

ARBITRATION IN INDIA NOT FOR THE FAINT-HEARTED: ENFORCING FOREIGN ARBITRAL AWARDS

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ABSTRACT

The distinction between the jurisdiction for enforceability of foreign awards and the jurisdiction in challenging it is a blurred line. This distinction assumes critical importance in the light of significant issues to be explored in this note, such as whether the current structure of the conventions allows for the Challenging Jurisdiction of convention awards to be considered concurrent between the “territory where the award is relied upon” & the “territory where the award is enforced”; what are the current Challenging Jurisdiction as per the Arbitration and Conciliation Act & its interpretation as per the Indian judiciary, also accepting the inherent conflict between the rules and methods that various territory use to reach the final award; what is the effectiveness of the Indian Judicial System in accepting the binding effects of foreign arbitral awards? Discussing these issues, this note is an attempt to delve into the factors that retard the successful conclusion of arbitral process and enforcement of awards in India and highlights the urgency to eliminate excessive court intervention in order that the objectives of arbitration as a mode of alternative dispute resolution stand achieved.

INTRODUCTION

The litigious spirit is more often found with ignorance than with knowledge of law.

~ Cicero¹

The proliferation of international commercial disputes, usually involving several parties, is an inevitable by-product of the global economy. Litigation ceases to be an option in a country like India where delivering speedy justice is but a distant dream due to inordinate delays and backlogs that are characteristic of the Indian Judiciary. With more than 2500 bilateral investments in place, investors are frantically looking for international protection of their investments more specifically, in terms of an appropriate dispute settlement mechanism. Arbitration, an outcome of discontentment with the traditional rigid and adversarial court system, has emerged as a favourite choice of dispute resolution mechanism especially in case of cross-border disputes. The dramatic growth of international commercial arbitration in recent years in the Asia-Pacific region has been extraordinary. This reflects the rapid growth of international trade and commerce in this region as well as an increased

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1. I CICERO, DELEGIBUS vi (1928 ed.).

willingness of commercial parties to resort to international arbitration as a dispute resolution mechanism.²

Arbitration as a method of Alternative Dispute Resolution³ is not free from loopholes. Of late, this method of ADR has been a subject of criticism chiefly on account of difficulty in enforcement of arbitral awards. In this respect, the viability of arbitration as an efficient mechanism of dispute resolution has come under question. This note shall set out to examine the factors that affect the enforceability of foreign awards in India. Part I of the note is a primer on the Arbitration law in India. Part II discusses the scope of the term ‘international commercial arbitration’ in light of judicial interpretation. Part III discusses the meaning and scope of ‘court intervention’ in arbitral process and enforcement of foreign arbitral awards in India in light of the judicial interpretation or rather “intervention”. Part IV of this note is a critical analysis of the proposed amendments to the Arbitration and Conciliation Act, 1996 including suggestions to facilitate successful enforceability of foreign awards in India with the least amount of judicial intervention. The conclusion underscores the need to remove the hurdles in enforcing foreign awards in India by adopting suitable reforms both on statutory and judicial avenues on the lines of the suggested changes.

I. ARBITRATION LAW IN INDIA— A PRIMER

*Arbitration is a process used by agreement of the parties to resolve disputes. In arbitration, disputes are resolved, with binding effect, by a person or persons acting in a judicial manner in private, rather than by a national court of law that would have jurisdiction but for the agreement of the parties to exclude it. The decision of the arbitral tribunal is usually called an award.*⁴

Until 1996, the law governing arbitration in India was contained in mainly of three statutes: the Arbitration (Protocol and Convention) Act 1937, the Indian Arbitration Act 1940, and the Foreign Awards (Recognition and Enforcement) Act 1961.

The 1940 Act was the general law governing arbitration in India along the lines of the English Arbitration Act of 1934. Both the 1937 and the 1961 Acts were designed to enforce foreign arbitral awards (the 1961 Act implemented the New York Convention of 1958).⁵

2. See Kyriaki Noussia, *Arbitration Reform in Australia*, INT. ARB. L. R. 12 (2009) (This paper considers amendment in order to ensure that the Act provides a comprehensive and clear framework governing international arbitration in India, to improve the effectiveness and efficiency of the arbitral process and to adopt the best practice development in national arbitration law from overseas.).

