# THE SCOPE OF JUDICIAL INTERVENTION DURING DIFFERENT STAGES OF ARBITRAL PROCEEDINGS: AN ANALYSIS IN THE LIGHT OF THE EMERGING REGIME OF JUDICIAL MINIMALISM

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## ABSTRACT

Due to the large number of cases pending before the Indian Judiciary, the reliance of people on alternative dispute resolution mechanism in India is increasing. In order to keep away from the undue delay of courts, out of court settlement options are the most viable means to secure quick redressal of disputes. Therefore, due to the upwards growth of arbitration, certain hinderances are observed in its path of successfully rendering justice. There are often times when the judiciary is seen to necessarily interfere during the arbitration proceedings by way of loopholes in the legislative provisions. Such an intervention is observed at different stages of the arbitral process, starting from commencement of the arbitral proceedings, during the arbitral proceedings as well as even after the arbitral award is rendered. The uncalled intervention, defeats the purpose and objective of the legislation, which is to reduce the burden of the courts and render quick justice.

Therefore, the objective of this paper is to identify and scrutinise the provisions of the Arbitration and Conciliation Act of 1996, with the objective of identifying provisions which allow intervention of courts in arbitral proceedings along with the extent of intervention permitted, in consonance with the objective of the Act. Furthermore, in light of the above analysis, the standpoint of India, on the international principle of judicial non-interference or judicial minimalism can be understood. For this, the paper shall consider the amendments made to the arbitration law and judicial pronouncements of Apex Court, while commenting on the


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success of these measures in achieving minimalistic judicial intervention in the process of arbitration.

***Keywords***- *Arbitration, Arbitration proceedings, Judicial intervention, Judicial minimalism.*

## INTRODUCTION

With the rapid economic growth in India, the scope of resolution of disputes through unconventional means arises to keep up with the increasing actionable disputes. The Indian Judicial system is struggling to provide timely delivery of justice. Despite the judiciaries success in terms of having capable professionals, independence and efficacy in quality of judgements, the huge number of pending cases can be seen as one of its inadequacies. The judicial adjudication process in India is known to take over 10 years commonly to deliver a final judgment.

As a result, the need to adjudicate or settle disputes in an expeditious manner through means other than litigation before the court leads to use of Alternative dispute resolution mechanisms. In such times, arbitration particularly has been witnessed as an alternative widely preferred due to its efficiency in rendering private adjudication. The Arbitration and Conciliation Act, 1996 has thus been brought into force to cater to the requirement or quick resolution of dispute and build a regime that instils the trust amongst the Indian population to opt for arbitration. The Act has been modelled in consonance with the *"*UNCITRAL Model Law on International Commercial Arbitration*"*, therefore the objectives of the act are to minimise the inference and supervision of the courts, reduce the scope of judicial review of arbitral awards, maintain finality of arbitral awards and provide an expeditious process for dispute resolution.

However, the arbitration laws in India often failed to stay aligned with its objectives of minimising judicial intervention and respecting the finality of arbitral awards. Thus, the process faced criticism for not only prolonging the adjudication process, but also for being ineffective in reducing the burden of the courts. In light of the issue to minimalize judicial intervention the Law Commission in its 246th Report of August 2014[1] proposed certain amendments to the act of 1996. With the Arbitration & Conciliation (Amendment) Act 2015 the proposed amendments to limit judicial intervention and promote arbitration were brought into force.


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Marking the presence of section 5 in the Arbitration and Conciliation Act, 1996 as well as its amendment in 2015, the intention of the legislature to reduce judicial intervention is clear. Section 5 of the 1996 Act which was inspired by Article 5 of the UNCITRAL Model Law, restricts the judicial intervention in part I of the act, stating that, "*notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*" The limited interference has not been added with the idea of negating any judicial intervention as a whole, but with the aim to restrict it and reduce the availability of other remedies to ensure finality of arbitral awards.

Judicial intervention in arbitration can be witnessed in three stages under the Act of 1996, being:

a) Prior to the commencement of arbitral proceedings: where the court can refer parties to arbitration (section 8), appoint arbitrator (section 11), challenge an arbitrator (section 13(5)) and the Competence of an arbitral tribunal (section 16(6)).
b) During the arbitration proceedings: the court can make interim orders (section 9) and provide assistance in taking evidence (section 27).
c) After the arbitral awards is rendered: the court has the authority to enforce the arbitral award as a decree (section 36) and set aside the arbitral award (section 34) or hear an appeal on specific matters (section 37).

