ARBITRATION'S UNFINISHED BUSINESS: RETHINKING FINALITY, PUBLIC POLICY, AND JUDICIAL POWER IN INDIA

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ABSTRACT

Despite India's stated commitment to a pro-arbitration, minimal-interference regime, the post-award stage continues to witness expanding judicial engagement, raising fresh questions about the true meaning of arbitral finality today. This paper traces the contemporary trajectory of India's post-award framework under the Arbitration and Conciliation Act, 1996, examining how the doctrine of public policy has been narrowed on paper but continues to permit substantive review in practice, how arbitrability has steadily expanded the range of disputes courts consider fit for judicial scrutiny, and how recent judicial recognition of a power to modify awards signals a further shift toward supervisory control. It also addresses the unresolved scope of remission provisions, which leave tribunals dependent on courts even for correcting their own awards. Situating these developments against France's comparatively restrained approach to international public policy, the paper argues that India's current framework is structurally, not merely judicially, dependent on courts, since tribunals lose all authority once an award is rendered.

Keywords: Arbitral finality; public policy; patent illegality; 246th Law Commission Report; arbitrability; Section 34(4) remission; judicial modification of awards; functus officio; pro-enforcement regime.

INTRODUCTION

A central tenet of arbitration is the finality of the arbitral award, which is the decision delivered by the arbitral tribunal that conclusively determines the parties' rights and obligations. [1] While the Indian arbitration framework adopts a generally pro-arbitration approach and seeks to minimise judicial interference, the Arbitration and Conciliation Act, 1996 (the **"Act"**) recognises limited grounds upon which courts may intervene, including procedural irregularities, jurisdictional defects, and conflicts with public policy. This reflects the inherently paradoxical relationship between arbitral tribunals and national courts: arbitration seeks autonomy from judicial processes, yet remains dependent upon courts for legitimacy, procedural assistance, and enforceability. This supervisory and facilitative role of courts is reflected in provisions such as Sections 9 and 27 of the Act, which empower courts to grant interim measures and assist in evidentiary processes.[2] As observed, *"The paradox is that arbitration is best suited to tailored procedures, proportionate to the matters in dispute and it has the ability to be adopted at time which avoids escalation."*[3]

Against this backdrop, the paper examines the evolution, structural tensions, and continuing judicialization of India's post-award arbitral framework.

PART I

The Post-Award Intervention Regime

(i) Public Policy as a Ground for Challenging Arbitral Awards

The Act is substantially modelled on the UNCITRAL Model Law and the New York Convention, both of which embody a limited-intervention and pro-enforcement framework. Article V(2)(b) of the New York Convention permits refusal of enforcement where recognition of the award would be contrary to the "public policy of that country", while deliberately leaving the expression undefined and allowing individual States to develop their own standards of

[1] AMLEGALS, "Ground for Setting Aside Arbitral Award Under Section 34," AMLEGALS (Aug. 17, 2021), https://amlegals.com/ground-for-setting-aside-arbitral-award-under-section-34/.
[2] Arbitration and Conciliation Act, 1996, §§ 9, 27 (India).
[3] Shubham Kaushal & Vijay Purohit, "The Arbitration and Conciliation (Amendment) Act, 2015: Making India an Arbitration Friendly Seat," 3 RGNUL Student Research Review 1 (2016).

public policy. [4]

Similarly, Sections 34(2)(a) and (b) of the Indian statute, corresponding to Article 34 of the Model Law, permit challenges to arbitral awards only on limited procedural and substantive grounds. Despite this statutory framework, Indian jurisprudence gradually expanded judicial intervention through an evolving interpretation of "public policy".

The foundational position was laid down in *Renusagar Power Co. Ltd. v. General Electric Co.*, where the Supreme Court construed public policy narrowly and held that enforcement of a foreign award could be refused only if it was contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India, or; (iii) justice or morality. The Court further clarified that mere "contravention of law" would not attract the public policy exception and emphasised that courts should exercise greater restraint in matters involving a foreign element. [5]

This pro-enforcement approach, however, underwent a substantial shift in *ONGC Ltd. v. Saw Pipes Ltd.*, where the Supreme Court widened the ambit of public policy by introducing the doctrine of *"patent illegality"*.[6] The Court held that an award patently violating statutory provisions would be contrary to public interest, thereby permitting courts to review the merits of domestic arbitral awards under the guise of public policy. Subsequently, in *McDermott International Inc. v. Burn Standard Co. Ltd.*, the Court clarified that such illegality must go "to the root of the matter" and be so unreasonable as to "shock the conscience of the court".[7]

The expansion of judicial review was further aggravated where the doctrine of "patent illegality" was extended even to foreign awards under Section 48.[8] This significantly increased judicial interference and enabled parties to reopen arbitral disputes on alleged violations of Indian law.