3. Hereinafter ADR.

4. II HALSBURY'S LAWS OF ENGLAND 1201 (5th ed. 2008) (emphasis supplied).

5. The New York Convention of 1958, i.e. the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, is one of the most widely used conventions for recognition and enforcement of

In order to modernize the outdated 1940 Act, the government enacted the Arbitration and Conciliation Act, 1996 (hereinafter the Act). The Act is a comprehensive piece of legislation modeled on the lines of the UNCITRAL Model Law on International Commercial Arbitration⁶. It repealed all the three previous statutes (the 1937 Act, the 1961 Act and the 1940 Act).⁷ Its primary purpose was to encourage arbitration as a cost-effective and quick mechanism for the settlement of commercial disputes.⁸

The 1940 Act covered only domestic arbitration and while it was perceived to be a good piece of legislation in its actual operation and implementation by all concerned - the parties, arbitrators, lawyers and the courts, it proved to be ineffective and was widely felt to have become outdated.⁹

The present Act is unique in two respects. First, it applies both to *international* and *domestic* arbitrations unlike the UNCITRAL Model Law, which was designed to apply only to *international commercial arbitrations*.¹⁰ Secondly, it goes beyond the UNCITRAL Model Law in the area of minimizing judicial intervention.¹¹

II. ‘INTERNATIONAL COMMERCIAL ARBITRATION: SCOPE OF THE ARBITRATION AND CONCILIATION ACT, 1996

The meaning and scope of the term International Commercial Arbitration assumes great importance in the context of the discussion on enforcement of foreign arbitral awards. This section analyses the term in light of contemporary judicial interpretation.

“International commercial arbitration” means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is— an individual who is a national of, or habitually resident in, any country other than India; *or* a body corporate which is incorporated in any country other than India; *or* a company or an association or a body of individuals whose central management and control is exercised in any country other than India; *or* the Government of a foreign country.¹²

foreign awards. It sets forth the procedure to be used by all signatories to the Convention. This Convention was first in the series of major steps taken by the United Nations to aid the development of international commercial arbitration. The Convention became effective on June 7, 1959.

6. Hereinafter UNCITRAL Model Law.

7. § 85, Arbitration and Conciliation Act, 1996 [hereinafter The 1996 Act].

8. Ashok Bhan, *Dispute Prevention and Dispute Resolution* (2005), available at <http://www.ficci.com/icanet/icanet/activity/annual-report.pdf> (last visited on 9 July 2011).

9. Statement of Objects and Reasons, The 1996 Act.

10. See UNCITRAL Model Law, art. 1.

11. S K Dholakia, *Analytical Appraisal of the Arbitration and Conciliation (Amendment) Bill, 2003*, 39 ICA’s ARB. QUAT. 3 (2005).

12. § 2(1)(f), The 1996 Act.

In the case of *R. M. Investment Trading Co. Pvt. Ltd. v. Boeing Co*¹³ the term “commercial relationship” came under consideration. The Supreme Court of India observed:

While construing the expression ‘commercial’ in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction.

The Court further emphasized upon the activity that forms the structure of commercial relationships by noting that trade and commerce is not mere traffic in goods, but with modern dimensions coming into play, transportation, banking, insurance, stock exchange, postal and telegraphic services, energy supply and communication of information, etc., all form a part of commercial behavior and transactions. Applying the same logic, the Supreme Court ruled that a consultancy service for promotional sale is considered a commercial transaction and hence any dispute there under is of that nature.

III. ‘COURT INTERVENTION’: A HURDLE IN ENFORCEMENT OF ARBITRAL AWARDS

It is noted that one of the greatest advantages of international commercial arbitration is its cross-border enforceability. In other words, an award rendered in one country can be taken, with relative ease, to another country and be enforced. The principal source of this ease of enforcement is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which as on date has 145 signatory states, following the accession of Fiji to the treaty. The New York Convention provides for the recognition of all foreign arbitral awards provided they meet certain basic minimum standards (such as the award being in writing, and not contrary to public policy).¹⁴

This Convention provides for the validity of the arbitration agreement, recognition of their jurisdictional impact, and presumptive enforceability of arbitration law. Furthermore, it emphasizes the importance of integrity of national legal order by allowing the courts of a requested state to deny enforcement to an

13. AIR 1994 SC 11 36, at ¶ 12 (A two judge bench of the Supreme Court deliberated on whether consultancy service provided by appellant for promotion of Boeing was ‘commercial’ in nature.).

