
JUDICIAL INTERVENTION IN INTERNATIONAL COMMERCIAL ARBITRATION: RHETORIC VERSUS REALITY

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ABSTRACT

In this paper, we discussed about the Arbitration and Conciliation Act, 1996 and its further amendments and how judicial intervention has been made in international commercial arbitration by the Indian judiciary. Focusing towards the legislative reforms in order to achieve the goal of minimum Judicial intervention. When courts used the given ambiguities in the statute to intervene in an out-of-court settlement dispute. Along with that, a comparative perspective has also been given with Singapore, the United Kingdom, and Hong Kong, known for their arbitration settlement and how their Courts look into the awards. By putting some suggestions to bridge this gap between the practice and aspirations.

RESEARCH METHODOLOGY

The paper focuses on the doctrinal research methodology with the help of the secondary sources, making them the primary basis of our research. With the usage of academic literature, in which we have journal articles and commentaries, using them thoroughly to arrive at the main topic of our paper, which is judicial intervention in arbitration. Landmark judicial judgments that shaped the working of awards. The methodology helped in the formation of the conclusion and the given recommendation.

INTRODUCTION

In the Arbitration proceeding, courts are not the center of the stage like the traditional court setting, but they act as the last resort, mainly as a periphery. Given that this principle has been incorporated in the UNCITRAL Model Law on International Arbitration¹ implicitly mentioned in the New York Convention of 1958 and adopted worldwide in arbitration friendly jurisdiction.

India, after opening its economy in the 1990s, enacted the Arbitration and Conciliation Act, 1996 (referred to as the 1996 Act), which is in consonance with the UNCITRAL Model Law. The purpose of this statute is to make India as arbitration friendly, which is effective, flexible, less biased and with minimum judicial interference, purported in the Statement of Objects and Reasons of the Act.

But with time, some gaps have emerged in the practice and in the law where Courts have taken divergent views and have expanded domestic arbitration to the foreign seated proceeding through the given exception in the statute itself.

I. THE PRE-AMENDMENT ERA: Judicial overreach and the Bhatia syndrome

The Arbitration Act has been modelled around the UNCITRAL Model Law, making it go along with the international setting. Making the judiciary only the support system and not the active one in the award, this can be seen through Section 5 of the act, which expressly mentions judicial intervention only in the areas specifically mentioned in the statutes. But this has not

¹ United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (as amended 2006), UN Doc A/40/17, Annex I.

been seen in the practical scenario.

Bhatia International V. Bulk training S.A. (2002),² interpreted Section 2(2), which is part of Part I, saying that the Act shall apply 'where the place of arbitration is in India'. Aligned with Part I, which is about the India-seated arbitration in line with the territorial basis of international arbitration jurisprudence. But the Supreme Court interpreted that it would apply to all the arbitration proceeding exceptions being implied exclusion by the parties themselves.

Reason given by the Court that omission of the word "only" in S.2(2), which is being provided in the UNCITRAL Model Law, makes the exclusion in the 1996 Act inclusive rather than being restrictive. Making one commentator aptly remarked this decision by the court as 'unlimited jurisdiction' to intervene in the foreign seated arbitrations. This judgment has been applied in other cases, such as in National Agriculture Co-op Marketing Federation India Ltd. v. Gains Trading Ltd. (2007)³ where SC accepted the judgment of Bhatia and held that choosing only the foreign seat of arbitration will not exclude Part I of the Act.

This case led to the intervention of the judiciary in the proceedings. The epitome came with the case Venture Global Engineering v. Satyam Computer Services Ltd. (2008)⁴ in which SC held that S.34 of the 1996 Act, which relates to the mechanism of setting aside the arbitration awards, would also apply to foreign-seated arbitration unless excluded. Meaning that an arbitration seat in foreign could be challenged and set aside as if it were a domestic award. This kind of judgment completely blurred the line between the domestic and international arbitration that the 1996 Act enacted.

While Bhatia Case mentioned that Part II is for the foreign awards, and hence Part I should not apply to them. The Venture Global case misinterpreted this distinction. Both these cases made parties with an Indian nexus subject to the Indian court supervision, regardless of the parties' own choice and institutional laws. Making it a disproportionate share for the foreign investors.

II. THE POST-AMENDMENT LANDSCAPE: GRADUAL RECALIBRATION AND ITS LIMITS

With 2009 onwards, courts in India revived the arbitration principles which had been

² Bhatia International V. Bulk training S.A. (2002) 4 SCC 105

³ National Agriculture Co-op Marketing Federation India Ltd. v. Gains Trading Ltd. (2007) 5 SCC 692

⁴ Venture Global Engineering v. Satyam Computer Services Ltd. (2008) (1) SCLAE 214

marginalized by the Bhatia case, especially in the seat theory and the presumption linking curial law to the law of the seat of Arbitration. Along with that, legislative amendments are also being made to make India arbitration friendly as it's the need of the hour with the growing private and foreign investment in India.