## LEGAL PROBLEMS

Even though sufficient time has passed from time the Arbitration and Conciliation Act, 1996 has come into force, numerous judicial decisions have gone against the literal text of the Act, changing the meaning of the provisions from the intention of the legislature. This has caused confusion and ambiguity in the interpretation of the law as well as undermined the principles of which the act is based.

The irregularities in the jurisprudence and the excessive intervention have damaged the reputation of India to serve as an international seat of arbitration. Therefore, in order to make


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up for the damages done, the legislature went ahead by making certain amendments to the Act of 1996, to reduce the unnecessary judicial intervention in arbitral proceedings.

Before the 2015 amendments to the Arbitration and conciliation act 1996, due to the huge number of pending cases before the judiciary and delay in disposal of cases, the Indian judicial system was facing heavy criticism. One of the biggest hindrances in the arbitral process was that the excessive judicial intervention that was contradicting the whole aim behind which the act was instituted. The expeditious justice promised through arbitration was delayed as a result of intervention of courts while simultaneously undermining the authority of arbitral awards.

Therefore, the regime of judicial minimalism became a key aspect to monitor the scope of judicial intervention during different stages of arbitral proceedings. The paper will be analysing the concept of minimal judicial interference or principle of non-interference with respect to different provisions governing arbitration at different stages of arbitral proceedings through judicial pronouncements. The following research questions arise due to the legal problem:

1. What is the degree of power granted to courts to intervene arbitral proceedings under provisions of Arbitration and Conciliation Act, 1996?
2. What is the standpoint of India on the principle of *"Judicial Non- Interference"* or *"judicial minimalism"*?
3. Have amendments to the arbitration law and judicial pronouncements of Apex Court been successful in achieving minimalistic judicial intervention in the process of arbitration?

## RESEARCH METHODOLOGY

The researcher will use doctrinal legal methodology for carrying out this research. Primarily, the central legislation of the Arbitration and Conciliation Act, 1996 will be used along with various authorities on it. Additionally, the research will also be relied on secondary data sources such published government reports, judicial pronouncements, books and arguments by scholars and publications of articles and journals on websites.

Analytical mode of research shall be used to scrutinise the degree of power granted to the courts to intervene during arbitral proceedings under provisions of the Arbitration and Conciliation


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Act, 1996. Furthermore, the researcher will rely on the interpretive and critical method to study the standpoint of India on the principle of *"Judicial Non- Interference"* or *"judicial minimalism"*. Lastly, a comparative mode of analysis will be used to differentiate the degree of success of amendments to the arbitration law and judicial pronouncements of Apex Court in achieving minimalistic judicial intervention in the process of arbitration.

## LITERATURE REVIEW

**Gary Born** in his research paper "**Principle of Judicial Non-Interference in International Arbitral Proceedings**"[2] underlines the theoretical aspects regarding the objectives of arbitral procedures in international arbitration and the arbitrator's procedural autonomy by providing a competitive study of international conventions and subsequently national legislations of different countries worldwide. The paper explains the "principle of judicial non-interference in arbitral proceedings" as under the New York Convention, the Inter-American Convention, the European Convention and National Legislations. Born very rightly addressed judicial non-interference as the *"central pillar of contemporary arbitration."*

**Gourab Banerji** in his paper entitled "**Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts**"[3], gives an in-depth insight into the judicial intervention post the arbitral awards by an extensive discussion with landmark judgments by the Indian Courts. The author first identifies the intention of the legislature with respect to the Arbitration and Conciliation Act, 1996 as well as its implementation to reduce judicial intervention. The author differentiates the Act of 1996 with the Arbitration Act, 1940 pointing out that the main reasons for the new legislation was to reduce the remedy of judicial review, while also providing the approach of judges towards non-interference in arbitral awards through landmark cases.

**Mitakshara Goyal** in her research paper "**Extent of judicial intervention in the arbitral regime: Contemporary scenario**"[4] has provided an analysis of the provisions of Arbitration and Conciliation Act, 1996 that aim at reducing judicial intervention in arbitration along with the 2015 Amendment to the Act. She pointed at the nature of the amendments, stating that they were aimed at preserving the sanctity of arbitration alongside reducing the burden of the judiciary. She concluded that judicial intervention of an unnecessary decree was dissolving the


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purpose of the Act while analysing the extent to which the amendment was successful in achieving its purpose of reducing intervention of courts. She addressed the irregularities in the intention of legislature in respect of the amendment being in consonance with the spirit of the Act.

