>[36]</sup> Supreme Court held that when the substantive law of arbitration agreement is a foreign law as agreed by the parties, Part – I of the Arbitration and Conciliation Act, 1996 would not apply and thus limited the scope of judicial intervention in international commercial arbitration. In *Yograj Infrastructure Ltd.* <sup>[37]</sup> Supreme Court stated that “where the rules regulating arbitration and place of arbitration is foreign country then Part – I of the Arbitration & Conciliation Act, 1996 is excluded” and permitted the parties to exclude the applicability of the Part – I of the Act either expressly or impliedly, The effect of this judgment is that it limits the scope and application of Bhatia

International case <sup>[38]</sup> and Venture Global case <sup>[39]</sup>. The five-judge Bench of Supreme Court has overruled Bhatia International and Venture Global Cases in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc* <sup>[40]</sup>. (BALCO). ‘The Judgment on these points is clear and convincing, and ends two long-standing misconceptions: that the omission of the word “only” from 269Section 2 (2) of the Arbitration Act, 1996, was intended to make Part I of the Act applicable to arbitrations in which the seat is outside India, and that it is for the courts to “construe” the Act liberally to provide interim relief in aid of foreign-seated arbitrations’ <sup>[41]</sup>. The difficulty in enforcement of foreign awards that enlarging the application of Part- 1 of the Act to international arbitrations conducted outside India has been resolved by this judgment <sup>[42]</sup>

### Judicial Scrutiny of Awards

**Error of Law** The court can examine and scrutinize an award on a challenge where a serious irregularity or misconduct of the arbitrator is alleged. The error of law ground may facilitate a restricted right of appeal in enforcing the awards.

### Judicial Scrutiny of Awards: Public Policy Considerations

Section 34 of the Act provides limited grounds for challenging the award, and it is also accepted that the courts have no power to get into the merits of the dispute. Supreme Court in *Renu sagar Power Plant Co. Ltd. v. General Electric Co* <sup>[43]</sup> while establishing or formulating the title named ‘public policy’ in Section 7(1) (b) (ii) of New York Convention, applied the principles of private international law and stated that “an award would be opposing to public policy if the enforcement is against (i) fundamental policy of Indian law, or (ii) the interests of India; or (iii) justice or morality”. This was a narrower interpretation of the expression “public policy of India” in the context of enforcement of foreign awards. The imprecise meaning of international public policy continues to cause disagreement and even bewilderment among judges, arbitrators, and scholars. The overlapping categories of domestic, international and transnational public policies also risk unruly applications of the public policy exceptions. The diversity of terminology, increasing conflation of private international law and public international law conflate the already overlapping categories of public policy. For instance, the public policy against corruption exemplifies the coalescing international and transnational public policy <sup>[44]</sup>.

In *China*, in *Chongqing Baodao Pearl Co Ltd v. Chongqing Shapingba Mall Group Inc* <sup>[45]</sup> where one of the parties to the agreement was a Chinese company and the other was a foreign related company invested and controlled by Taiwanese and the Higher People’s Court of Chongqing province resisted enforcement of the award and on appeal the Supreme People’s Court considered it as domestic rather than foreign related reasoning that, because all the parties were registered in China, they were, therefore, Chinese entities and as such there is no foreign element. This ruling clearly shows that a JV entity or local subsidiary of a foreign company even if controlled by foreign investors considered as Chinese legal entities and therefore, obliged to enter into arbitration and comply with an award under the domestic arbitration regime.

In *Titan Corporation v Alcatel CIT SA* <sup>[46]</sup> in which an arbitral award was rendered in a dispute between a French company (Alcatel CIT SA) and two companies domiciled in the United States (Titan Corporation and Titan Africa Inc). The dispute troubled a telecommunications system to be installed in Benin. The arbitration clause mentioned to the International Chamber of Commerce Rules on Arbitration and appointed Stockholm as the place of arbitration. The sole English arbitrator bears a meeting to take evidence in Paris and accomplished the rest of work in England. Thus, meeting is not took place and no work was performed in Sweden. However, Stockholm had been chosen as the place of arbitration, both parties and the arbitrator regarded Swedish arbitration law as the law applicable to the arbitral proceedings. On application to set aside the award the court found procedural hindrance i.e., whether the court had jurisdiction over a challenge to the award and that the only connection of the arbitration with Sweden was the choice of Stockholm as a forum and the fact that the parties recognized Swedish arbitration law as the law applicable to the arbitral proceedings. The court wondered whether there was a Swedish judicial interest, which is a condition for Swedish courts to deal with a dispute. The court held that such judicial interest presupposes that the dispute has at least a minor connection with Sweden and concluded that there was no judicial interest and therefore, no Swedish jurisdiction over the dispute and hence refused to enforce the award. It is, however, clear that a mere reference to Swedish arbitration law in the parties’ submissions and the award is not sufficient to enforce it but, must create the necessary Swedish connection.