In the DSG Realtors Pvt. Ltd. v. Realogy Corporation (2009)⁵ applied the new ground of presumption which is given in the National Thermal Corporation v. Singer Company (1992)⁶ To find the implied exclusion of Part I, the curial law is presumed to be the law of the seat of arbitration, making it in harmony with the international jurisprudence.

Even in the suit in Dozco India P. Ltd v. Doosan Infracore Co. Ltd. (2010)⁷ where they have applied the NTPC v. Singer presumption of the curial law, saying that seat of arbitration was Seoul hence the curial law was South Korean law and this is what is meant by 'express' exclusion of Part I. hence this made India closer towards the internationally claimed position that the designation of a foreign seat carries and implied exclusion of supervisory jurisdiction of SC.

The final overruling of Bhatia case came with the Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc. (BALCO) (2012)⁸ which led to Part I of the Act (1956) will not apply to the foreign seated arbitration. Making the territorial principle, the seat theory resorted to the Indian law.

III. LEGISLATIVE REFORMS: The 2015, 2019 and 2021 Amendments

The 2015 Amendments made the BALCO position into the S.2(2) by amending it, saying that Part I does not apply to the foreign seated arbitrations, making Bhatia International and Venture Global jurisprudence not applicable anymore. Along with that, it curtailed the ground of 'Patent illegality' under S.34, making it applicable only to the domestic law, hence narrowing the most commonly used challenge in the arbitral award.

Now, the 2019 Amendments come with institutional reforms enacting the Arbitration Council of India, and those Section 11 applications for the arbitrator appointment in international

⁵ DSG Realtors Pvt. Ltd. v. Realogy Corporation, (2009) (Delhi High Court, India)

⁶ National Thermal Corporation v. Singer Company (1992) 3 SCC 551

⁷ M/S Dozco India P. Ltd v. Doosan Infracore Co. Ltd. (2010) AIR SCW 7007

⁸ Bharat Aluminium Company v. Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552

commercial arbitration are to be routed through the SC, along with encouragement towards arbitral institutions for this purpose. Timeframe has also been made express that for completion of the arbitral proceeding twelve months, which can be extendable to eighteen months, given the party's consent. If further extension is needed, then the court's permission is needed. This deals with the main issue of the Indian judiciary of tactical delays.

Amendments in the 2019 come up with the targeted reforms, which include the restriction of automatic stays of arbitral awards, setting aside applications under Section 34. Earlier, only filling of the S.34 application used to suspend the enforcement of the Section 36 award, but now this can be done only when the court is prima facie satisfied that the contract was made through fraud or corruption. Setting the threshold for the constraints by the award debtors to use the Section 34 application on the basis of delay mechanisms.

The improvement in the Indian arbitration forum can be seen through these amendments. As, in *Vijay Karia v. Prysmian Cavi E Sistemi SRL* (2020)⁹, the Supreme Court reaffirmed the principle of non-interference in enforcement proceedings and imposed costs for frivolous objections.

IV. PERSISTING PROBLEMS AND THE GAP BETWEEN RHETORIC AND REALITY

Even with the legal changes mentioned earlier, there's still a big difference between India's promise of limited court intervention and what's actually happening. Structural issues are still affecting the efficacy of the Indian arbitration system.

i. The Public Policy Conundrum

One major hurdle remains the ongoing ambiguity in how courts interpret 'public policy' when deciding whether to uphold or overturn arbitration awards. The Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co.* (1994)¹⁰ had laid down a narrow construction, restricting the interpretation of public policy only to sovereignty and integrity of India, "the fundamental policy of Indian law" and "just standards of morality". This was departed from, however, in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003)¹¹, where the

⁹ *Vijay Karia v. Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1

¹⁰ *Renusagar Power Co. Ltd. v. General Electric Co.* (1994) Air SCC 860

¹¹ *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) AIR SC 2629

expression was expanded to include “patent illegality”. This allowed intervention by courts on the merits of an award under the guise of an otherwise expansive inquiry into public policy. This position was sought to be restored via subsequent decisions such as *Shri Lal Mahal Ltd. v. Progetto Grano Spa* (2013)¹² and later on, through the 2015 Amendment, which statutorily limited patent illegality to domestic awards only. However, the mischief created by *Saw Pipes* jurisprudence still continues to linger in ambiguity.