**Promod Nair** in his article "**Ringfencing Arbitration from Judicial Interference: Proposed Changes to the Arbitration and Conciliation Act**"[5] dealt with the effect and position of the key amendments proposed through the consultation paper of the Ministry of Law and Justice to amend the Arbitration & Conciliation Act, 1996. While referring to judicial review of Indian Courts of international commercial arbitral awards, Nair widely commented on the intention of the Act to preclude intervention of Indian courts by choosing foreign seat. He felt that the self-conferred power to exercise jurisdiction over such matters has no textual support from the Act of 1996, showed the keen nature of the Indian judiciary to encroach upon powers reserved for the foreign seat. He felt that these amendments could have been bolder but were necessary to support the momentum of change in Indian Arbitration and reduce the propensity of intervention that was present.

**Moin Ghani** in his research on "**Court Assistance, Interim Measures, And Public Policy: India's Perspective on International Commercial Arbitration**"[6], pointed at the prerogative which Indian courts have undertaken to supervise the enforcement of foreign arbitral awards. Scrutinising the Act of 1996, along with the conventions it was derived from, Ghani criticised the inconsistent narrative of Indian courts while intervening in International Arbitration that blatantly disregard the letter of the law. Through the analysis of Indian Judgments, he concluded that rather than assisting the arbitral tribunals in resolving disputes, the courts have taken away the role from the tribunals as a whole.

**Varsha Mansingh Rajora** in her paper "**Is Judicial Intervention in Arbitration Justified?**"[7], addressed the issues of intervention by courts in Indian arbitral proceedings under the Arbitration & Conciliation Act, 1996, by first explaining the arbitration laws in India as a derivative of the UNCITRAL Model Law on International Commercial Arbitration. The later part of the research focuses on the areas of conflict between arbitration and judicial intervention with specific reference to section 34 of the Act of 1996.


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**Tanuj Hazari** in his research article titled "**Judicial Intervention in arbitral awards: the obsolete notions of 'Public policy' and Applicability clause**"[8], analysed the degree of success of the objectives of the Arbitration and Conciliation Act, 1996 in terms of minimalizing intervention of courts. Through interpretation of judicial pronouncements and provisions of the Act, the author ventured into the concept of 'public policy' to concluded on the tussle between the finality of arbitral award and the extent of judicial review. He further pointed out the concerns of the international arbitration community regarding arbitration autonomy. Hazari rightly addressed the power of judicial review of Indian Courts to cause *"cacophony of the unrest"* in at an international level with respect to the credibility of Indian courts.

## THE PRINCIPLE OF "JUDICIAL NON- INTERFERENCE" OR "JUDICIAL MINIMALISM"

### *International Standpoint on the Principle of Judicial Non-intervention*

In International arbitration, one of the most important factors that leads the parties to resort to arbitration for resolving their disputes is procedural conduct. The lack of formalities and procedures as required in Courts is absent in case of arbitration, where decisions rendered are flexible an efficient as per needs of the parties[9]. Various international conventions have been the basis of arbitration procedures internationally for the parties to enjoy their autonomy in arbitral proceedings by giving wide discretionary powers to the arbitrators.

These international conventions that lay down the procedural aspects of international arbitration are based on the principles of *"judicial non-interference"* while the arbitration process is going on. Though this principle is often ignored in national arbitration, it is the pillar for preserving the autonomy of parties and discretion of the arbitrator in the arbitration process. The problem of ignoring the principle arrives when the law provides an unfettered judicial review of the arbitral decision.

The New York Convention, 1959[10] provides that national courts can refer parties to arbitration once they have ascertained the presence of an arbitration agreement. The courts should avoid making provisions regarding judicial intervention in the arbitral process. The convention does


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not provide for judicial intervention in terms of appointing the arbitral tribunal or supervising the arbitral process. Therefore, under the convention, the role of courts is limited to reference and enforcement of the awards. The "*principle of judicial non-interference*" is preserved by disallowing courts to interfere during the arbitration under Article II of the convention.

Many statutes and judicial pronouncement in recent times have been based on international arbitration conventions which promote the "*principle of judicial non-interference*". The UNCITRAL Model Law, 1985[11] under Article 5 states that, *"In matters governed by this Law, no court shall intervene except where so provided in this Law."* The model law one provides a limited scope for intervention by Courts during the arbitral proceedings. For instance, courts can interfere in matters involving questions of jurisdiction, granting interim reliefs, helping in the constitution of the tribunal, etc., but not in supervision of arbitration proceedings by Courts.

***Indian Standpoint on the Principle of Judicial Non-intervention***

The Arbitration and conciliation Act, 1996 has an underlying theme which aims at minimising the intervention by courts in the arbitral proceedings. The Act intends to give authority to Courts to intervene in arbitral proceedings only in the case of appointing arbitrator when the parties fail to do so, if the mandate of arbitrator is terminated because of failure to perform his functions in a time bound manner or assist the tribunal in taking evidence.