The Supreme Court in *Steel Authority of India Ltd v. J.C. Budharaja, Government and Mining Contractor* <sup>[47]</sup>, observed that “it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action.....” and further observed that “the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existent depends upon the agreement and his function is to act within the limits of the said agreement”. In *W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors* <sup>[48]</sup>, it was perceived that “If there is a certain term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of the jurisdiction” and in the case of *Bharat Coking Coal Ltd. v. Annapurna Construction* <sup>[49]</sup>, the court reiterated the legal position that “ There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power alone from what the parties have given him under the contract. If he has traveled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

### Judicial Scrutiny of Awards: Error of Law

The court can examine and scrutinize an award on a challenge where a serious irregularity or misconduct of the arbitrator is alleged. Conversely, the Model Law makes no reference to serious irregularity in article 34; instead, it provides an exhaustive list of circumstances whereby an award may be set aside. The error of law ground may facilitate a restricted right of appeal in enforcing the awards. This goes to the notion that a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with a force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.

### Summing up

In evaluating the judicial interpretation of international commercial arbitration the scholar has explored the various judicial decisions of the courts. The Supreme Court's judgment in *Saw Pipes*<sup>[50]</sup> expanded the concept of public policy to add that the award would be contrary to public policy if it was "patently illegal". The court distinguished *SAW Pipes* case from that of *Renusagar*<sup>158</sup> on the ground that the *Renusagar* judgment was in context of a foreign award, while the ratio of *SAW Pipes* would be confined only to domestic awards; and in the name of public policy, the court went on to re-appreciate the question of facts, mixed question of fact and law and refined question of law, which is most undesirable in international commercial arbitration, as it would lead to uncertainty, a factor which no businessman in international business transaction would like to have. The Supreme Court in its recent decision on the subject of setting aside an award on the ground of public policy under Section 34 in *Venture Global Engineering Vs. Satyam Computer Services Ltd* basing on the earlier judgment in *Bhatia International* held that Part I provisions are suggests by expressly or impliedly. Moreover, it cannot be inconsistent with Section 48 of the 1996 Act in applying sec34 and judgment-debtor cannot be disadvantaged his right to evoke the Indian public policy to set aside. Thus, the extensive definition of public policy could not agreed by taking foreign country award for enforcement. This judgment is contrary to the object and scheme of the New York Convention and also in violation of Article III of the Convention, in as much as it introduces an extra ground for challenging a foreign award. The decision is contrary to the intention of the Indian legislature and intervention in the *Satyam* case<sup>159</sup> on grounds of public policy is most unfortunate, as it does not take the decision of the three judges bench in *Renusagar* case.

The decision, in *Satyam* case, exposes foreign awards to challenge on merits on the ground that it is "patently illegal", notwithstanding the enforcement proceedings in any other jurisdiction. In effect, the decision uses a foreign award as a domestic award, if the execution of the award is to be done as per the laws of India.

There is no uniformity in national laws governing the applications and exercise of the right of appeal from or the power of review of arbitral decisions and awards. The above

case law analysis suggest that the courts often meddle in commercial arbitration, it is, however, unfair to say that they reflect, as a whole, the working relationship between the courts and arbitral tribunals. Whilst there is no doubt that such judgments are based on sound reason and are arguably required in the realm of the grey area that existed in the laws that lead us, the larger question that these judgments throw up remains open. That being whether parties would, using these judgments as precedents, be encouraged to try their luck before the courts, where systemic delays abound. policy' and to establish India as an international commercial arbitration destination, which is much desirable in the context of international trade policy. Basing on the research work carried out by the scholar, the scholar has summarized the entire research work and produced in the next following chapter. In the concluding chapter, the scholar has also come up with certain suggestions for effective enforcement of international commercial arbitration which is the need of the hour in the present day globalized economy.