Another area of continued difficulty is the phrase ‘contrary to the fundamental policy of Indian law’, which continues to be unabashedly open-textured, and allows for substantive attacks on the award under the guise of arbitral tribunals’ findings of law or fact. Such uncertainty allows for broad judicial discretion, inconsistent interpretations across High Courts and ultimately, creates the unpredictability that parties attempt to avoid by opting for arbitration in the first place. A lack of clarity regarding India’s international public policy further complicates matters when dealing with foreign awards. Article V(2)(b)¹³ of the NY Convention allows refusal of enforcement if it is “contrary to the public policy of that country”, a clause notoriously open to wildly varying interpretation and which Indian courts have not always interpreted with the required degree of restraint.

ii. Procedural Delays and the Appeal Architecture

The second ground for structural malfunction arises from the routes available for challenging orders of courts dealing with arbitration matters. If the listing of orders appealable under Section 37 of the 1996 Act was kept deliberately short to preclude the judiciary from meddling with the arbitral process too much, the Supreme Court’s opening of the floodgates to revisional jurisdiction under Section 115 of Code of Civil Procedure has gutted the purpose of Section 37. By holding in both *Nirma Ltd. v. Lurgi Lentjes Energietechnik GmbH* (2002)¹⁴ and *ITI Ltd. v. Siemens Public Communications Network Ltd.* (2002)¹⁵ that the bar on second appeals under Section 37 did not also take away the jurisdiction of High Court to entertain a revision, it has effectively allowed a party to keep fighting till the cows come home. It is difficult to avoid the conclusion that parties can litigate even after a concluded Section 37 appeal,

¹² *Shri Lal Mahal Ltd. v. Progetto Grano Spa* AIR ONLINE (2013) SC 191

¹³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention].

¹⁴ *Nirma Ltd. v. Lurgi Lentjes Energietechnik GmbH* AIR (2002) SC 3695, 2002 (5) SCALE 10

¹⁵ *ITI Ltd. v. Siemens Public Communications Network Ltd.*, (2002) 5 SCC 510

rendering a farce of the finality sought to be introduced by the 1996 Act.

Delay is further entrenched by the way in which Section 34 application is used as a tactical weapon. The 2021 Amendment removed the automatic stay of awards pending challenge, which was a welcome development, but the filing of a setting-aside application still introduces significant delay because courts simply take a long time to dispose of these cases. India's judiciary is carrying a huge backlog of pending cases, and in that environment, even the most well introduced statutory deadlines tend to remain aspirational.

The appointment process also continues to cause problem. The 2019 Amendment addressed some of the concerns by allowing arbitral institutions to handle appointments and by prescribing sixty-day timelines, but the fundamental question of whether Section 11 orders are judicial or administrative in nature has never been definitively resolved. Parties who want to delay the constitution of a tribunal still finds ways to do so, and continue to exploit procedural ambiguities that courts have not always been firm in rejecting.

iii. The Execution Gap

There is also a problem that arises at the execution stage. Even where an award survives challenge and is declared enforceable, its prompt satisfaction is far from assured. Award-debtors resist execution in every way they can, challenging attachment orders, raising technical objections to the mode of execution, seeking adjournments on the promise of voluntary compliance that never materialises, and so on. Where the award debtor is a public sector-entity, the difficulty multiply, because government bodies enjoy procedural protection and immunities that create additional layers of friction. For foreign awards, the two step process of obtaining a declaration of enforceability under Section 48 before pursuing execution as a decree introduces delays that are fundamentally inconsistent with the purposes of arbitration, and conflicting interpretations across High Courts regarding the execution procedure compound the jurisdictional uncertainty faced by award creditor.

iv. Institutional Underdevelopment

The story of institutional arbitration in India is similarly disappointing. The 2019 Amendment envisaged the creation of the Arbitration Council of India as the cornerstone of a reformed institutional framework, but the council has still not achieved the standing or operational

capacity needed to make a real difference. The continued dominance of ad-hoc arbitration perpetuates problems of inconsistency and delay.

V. COMPARATIVE STUDIES:

i. India and Singapore

The situation in Singapore provides a useful point of comparison, as the two nations have more in common than is widely acknowledged. Similar to India, Singapore is a common law jurisdiction and has an arbitration law modelled on the UNCITRAL Model Law. Singapore sees itself as Asia's natural destination for international commercial dispute resolution. And yet, when the Singapore High Court was asked in *Sui Southern Gas*¹⁶ to set aside an award on the grounds that it was perverse, manifestly unreasonable, and irrational (three of the many formulations for judicial review of administrative decisions in that country), it refused to get involved. The court determined that setting aside under the International Arbitration Act is exhaustive and cannot be supplemented by importing administrative law. As Garg and Srivastava (2016) note, the court correctly distinguished between administrative decisions subject to judicial review as exercises of public power, and arbitral awards grounded in private agreement. When faced with a similar issue, the Singapore Court of Appeal followed the suit in *L W Infrastructure Pte Ltd. v. Lim Chin San Contractors Pte. Ltd.* (2012)¹⁷. The result of this steady diet of judicial restraint has been commercially significant, Singapore has managed to become the go-to location for international arbitration among Asian entities, a feat India hasn't matched, given its geographical, legal and commercial position.