- ***The 246th Law Commission's Response to Judicial Expansion of Public Policy***

In response to the expansive interpretation developed through ONGC Ltd. v. Western Geco

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[4] Amogh Srivastava & Mathilde Adant, "National or International Public Policy: The Perfect Fit for International Arbitration in India?—Drawing Inspiration from the French Approach," 7 Indian Arbitration Law Review 37 (2025).
[5] Renusagar Power Co. v. Gen. Elec. Co., AIR 1994 SC 860 (India).
[6]ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705 (India).
[7] McDermott Int'l Inc. v. Burn Standard Co. Ltd., (2006) 11 SCC 181 (India).
[8]Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300 (India); Venture Global Eng'g v. Satyam Computer Servs. Ltd., (2008) 4 SCC 190 (India).

International Ltd. and related decisions, the 246th Law Commission of India Report sought to recalibrate the balance between arbitral finality and judicial supervision. The Commission proposed a statutory definition of public policy based on Renusagar and recommended excluding the phrase "interests of India" owing to its susceptibility to interpretational misuse. Following Western Geco, the Commission issued a Supplementary Report in February 2015, criticising the incorporation of the Wednesbury principle of reasonableness[9] within the phrase "fundamental policy of Indian law", since it enabled courts to determine whether an arbitral conclusion was one "no reasonable person would have arrived at". According to the Commission, such a standard effectively permitted merits-based review, contrary to both the objectives of the Arbitration Act and prevailing international arbitral practice. Consequently, it proposed an explanation to Section 34 clarifying that "the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."

These recommendations substantially shaped the 2015 amendments, which narrowed the scope of public policy by limiting it to cases involving fraud, corruption, contravention of the fundamental policy of Indian law, or conflict with the "most basic notions of morality or justice". The amendments further clarified that courts cannot undertake review on the merits while adjudicating challenges under Section 34. This position was where the Supreme Court restored the Renusagar standard and held that public policy would arise only in exceptional circumstances that "shock the conscience of the Court". [10]

Thus, while Indian arbitration law has progressively narrowed the doctrines of public policy and patent illegality in order to align with international standards, the continued judicial engagement with concepts such as perversity, irrationality, and patent illegality reflects the enduring tension between arbitral autonomy and judicial supervision.

- ***Comparative analysis with France***

A comparative analysis with France further highlights the evolving tension between arbitral finality and judicial supervision within the Indian framework. French arbitration law is widely regarded as one of the most arbitration-friendly legal systems globally and adopts a distinctly

[9]Associated Provincial Picture Houses Ltd. v. Wednesbury Corp., [1948] 1 K.B. 223 (C.A.).
[10]Ssangyong Eng'g & Construction Co. v. NHAI, (2019) 15 SCC 131 (India).

narrow conception of public policy in the post-award stage.[11] The French framework expressly distinguishes between domestic and international public policy under separate provisions of the French Code of Civil Procedure, with the determining factor being whether the dispute concerns "international trade interests", irrespective of where the award is rendered. In the context of international arbitral awards, French courts restrict intervention to cases involving a characterised violation of international public policy, such as serious instances of fraud, corruption, or fundamental procedural unfairness.[12]

In contrast, the Indian approach has historically remained susceptible to broader judicial interpretation, particularly through the doctrines of public policy and patent illegality.

Although the 2015 amendments and subsequent decisions substantially narrowed the scope of intervention, the continued judicial engagement with concepts such as perversity, irrationality, and patent illegality continues to create uncertainty regarding the permissible boundaries of review. From the perspective of international commercial parties and foreign investors, such uncertainty carries significant implications. Commercial actors entering cross-border transactions structure their dispute resolution mechanisms on the expectation of predictability, enforceability, and limited judicial interference, particularly in jurisdictions claiming adherence to the UNCITRAL Model Law and the New York Convention. Subjecting international arbitral awards to expansive and domestically contingent interpretations of public policy risks undermining commercial certainty and diluting India's credibility as an arbitration-friendly jurisdiction.