The Act is derived from the UNCITRAL model laws[12] wherein Section 5 of the Act provides the non-obstante clause and Section 8 is in consonance with Article 8 of the Model Laws, by allowing courts to refer a dispute to arbitration. However, Section 8 does not allow courts the power to entertain objections to ascertain if an arbitration agreement is valid or *"null and void, inoperative or incapable of being performed"*. Consequentially, the intention of the courts to keep judicial intervention to a minimal level is demonstrated.

The Indian Courts too have understood the spirit of the Act to minimise obstruction in arbitral proceedings and respect the "*principle of non-intervention*". In the case of "***CDC Financial Services (Mauritius) Ltd vs. BPL Communications***"[13], where one of the parties approached the High Court seeking an anti-arbitration injunction for the reason that the subject-matter was beyond the jurisdiction of arbitration. However, the Supreme Court rejected this plea on the


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grounds that it was within the sole arbitrator's jurisdiction, vacating the injunction and preventing the party from filing further applications.

## INTERVENTION OF THE COURTS PRIOR TO THE COMMENCEMENT OF ARBITRAL PROCEEDINGS

The statutory limit of judicial intervention is prescribed through Section 5 of the Arbitration and Conciliation Act, 1996. The non-obstante Clause which clearly aims at eliminating judicial interference, stating that *"Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part"*. Despite this, there is still a large extent of intervention by Indian Courts while applying arbitration laws. In the case "***P Anand Gajapathi Raju v. PVG Raju***"[14], the court clarified that the term "*no judicial authority*" has been used to limit judicial intervention in areas involving no judicial discretion and that the words "*shall intervene*" has been used in aspects where the legislature intended an intervention.

The Courts must only play a certain degree of administrative role rather than an adjudicator in an arbitral process. The Supreme Court in the case of ***Surya Dev Rai V. Ram Chander Rai***[15] clarified its position stating that if judicial intervention is allowed, there will be a delay in completing the proceedings. At the same time, if there is not intervention, then an error is likely to be neglected from being corrected. Therefore, a degree of judicial intervention can be exerted at the discretion governed by *"the dictates of judicial conscience enriched by the judicial experience and practical wisdom of the Judge"*.

When there is a contravention of the arbitration agreement, the party has the option to make an application to an adjudicatory authority for the resolution of their disputes. The court has to entertain such applications and cannot force arbitration on a party since they have a right to adjudicating their disputes through the courts. The Arbitration and Conciliation Act, 1996, allows courts to refer the parties to a dispute pending before it, to arbitration for settlement out of the court by virtue of Section 8. However, the power to make such a reference only arises when an arbitration clause to the effect of the same exists to establish a nexus between the intentions of the parties. Therefore, the provision has been made so as to support arbitration


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rather than supervise arbitration proceedings or override it. In the ***P Anand Gajapathi Case***[16], the court interpreted the text of Section 8 of the Act definitive, thereby bringing a legal obligation on the adjudicatory authority to refer the parties to arbitration.

In the case "***Hindustan Petroleum Corpn. Ltd v. M/S. Pinkcity Midway Petroleums***"[17], the Apex Court held that such reference of parties by judicial authorities to arbitration was mandatory. For this, the Supreme Court elucidated on the role of civil courts under Section 8, where the issues were about the validity of the arbitration agreement. The Apex court relied on the decision given in ***Konkan Rly. Corpn. Ltd.*** **v.** ***Rani Construction (P) Ltd.***[18], where it was said that, *"the arbitral tribunal has the power to rule on its own jurisdiction under Section 16 of the Act"* and therefore even on the validity of the arbitration agreement. In the ***Hindustan petroleum case***[19], the Supreme Court held that "*the civil court cannot proceed to examine the applicability of the arbitration agreement to the facts of the case*."

The parties are often at a deadlock while appointing the arbitrator. To avoid delay in the appointment of an arbitrator Section 11 of the Act provides that, *"the parties could approach the High court in case of domestic arbitration and the Supreme Court in case of international commercial arbitration."* In ***Konkan Railway Corpn. Case***[20], that the power of appointing an arbitrator was not an adjudicatory order. However, in ***S.B.P & Co. v. Patel Engineering Ltd***[21], the Supreme Court overruled the judgment stating that powers under Section 11 were judicial powers and not administrative in nature. The decision further allowed the Chief Justice to determine the validity of an arbitration agreement and such a decision would be final. The reason for this judgment to be flawed was that it took away the power vested to the tribunal to determine the validity of the arbitration agreement as per Section 16 as well as making appointment orders subject to appeal as a result of their judicial nature. However, the 2015 Amendment Act restricted the overstepping by courts, adding a provision that limited the power of the courts to only examine the arbitration agreements, but not its validity[22].