The Law Commission of India acknowledged in the supplementary to the 246th Report¹⁸ that India's reputation as an 'arbitration unfriendly regime' is in stark contrast to that of Singapore that considered 'investor-friendly' and an ideal seat for international arbitration.

ii. India and the United Kingdom

The UK's Arbitration Act of 1996 and India's Arbitration and Conciliation Act of 1996 were passed in the same year, and both drew inspiration from the UNCITRAL Model Law. Apart

¹⁶ *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] SGHC 62

¹⁷ *L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal* [2012] SGCA 57

¹⁸ Law Comm'n of India, Report No. 246, Amendments to the Arbitration and Conciliation Act, 1996 (Aug. 2014).

from that, the resemblance mostly ends. Unlike the Indian legislation, born from a tumultuous legal landscape, the UK's Act benefited from a strong, collaborative legislative approach, prioritizing a self-sufficient arbitration system with minimal judicial intervention. Section 1 of the UK Act states its basic principles unambiguously. Arbitration is meant to resolve disputes in a manner that is fair to the parties and that is also efficient. Further, parties are free to conduct their arbitration as they see fit, and courts should not intervene except in the circumstances envisaged by the Act. This simple restatement of arbitration philosophy, which is missing from India's 1996 Act in anything approaching similar form, has served English courts well. This has served as a key principle, encouraging a more cautious approach. Where the UK Act shines compared to India's is in its definition of the seat of arbitration. Section 3 of the UK Act resolves the ambiguity we grappled with in *Bhatia International* by defining the seat of arbitration directly.

The public policy exception illustrates a stark judicial cultural gap. English courts have consistently held that enforcement will be refused on public policy grounds where doing so would be wholly offensive to any reasonable, fully informed observer; ordinary errors of law or procedural irregularities do not come close to meeting that threshold. The contrast with *Saw Pipes*, where the Supreme Court of India held that an award contrary to Indian statutory provisions could be set aside, could hardly be more pronounced. Though India's subsequent legislative and judicial reforms have moved closer to the English position, the shadows of these problems still loom over the predictability of Indian enforcement proceedings.

iii. India and Hong Kong

Hong Kong is perhaps the most pointed comparison of India. Given that both countries share a common law tradition, and both have actively sought to position themselves as leading arbitration centres in Asia. Hong Kong's Arbitration Ordinance (Cap. 609)¹⁹, enacted in 2011, adopts the UNCITRAL Model Law comprehensively and applies a unified framework to both domestic and international arbitrations, eliminating the domestic-international bifurcation that has generated confusion in India.

The Hong Kong Arbitration expressly provides that the courts of Hong Kong shall not intervene in arbitral proceedings except for the instances provided in the Ordinance itself.

¹⁹ Arbitration Ordinance (Cap 609) 2011 (HK)

Though the provision is similar to Section 5 of the 1996 Act, it has been applied with more fidelity than its Indian counterpart. The courts of Hong Kong have continued to refuse to expand their supervisory jurisdiction beyond what the Ordinance has expressly sanctioned.

Hong Kong's judiciary has been notably stricter in setting aside arbitral awards. The grounds for setting aside awards mirrors that of the UNCITRAL Model Law, and their interpretation has been narrowly done by the courts, to avoid making it a medium for merits review.

The Hong Kong International Arbitration Centre, established in 1985, has developed over four decades into one of the world's leading arbitral institutions. India's institutional landscape, while improving, has not yet produced bodies of comparable international standing. The Arbitration Council of India envisaged under the 2019 Amendment remains slow to become fully operational, and India continues to lose high-value international arbitration to its Asian counterparts as a result.

CONCLUSION

The history of judicial intervention in Indian international commercial arbitration can be characterized by the conflicting dynamics of legislative intent for minimal interference and the judiciary's strong proclivity for oversight and control. For much of the period between 2002 and 2010, that vision was systematically contradicted by judicial decisions that expanded Part I's territorial reach and brought foreign seated arbitration within the reach of domestic challenge mechanisms. Since 2010, things have genuinely improved. The Supreme Court's decisions in cases like *Dozco*, and *BALCO*, together with the legislative amendments of 2015, 2019, 2021, have brought India's formal legal framework much closer to international norms. The Court's pro-enforcement approach in recent years reflects a level of institutional commitment to non-interference that would have been hard to imagine in the Bhatia International era.

But formal legal change is not enough on its own. Closing the gap between rhetoric and reality will require dedicated procedural rules for the execution stage, a genuinely empowered Arbitration Council of India, rigorous judicial training in arbitration norms at every level of the court system, and most importantly, a genuine shift in legal culture.

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