Consequently, greater statutory and doctrinal clarity becomes essential in ensuring consistency within India's post-award framework. The French conception of narrowly tailored international public policy demonstrates that judicial supervision can coexist with arbitral legitimacy without permitting courts to undertake substantive reconsideration of arbitral outcomes. Such an approach better accommodates the interests of arbitral parties, institutions, and international commercial users, while simultaneously preserving the State's legitimate interest in preventing enforcement of awards tainted by fraud, corruption, or violations of fundamental justice.

[11] M. Scherer, "Long-Awaited New French Arbitration Law Revealed," Kluwer Arbitration Blog (Jan. 15, 2011), https://arbitrationblog.kluwerarbitration.com/2011/01/15/long-awaited-new-french-arbitration-law-revealed/.
[12] French Code of Civil Procedure, art. 1506 (1981).

(ii) Arbitrability and arbitral awards

The concept of arbitrability under the Indian arbitration regime has evolved primarily through judicial interpretation. In *Booz Allen & Hamilton v. SBI Home Finance Ltd.*, the Supreme Court laid down the distinction between rights in rem and rights in personam and identified three facets of arbitrability, namely whether the dispute is capable of adjudication through arbitration, whether it falls within the arbitration agreement, and whether it falls within the scope of reference before the tribunal. [13]The jurisprudence was subsequently expanded finally through *Vidya Drolia v. Durga Trading Corporation*, where the Court formulated the four-fold test concerning rights in rem, erga omnes effect, sovereign functions, and statutory exclusion.[14]

However, the more significant aspect of this jurisprudence lies in the criticism surrounding it. The whole purpose of bringing ADR into the picture was to limit the scope of court litigation with the will of the parties. Arbitration has always been known for its party autonomy and out-of-court resolutions, but India is far from achieving that feat.[15] The evolution of arbitrability in India demonstrates how courts gradually expanded their supervisory authority over arbitral proceedings under the guise of determining jurisdictional competence.[16] The criticism against *Booz Allen* is particularly important because the judgment completely ignores the principle of *kompetenz kompetenz* that has been furnished under section 16 of the A&C Act and further started the trend of judicial interference in arbitration. Rather than merely examining the validity of the arbitration agreement under Section 8, courts increasingly began deciding whether the dispute itself ought to be resolved through arbitration. This considerably widened judicial intervention at both the pre-reference and post-award stages.

Even while expanding the scope of arbitrable disputes involving fraud, commercial disputes, landlord-tenant disputes, and intellectual property claims, Indian courts continue to retain substantial authority in determining the permissible boundaries of private adjudication.

The jurisprudence on arbitrability has remained in a constant state of judicial recalibration,

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[13] Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd., (2011) 5 SCC 532 (India).
[14] Vidya Drolia v. Durga Trading Corp., (2021) 2 SCC 1 (India).
[15] Poonam Rawat & Rahul Kumar, "Scope of 'Arbitrability' and 'Public Policy' as a Ground for Setting Aside an Arbitral Award Under Section 34 of the Indian Arbitration and Conciliation Act, 1996," 45(1)(V) Sambodhi Indological Research Journal of L.D.I.I. (2022).
[16] Ibid.

where courts repeatedly broaden and narrow the contours of arbitrable subject matter through evolving interpretative standards, thereby retaining continuing control over the intensity and scope of arbitral autonomy itself.

(iii) Judicial Power to Modify Awards Under Section 34.