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## INTERVENTION OF COURTS DURING ARBITRATION PROCEEDINGS

It is often witnessed that the judiciary intervenes throughout the arbitration process. Under Section 9 of the Act, interim measures can be granted by courts. Similarly, Section 17 of the Act allows the arbitral tribunal to made orders for granting interim measures. The arbitral tribunal also relies of courts for "assistance in taking evidence" under Section 27 of the Act.

Under Section 9 of the Act, the power given to courts is mandatory and does not infer any autonomy on the parties of the dispute. Since interim measures under Section 9 are a discretionary relief granted by the courts not a substantive one[23].

In ***Ashok Traders & Anr. v. Gurumukh Das Saluja & Ors***[24], it was held that the sole aim behind such reliefs is to ensure the right to resolve a dispute through arbitration is not taken away from a party. Under Section 9, the Courts are responsible to ensure the existence of intention between the parties to resort to arbitration. The order must not cause such a delay that any of the parties lose their right to resort to arbitration. The decision of the court was brought into the act through the 2015 amendment which included a time limitation for commencing arbitration in Section 9.

In the case "***M/S. Sundaram Finance Ltd. v. M/S. N.E.P.C. India Limited***"[25], the Supreme Court identified that Section 9 of the Act is used as a mechanism to delay pending arbitration proceedings. It held that the intention of Section 9 is for civil courts to assist the tribunal in expeditious resolution. Parties can't frivolously utilize this provision to delay proceedings.

Coming to the power of arbitral tribunals to grant interim orders, not enough protection has been given through legislative means for ensuring that enforcement of these orders under Section 17 of the Act are not challenged. This lacuna was identified in the case of ***Sri Krishan v. Anand***[26].

However, in ***ITI Ltd v. Siemens Public Communications Network Ltd***[27], the SC held that Section 9 of the Act has been made keeping in mind the provisions of interim injunction by civil courts under the Civil Procedure Code, 1908. This is an indicator that the arbitral tribunal respects the authority of civil courts to grant injunctions and to seek assistance of courts for the same.


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The powers of the court are further restricted by not allowing the courts to pass interim orders, *"once the arbitral tribunal has been constituted*" as provided under Section 9(3) of the Act, except in extraordinary cases where the remedy under Section 17 would not be effective. However, the 2015 amendment has strengthened the position of interim orders granted by the tribunal similar to those granted by the courts under Section 9. This is a positive change that has been witnessed by to minimise the intervention of courts. Before the 2015 amendments, the interim orders passed by arbitral tribunals lacked the authority that the interim orders of courts enjoyed. The arbitral tribunals had to depend of courts for granting interim orders prior to the commencement of the arbitral proceedings or after the granting of the award but prior to its enforcement.

## INTERVENTION OF THE COURT AFTER THE ARBITRAL AWARDS IS RENDERED

### *Applying Part-I Provisions to International Commercial Arbitration*

The Arbitration and Conciliation Act, 1996, applies to both international and domestic arbitration. Part-I of the Act, applies to arbitration that takes place in India. It includes international commercial arbitrations "*where the seat is in India*". While part-II of the Act, deals with "*enforcement of foreign awards*". Only Part-I of the Act, bestows the power of making interim orders to the Indian Courts during the arbitral proceedings that take place in India by reading Section 2(1)(f) with Section 9. However, no provisions under Part-II allow Indian Courts to Intervene in Foreign arbitration for granting interim orders.

In "***Bhatia International v. Bulk Trading S.A.***"[28]***,*** the question pertaining to the jurisdiction possessed by Indian Courts to grant issue interim reliefs in matters subject to International Commercial Arbitration conducted outside India arose. The Supreme Court gave its decision based on Section 2(2) of the Act, stating that regardless of the words of the Act, *"Part-I of the Act shall apply to international commercial arbitration held outside India"*. Thus, going against the intention and spirit of the Act of 1996, which states that, *"This Part shall apply where the place of arbitration is in India*". The reason given by the Apex Court for deviating from the literal interpretation was that, *"The conventional way of interpreting a statute is to*


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*seek the intention of its makers."* Due to the lack of use of the term "only" as done in Article I of the UNCITRAL Model Laws, such an interpretation was permitted by the Supreme Court. Additionally, the Court also stated that cohering with the absolute text of the Act would give "*untenable results*"[29].