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14. Rohit Moonka, Silky Mukherjee, Impact Of The Recent Reforms On Indian Arbitration Law, BRICS Law Journal, 2017, 4(1).
15. Ibid
16. Ibid
17. Durtnell R, Sons v. Secretary of State for Trade and Industry, 2000, 321.
18. Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951(1997), Brower v. Gateway 2000, Inc. 676 N.Y.S.2d

- 569, 1998.
19. The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement.”
  20. Supra note 24.
  21. James Miller, Partners Ltd v. Whitworth Street Estates Ltd, 1970, 583-603.
  22. Chartbrook Limited v. Persimmon Homes Limited, 2009, 38.
  23. Bhushan Steel Ltd v. Singapore International Centre and Anr IA No 11355/2009 in CS (OS) No, 2009.
  24. Nandan Biomatrix Limited v. D I Oils Limited Arbitration Application, 2007.
  25. Denel (Proprietary Limited) v. Bharat Electronics Ltd. 2010; 6:394.
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  28. Naval Gent Maritime Ltd vs. Shivnath Rai Harnarain 2000; 4:512.
  29. The Channel Tunnel Group vs. Balfour Beatty Construction Ltd & Ors. 1993; 1:64.
  30. NBCC Limited v. JG Engineering Pvt. Limited. 2010; 2:385
  31. Some awards have a ‘domestic’ nature, though they may involve international transactions or parties of different nationalities. For the enforcement and challenge of awards, it is the place of arbitration that makes them ‘domestic’. However, under the FAA certain awards made in the USA may be enforced or denied enforcement by US courts under the New York Convention, as if they were rendered in another country, if they bear significant relationships with another country (FAA, § 202); and that an award made in France may be enforced or denied enforcement by the French courts in the same manner as an award made in another country if the award ‘implicates international commercial interests’ (French Code of Civil Procedure, arts. 1492, 1502). For purposes of recognition and enforcement of awards under the Model Law, however, the distinction between ‘domestic’ and ‘foreign’ awards made valid
  32. In US, the courts of the view that whether the parties, by agreement, can enlarge the jurisdiction of a reviewing court so as to permit it to set aside awards for errors of law or because findings of factare not supported by sufficient evidence. Lapine Technology v. Kyocera Corp., 130 F. 3d 884 (9th Cir. 1997) with Chicago Typographical Union No. 16 v. Chicago Sun-Times Inc., 935 F. 2d 1501, 1991.
  33. 9 In US, the courts of the view that whether the parties, by agreement, can enlarge the jurisdiction of a reviewing court so as to permit it to set aside awards for errors of law or because findings of factare not supported by sufficient evidence. Lapine Technology v. Kyocera Corp., 130 F. 3d 884 (9th Cir. 1997) with Chicago Typographical Union No. 16 v. Chicago Sun-Times Inc., 935 F. 2d 1501, 1991.
  34. Badat, Co v. East India Trading Co AIR, 1964, 538.
  35. Ibid.
  36. Dozco India (P) Ltd v. Doosan Infracore Co. Ltd. 2011; 6:179.
  37. Yograj Infrastructure Ltd. 2011; 9:735.
  38. Supra Note 95.
  39. Supra Note 96.
  40. Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. 2012; 9:552
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  45. Chongqing Baodao Pearl Co Ltd v. Chongqing Shapingba Mall Group Inc. 2004; 8(2):44.
  46. Titan Corporation v. Alcatel CIT SA Case T-1038-05
  47. Steel Authority of India Ltd v. J.C. Budharaja, Government and Mining Contractor. 1999; 8:122
  48. WB. State Warehousing Corporation & Anr. V. Sushil Kumar Kayan & Ors. 2002; 5:679.
  49. Bharat Cooking Coal Ltdv. Annapurna Construction. 2003; 8:154
  50. Renuagar Power Plant Co. Ltd. v. General ElectricCo. AIR, 1994, 860.