The scope of judicial interference under Sections 34 and 37 was recently reconsidered by the Supreme Court in *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, where the Court addressed whether courts possess the authority to modify arbitral awards and, if so, to what extent. [17]While the Supreme Court acknowledged that permitting courts to modify awards may invite judicial interference with the merits of the dispute, it nevertheless justified limited modification on grounds of efficiency, cost reduction, and avoidance of unnecessary re-arbitration. Although modification powers are described as "limited," the Court recognised implied judicial authority to vary awards, sever portions of awards, rectify manifest errors, and even modify post-award interest in certain circumstances. The difficulty lies in the fact that such exceptions are inherently elastic and are susceptible to broad interpretation and may become a gateway for further judicial scrutiny.[18]

For instance, in a large infrastructure dispute between a multinational construction corporation and a small Indian subcontractor, a court may justify modification of post-award interest or sever portions of the award on grounds of "efficiency" or "justice." However, while the larger commercial party may possess the financial and procedural capacity to sustain prolonged Section 34, Section 37, and constitutional proceedings, the smaller party may effectively lose the very benefit of arbitral finality through continuing litigation costs and delays. Simultaneously, arbitral tribunals and institutions face increasing judicial oversight over awards already rendered, national courts continue expanding supervisory authority through evolving exceptions, and the State retains substantial control over defining the permissible limits of arbitral autonomy under the guise of efficiency and procedural fairness. Consequently, for both domestic and international users of arbitration, what is presented as a narrow corrective mechanism increasingly risks operating as continuing judicial reconsideration of arbitral outcomes.

[17] Gayatri Balasamy v. ISG Novasoft Technologies Ltd., (2014) 11 SCC 249 (India).
[18]Asialaw, "India Supreme Court Clarifies Scope of Judicial Interference Under Sections 34 and 37 of Arbitration Act," Asialaw (2020), https://www.asialaw.com/NewsAndAnalysis/india-supreme-court-clarifies-scope-of-judicial-interference-under-sections-34-a/Index/2322.

(iv) The Jurisprudential Scope of Remission Under Section 34(4)

Section 34(4) permits a court, while hearing an application for setting aside an arbitral award under Section 34, to adjourn the proceedings and remit the matter back to the arbitral tribunal in order to eliminate grounds that may otherwise result in the award being set aside. The provision is intended to preserve the award rather than annul it entirely. However, courts have clarified that the scope of this power is limited.[19]

Nevertheless, the significance of Section 34(4) lies less in its curative objective and more in what it reveals about the Indian post-award framework. Even after the arbitral tribunal has rendered a supposedly final determination, the continuation, preservation, or correction of that award remains dependent upon judicial supervision. The tribunal itself cannot independently revisit defects within the award; it may do so only after a court permits remission. In effect, the arbitral process remains structurally incomplete without judicial involvement.

Further, the power under Section 34(4) cannot be used in such a manner that it nullifies the provisions of Section 34. By exercising power under Section 34(4), a court cannot permit the arbitrators to change its findings or reverse the same because the Act does not permit the arbitrator to review/change its own award.Thus, even while remission seeks to preserve arbitral awards, the tribunal's authority remains confined within limits defined and supervised by courts themselves.

The ambiguity surrounding the true scope of Section 34(4) further intensifies this dependence. *"What kind of order is a court required to make while remitting the matter back to the award? Is the court's order of remitting the matter to the arbitrator under Section 34(4) appealable, which it appears to be not, going by the plain language of Section 37(1)(c)? What is the remedy available once the tribunal's order is passed on remand? Can the party making the application under Section 34(4), challenge the order passed by the arbitrator on remand?"* The Act provides no clear answer. [20]What begins as a supposedly narrow supervisory review under Section 34 may continue through remission proceedings, modification jurisdiction, Section 37

[19] Arbitration and Conciliation Act, 1996, § 34(4) (India).

[20] Cyril Amarchand Mangaldas, "Determining the Lakshman Rekha of Section 34 of the Arbitration and Conciliation Act," Cyril Amarchand Blogs (July 20, 2023), https://disputeresolution.cyrilamarchandblogs.com/2023/07/determining-the-lakshman-rekha-of-section-34-of-the-arbitration-and-conciliation-act/.

appeals, and ultimately constitutional review under Article 136.[21]

Thus, the proposed Section 34A introducing an Appellate Arbitral Tribunal should not be adopted, as it risks converting arbitration into a multi-tier appellate mechanism contrary to the principle of arbitral finality. Rather than reducing judicial dependence, it would merely add another layer of review before parties ultimately proceed to Sections 37 and Article 136 challenges, thereby increasing costs, delay, and procedural complexity without meaningfully improving enforcement or efficiency.