The ***Bhatia Judgment***[30] was criticised for the overreaching intervention by courts and exceptional deviation from the UNCITRAL model Laws. Where the question arose before the courts regarding the unjust nature of the Bhatia Judgment, the ratio was upheld numerous times. For instance, in "***Venture Global Engineering v. Satyam Computer Services Limited***"[31], where the Supreme Court decided that a foreign award made under Part-II could be set aside by Indian Courts under the grounds mentioned in Section 34 of the Act. However, such an application under Section 34 could only be made in case, the parties had not either "expressly or impliedly" barred the application of Part-I of the Act.

Post the "***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.***"[32], an absolute bar was placed on intervention by Indian Courts in Arbitration proceedings under Part-II. Adhering to Section 2(2) of the Act, Part-I can only be applied to arbitration where the seat is in India and not to arbitration outside India. However, as per the 2015 Amendment to the Arbitration Act of 1996, if the parties expressly provide in their arbitration agreement for the application of Part-I, Indian Courts shall exercise the jurisdiction to make interim orders or to assist the foreign seat of arbitration in taking evidence.

***Scope of Setting Aside Arbitral Awards under Section 34 of the Act of 1996***

On the scope of judicial intervention during the stage of enforcement of an arbitral award, the Indian courts often vary in their interpretation of Section 34 of the Act, which provides the grounds to set aside an award. While construing the term "public policy" for setting aside an award, courts have given conflicting views.

In "***Renusager Power Co. v. General Electric Co.***"[33], the Apex Court relied on the interpretation given by international jurisprudence of "public policy". Where the US courts warned against a wider interpretation of public policy as a defence to set aside an arbitral award[34]. The Supreme Court thus provided a narrow scope of interpreting the term "public


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policy" as a ground to set aside arbitral awards only in case of violation of *"the fundamental policy of Indian law, the interest of India or Justice or morality."*

However, in recent times, the scope of public policy under Section 34 of the Act has been expanded by courts. In the case of "***Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd.***"[35], where the award was challenged for being "*patently illegal.*" The interpretation given by the court for "*patently illegal award*" was when the award had made an error of law, i.e., substantive provisions of the Act of 1996. According to ***Hindustan Zinc Ltd. v. Friends Coal Carbonisation***[36], an award could also be set aside for being opposed to the terms of agreement.

The definition was only further expanded in ***Venture Global Engineering Case***[37], where attempts were made to challenge a foreign arbitral award in Indian Courts on the ground of Public Policy. The High Court correctly disallowed challenging the award under Section 34 of the Act, since Part-I is only applicable to arbitration with its seat inside India. Regardless, the Supreme Court held the ***Bhatia Judgment*** [38] as a valid precedent allowed the application of Part-I of the Act to challenge a foreign arbitral award.

Part-II of the act through Section 48 provides situations where enforcement can be refused on certain grounds. However, by setting aside foreign arbitral awards, the courts contravene Section 48 against the intention of the legislature for enforcement. Rather than assisting the arbitral tribunal the courts had taken away the authority of adjudication. The ***BALCO judgment***[39] was therefore necessary to bring a change in this regime.

The 2015 amendments, sought to simplify the position of "public policy" under Section 34 under the Act. Where it allows the challenge of an award which goes against the public policy of India as long as the award "*induced or affected by fraud or corruption or contravenes the fundamental policy of Indian Law or is in conflict with the most basic notions of morality or justice"*. Furthermore, there is no need for going into the merits of the dispute while testing if there has been a contradiction to the fundamental Public policy of India. Only in case of dispute between Indian parties, "patent illegality" of an award can be tested, but not by going into the merits of the case. Additionally, a time limit is added to Section 34(6) of the act to minimise delay in disposal of such applications.


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## RECENT DEVELOPMENTS AND 2015 AMENDMENT

The Indian courts have increasing been seen moving towards the regime of judicial minimalism in arbitral proceedings. The Supreme Court in "***State of Jharkhand v. HSS Integrated SDN & Anr***"[40], while dealing the extent of judicial interference in Section 34 proceedings, held that when there are numerous plausible views and the arbitrator's views are reasonable, they must not be questioned as per Section 34 of the Act.

The aim of the 2015 amendments to the 1996 Act was to minimise intervention from courts to the maximum extent. Before the 2015 Amendment, Section 8 of the Act, gave the discretionary power to courts to refer the parties to arbitration by using the word "*may*" which was subsequently replaced by the words "*shall*" to limit intervention of courts. Additionally, the order for the appointment of arbitrator by courts was declared non-appealable under Section 11 of the Act.