PART II

Suggested Reforms to the Arbitration Framework

Accordingly, a more balanced post-award framework may require three broad reforms:

(i) introducing a narrowly tailored post-award corrective power for arbitral tribunals themselves despite the functus officio limitation under Section 32;

ii) restructuring remission and enforcement proceedings under Sections 34, 34(4), and 36 to reduce excessive judicial dependence while preserving limited supervisory review within strict timelines; and

(iii) further narrowing public policy and setting aside standards in line with internationally accepted norms followed in jurisdictions such as France and Singapore, thereby promoting greater consistency, finality, and commercial certainty in arbitral enforcement.

Firstly, under Section 32 of the Arbitration and Conciliation Act, 1996, the arbitral tribunal becomes *functus officio* once the award is rendered, meaning that it effectively ceases to possess any substantive authority over the dispute except within the narrow confines of Section 33. Consequently, the entire burden of correction, preservation, modification, and enforcement shifts to courts under Sections 34, 36, and 37. A possible reform would therefore be to confer a narrowly tailored post-award review power upon tribunals themselves in limited circumstances, such as curing manifest procedural defects, computational inconsistencies, ambiguities in reasoning, or severable portions of awards before parties are compelled to initiate prolonged Section 34 proceedings. While an unrestricted review mechanism would

[21] Ibid.

undoubtedly dilute arbitral finality, a strictly limited corrective jurisdiction exercised within fixed timelines may better preserve party autonomy of arbitral proceedings.

Similarly, the 2015 Amendment attempted to reduce strategic obstruction of awards by removing the automatic stay previously triggered upon filing a Section 34 application and requiring parties to separately seek a stay under Section 36. This marked an important shift towards a pro-enforcement framework consistent with the UNCITRAL Model Law and New York Convention philosophy. However, despite this correction, enforcement in India continues to remain structurally dependent upon prolonged judicial determination through Section 37 appeals and constitutional review under Article 136.

Secondly, a further reform to Section 34(4) should permit courts, upon identifying limited defects such as patent illegality or procedural irregularity, to remit the matter back to the tribunal itself within a narrowly supervised framework instead of moving directly towards setting aside proceedings. However, such remission should operate within strict timelines and limited judicial supervision, similar to the court's facilitative role under Sections 9 and 27, so that the corrective process does not itself become another layer of prolonged litigation. This would preserve arbitral autonomy while reducing excessive judicial dependence in post-award proceedings.

Lastly, although Indian jurisprudence has gradually attempted to narrow the scope of Section 34, the framework still remains structurally broader than internationally accepted standards of public policy review. A more balanced approach would be to confine setting aside grounds primarily to internationally recognised concerns such as fraud, corruption, procedural unfairness, or violations of fundamental justice. Jurisdictions such as France and Singapore adopt a far more limited-intervention approach, where courts avoid reassessing facts or merits under the guise of public policy review and intervene only in exceptional circumstances. Such an approach better preserves certainty, finality, and commercial confidence in arbitration.

Although a universally accepted standard of public policy remains underdeveloped, increasing reliance upon internationally harmonised recommendations and narrowly construed public policy standards may promote greater consistency, predictability, and uniformity in the interpretation of enforcement-related judicial intervention across jurisdictions.[22]

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[22]Manupatra, "Arbitration," Manupatra Round Up, https://manupatra.com/roundup/326/articles/arbitration.pdf/.

CONCLUSION

In conclusion, India's post-award arbitral framework continues to struggle in maintaining a true balance between arbitral finality and judicial intervention. While judicial supervision remains an important feature of the Indian legal system, the larger issue appears to be structural and legislative rather than purely judicial. The present framework places excessive dependence on courts because arbitral tribunals become functus officio after rendering an award and lack meaningful authority to cure defects themselves, resulting in prolonged judicial scrutiny through Sections 34, 37, and constitutional review. Accordingly, the more effective solution lies in legislative reform that confers narrowly tailored corrective powers upon arbitral tribunals, restructures remission and enforcement proceedings under Sections 34(4) and 36 within strict supervisory timelines, and further narrows public policy review in line with internationally accepted standards followed in jurisdictions such as France and Singapore. Such reforms would better preserve arbitral autonomy, commercial certainty, and the finality that arbitration fundamentally seeks to achieve.