Additionally, the Amendment to Section 17, the arbitral tribunal to make interim injunctions during arbitration proceedings as well as after the award was given. The tribunals are no longer dependent and subservient to civil courts for the grant of interim reliefs. The enforcement of the relief granted by the tribunals under Section 17 is not done in a similar manner as that of civil courts.

In light of the 2015 Amendment to the explanation provided for "public policy", the Delhi High Court did not disallow enforcement of an award it deemed incorrect since it was a reasonable decision[41]. Additionally, the court also refused to set aside a foreign award under Section 48 of the Act since it does not allow review of the merits of the award[42]. Furthermore, the Delhi High Court in ***Daiichi Sankyo Company Limited v Malvinder Mohan Singh***[43] also gave a clarification about the explanation to Section 48(2)(b) of the Act, where no specific reference is made to Indian Laws, but the basic principles the law.

The Delhi High Court made an exception to the above rule of Non-intervention by courts[44], which was affirmed by the Apex Court in "***Vijay Karia v Prysmian Cavi E Sistemi SRL***"[45], where exceptions can be made to this rule when the award is against to the most basic principles of justice. Section 48(2)(b) of the Act can make an award unenforceable for violating the principles of natural justice for lack of consideration to the contentions of a party, even though courts are not allowed to go into the merits of an award.


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Furthermore, the 2019 Amendment to the Act of 1996, made a significant change to minimise intervention under Section 11 of the Act. As per the Amendment, the Supreme Court or the High Court shall design an arbitral institute from which the appointment of arbitrators must take place in case of a deadlock between parties under Section 11.[46]

## CONCLUSION

Even though the Act of 1996 was aimed to be in consonance with the UNCITRAL Model Law, both domestic and international arbitration governed within the same law is proving to be an obstacle. Detached from the text of the law and the intention behind it, the Indian Courts have rendered several judgments contradicting the provisions of the Act. The Indian Courts have failed to a certain extent in respecting the stand of arbitral tribunal, invading into territories of international commercial arbitration in a way which wasn't intended by the Act. Furthermore, a high level of judicial intervention, weakens the position of India to serve as a seat for international arbitration. The courts have taken away the task of adjudication from the hands of the arbitral tribunals rather than adhering to the role of assisting the tribunals.

However, in recent times, it has been witnessed that the Supreme Court is paving the path of minimal intervention in arbitral proceedings. Additionally, the Amendments to the Act of 1996 in 2015 and 2019 have been significant in laying down the principle of judicial non-intervention. These amendments are a key to filling the lacuna that existed in the 1996 Act towards minimising the scope of interference by Courts by nullifying the judgments going against the intention of the Act. The change in the attitude of the judiciary has been evident from a change in its approach. The Supreme Court through its recent decisions, for instance, in the ***BALCO case***[47] has changed its firmness on refusing to take a backseat in the arbitration process as was witnessed in the ***Saw Pipes case***[48]. The changes in the law through amendments and regulations are only bound to be successful so long as the Courts equally contribute in following them. It is up to the judicial interpretation given by the courts to not dilute the intention of the Act.

The scope of judicial review of International awards and the interpretation of the term "public policy" to set aside arbitral awards clearly calls for correction. Excessive intervention creates


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doubt against the credibility of the arbitration process in India. The culture of Indian courts much be such that indicates a pro-arbitration regime due to the large number of cases before it pending for adjudication. The autonomy of the parties choosing arbitration over the adversarial system of adjudication as well as the discretion of the arbitrator must be respected by the Indian Courts. Furthermore, the Indian judicial system should support the internationally accepted standards of dispute resolution through arbitral awards rather than resisting it.

## SUGGESTIONS

Certain concerns are yet to be addressed by the amendments to the Arbitration and Conciliation Act, 1996.

For instance, there is still not a provision to call for Emergency Arbitration in India. The parties have to approach the court to grant interim relief before the Arbitral tribunal is constituted. It is not the most suitable remedy available to a party trying to opt for arbitration since the primary reason for avoiding court adjudication is the undue delay and the rigorous court process. Drawing inspiration from "Hong Kong International Arbitration Centre (HKIAC) Rules" which allow the appointment of emergency arbitrators to grant parties interim relief before the arbitral tribunal is constituted. Similar provisions have also been witnessed in the International Chamber of Commerce and the London Court of International Arbitration. Despite the primary objective of the 2015 Amendment Act being *"minimal intervention of the courts in the arbitration"*, no provision ensures the appointment of emergency arbitrators to provide the parties a way for seeking immediate relief. The 246th Report of the Law Commission of India, recommended making a statutory provision recognising emergency arbitrators[49], but this recommendation was not included in either the 2015 or the 2019 Amendment Act.

Additionally, the 246th Report the Law Commission of India also proposed changes to allow arbitration of disputes involving fraud. By making amendments to Section 16 of the Act, complex issues in matters such as fraud and corruption, the arbitral tribunal can resolve such disputes. The Apex Court in "***Radhakrishnan v. Maestro Engineers***",[50] declared that questions involving matters of fraud are not arbitrable. However, the Apex Court in one of its judgment[51] held that the ***Radhakrishnan decision***[52] was not a fair rule of law. Subsequently, the Apex


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Court of India in "***A. Ayyasamy v. A Paramasivam & Ors***"[53] elucidated that question involving fraud are arbitrable so long as they are not of complex nature. However, an amendment to Section 16 as per the recommendation of the Law Commission Report would resolve any doubt on this matter.

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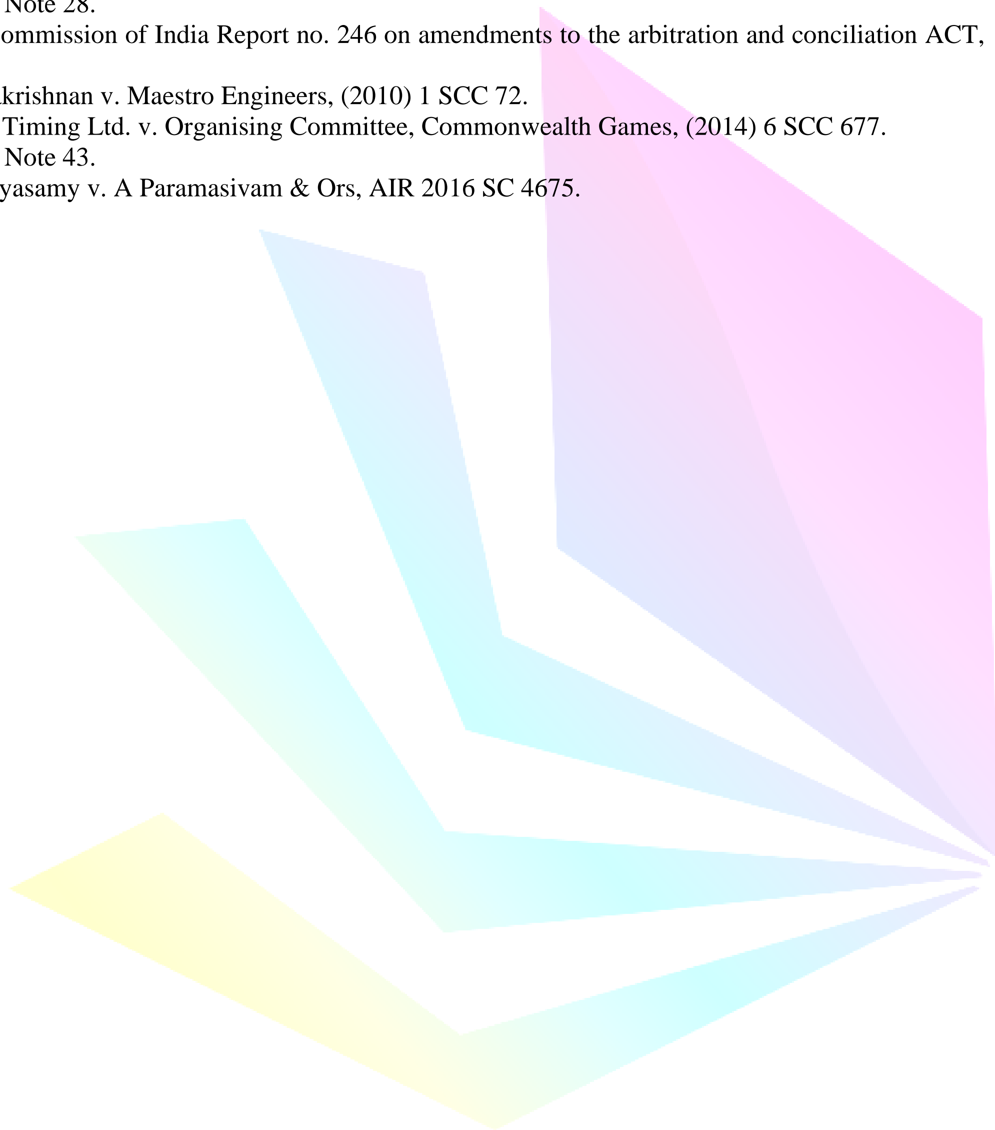


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