14. See Mark Beeley, *Arbitration in the Dubai International Financial Centre: A Promising Law, But will it Travel Well?* 12 INT. ARB. L. R. 1 (2009) (This paper discusses the reasons for the reluctance of western parties to seat their arbitrations in Dubai even after fulfilling certain basic standards. However, now with the advent of Dubai International Financial Centre Arbitration Law, western investors are more confident and familiar with arbitration in Dubai.).

award on the basis of ‘inarbitrability’ defense and public policy exception. The content of both the grounds is to be defined under the respective national laws.¹⁵

However, it has been witnessed that the enforcement mechanism in this method of alternate dispute resolution is plagued by what is known as ‘court intervention’. This is an expression frequently used in arbitration literature. The word ‘intervention’ however, does not appear appropriate as arbitration is a procedural mechanism based on the autonomy of the parties and recognized by law as an alternative way of resolving disputes.¹⁶ The courts role therefore should be limited to assist the arbitral tribunal to achieve the purpose of arbitration.

While it is accepted that the grounds for setting aside the award under the applicable law (*lex loci arbitri*) should be as narrow as possible, progress would be achieved if it were admitted that these grounds should be construed on the basis of Article V of the New York Convention, as provided by UNCITRAL Model law (Article 34).¹⁷

The most fundamental principle underlying the Model law is that of the autonomy of the parties to agree on the ‘rules of the game’. Such recognition of the freedom of the parties is not merely a consequence of the fact that arbitration rests on the agreement of the parties but also the result of policy considerations geared to international practice.¹⁸

Although, it has been established that Courts have the power to interfere with arbitral awards, if any award is against any statutory provision or is patently illegal or is violating the public policy of India, as was demonstrated in the more recent case of *Oil & Natural Gas Corporation Ltd. v. Saw Pipes (P) Ltd.*¹⁹, in our opinion, the principle of party autonomy should receive paramount consideration by the apex court, as excessive court intervention in the form of judicial review has retarded the dispute resolution.

National laws relating to arbitration could significantly affect the character of the arbitral process. These requirements would entail some form of judicial review of the merits of the arbitral awards at the enforcement stage.

15. See generally A VAN DEN BERG, THE NEW YORK CONVENTION OF 1958 (1982).

16. RICHARD B.LILLICH & CHARLES N.BROWER (EDS.), INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS “JUDICIALIZATION” AND UNIFORMITY, 12th SOKOL COLLOQUIUM (1992).

17. *Id.*

18. M. Hoellering, *The UNCITRAL Model Law on International Commercial Arbitration*, 20. INT’L LAW 327, 338 (1986).

19. AIR 2003 SC 2629 [hereinafter *Saw Pipes*].

In India, *first*, such court intervention is facilitated under Part I of the Arbitration and Conciliation Act, 1996 which applies to arbitration conducted in India and the awards thereunder; whereas Part II provides for enforcement of foreign awards and has further been sub-divided into two distinct chapters. Chapter one deals with the Awards as regulated by the New York Convention; defined as per Section 44 of the Act.²⁰ Chapter two deals with Awards as regulated by the Geneva Convention; section 53 of the Act covers it.²¹ The arbitration conducted in India and the enforceability of such awards (whether domestic or international) fall in the category of the Part I whereas the enforceability of foreign awards in India, based on the guidelines laid down in the New York Convention or the Geneva Convention is dealt with in Part II of the Act, 1996.

Secondly, the challenges posed on the grounds that the award in question is in conflict with ‘public policy’, as will be demonstrated in later parts of this note, is increasingly becoming an avenue for judicial intervention in arbitral process.

The enforcement statistics for arbitral awards in the High Court and Supreme Court for the period of 1996 to 2003 reveal that 29.41 percent of challenges on the ground of ‘jurisdiction’; 17.64 percent on the ground of ‘public policy’; 17.64 percent on ‘technical grounds- petition to be made under Section 48 and not Section 34).²² Thus, the present status of enforcement of foreign arbitral awards may be safely attributed to excessive court intervention.

Both the afore-mentioned instances of court intervention are sought to be examined *infra* in an attempt to establish that arbitral process in India is fraught with delay due to such intervention.

20. § 44 of the Act provides that: “...unless the context otherwise requires, “foreign award” means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960—(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and (b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies...”

21. § 53 of the Act states that: “...“foreign award” means an arbitral award on differences relating to matters considered as commercial under the law in force in India made after the 28th day of July, 1924,—(a) In pursuance of an agreement for arbitration to which the Protocol set forth in the Second Schedule applies, and (b) between persons of whom one is subject to the jurisdiction of some one of such Powers as the Central Government, being satisfied that reciprocal provisions have been made, may, by notification in the Official Gazette, declare to be parties to the Convention set forth in the Third Schedule, and of whom the other is subject to the jurisdiction of some other of the Powers aforesaid, and (c) in one of such territories as the Central Government, being satisfied that reciprocal provisions have been made, may, by like notification, declare to be territories to which the said Convention applies, and for the purposes of this Chapter an award shall not be deemed to be final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made...”

22. Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, 4 ASIAN INT. ARB. J. 81, 5 (2008).

A. Enforceability of/Challenging Foreign Awards

It is submitted that the distinction between the jurisdiction for enforceability of foreign awards and the jurisdiction for challenging a Foreign Award is a blurred line. With respect to enforcement of foreign awards, Article 3 of the New York Convention states that Foreign Awards are “binding as per the rules and the procedure of the territory where the award is relied upon.” Article 5, on the other hand, lays down the grounds under which the Recognition & Enforcement of an award may be challenged or refused. The Indian Act has identified the role of the Foreign Territory in the finality of the Challenging Jurisdiction in Section 48 clause 1 sub clause (e) of Part II of the Act - *if the Judgment Debtor as per the Award shows that the Award is not final, the court of the enforcing jurisdiction may refuse the enforcement of the Award.*

The above mentioned distinction between the Challenging Jurisdiction & the Enforcement Jurisdiction leads us to ask the following questions: Whether the current structure of the conventions allows for the Challenging Jurisdiction of convention awards to be considered concurrent between the “territory where the award is relied upon” & the “territory where the award is enforced”? What are the current Challenging Jurisdiction as per the Act & its judicial interpretation? Given the inherent conflict between the rules and methods of arbitral process across various territories, how effectively has the Indian judiciary enforced foreign awards or alternatively, responded to challenges to the binding effects of foreign arbitral awards?

As per the New York Convention and the Geneva Convention²³, while enforcing an award, the courts in the enforcing territory have no jurisdiction to entertain any challenge to the binding nature of Convention Awards due to an obligation on enforcing territories to recognize the enforcement of such arbitral awards. The grounds for challenging an arbitral award may be different between two different countries. However, this does not give rise to concurrent jurisdiction of courts in the enforcing territory. A plain reading of the scheme & provisions of the Act leads to the conclusion that such concurrent jurisdiction is discouraged in case of Convention Awards.

An analysis of cases under the Indian judiciary proves that the Indian approach to the enforceability of foreign arbitral awards is fraught with many shortcomings. This note analyses cases viz. *Bhatia International v. Bulk Trading S.A. and Anr.*²⁴,

23. Hereinafter Conventions.

24. (2002) (4) SCC 105 [hereinafter *Bhatia*] (A three judge bench of the Supreme Court held that an ouster of jurisdiction cannot be implied but expressed. Provisions of Part I of the Arbitration and Conciliation Act, 1996 are applicable also to international commercial arbitration which take place outside India unless the parties by agreement express or impliedly excluded it or any of its provisions. Such an interpretation does

*Inventa Fisher Gmbh & Co v. Polygenta Technologies*²⁵, *Saw pipes case*, *Venture Global Engineering v. Satyam Computer Services Ltd*²⁶ and *McDermott International Inc v. Burn Standard Company Ltd*.²⁷ in order to highlight the excessive judicial intervention in arbitral process, which frustrates the very purpose of the Act.

In *Bhatia*, the parties to a multi territorial contract chose to settle their dispute through arbitration according to the rules of International Chambers of Commerce, Paris; the seat of the arbitration being Paris. The foreign party being concerned with the enforceability of Non-Convention Awards i.e. those awards not recognized for enforcement under Part II of the Act, applied to Indian courts for interim measures based on an interim award to secure the property of the Indian party to the Arbitration. The Indian party filed an objection to the application since the seat of the arbitration was in Paris and under the New York Convention there were no provisions to allow interim measure until an arbitration is held under either Convention. The Honourable High Court rejected the above plea, which was upheld by the Honourable Supreme Court. In brief, the Supreme Court of India held that Part I of the Arbitration and Conciliation Act, 1996, which gives effect to the UNCITRAL Model Law by conferring power on an Indian court to grant interim measures despite that the arbitration was held outside India. This decision of the Supreme Court has received severe flak from scholars and legal luminaries. It has also been argued that the statement of law in *Bhatia* did not bring Convention Awards under Part I. It was this view that was argued before the Honorable High Court of Bombay in the *Inventa* case where the arbitration agreement was executed in Bombay but the arbitration was to be seated in Geneva as per the ICC rules.

In the context of this discussion, it is important to understand the meaning of the term ‘foreign award’. As per section 44 of the Act a foreign award is one which is made by means of an arbitral award on or after 11th October, 1960 in pursuance

not lead to any conflict between any of the provisions of the Act. Thus, art. 23 of the ICC Rules permits parties to apply to a competent judicial authority for an interim and conservatory measures. Therefore in such cases an application can be made under § 9 of the said Act.).

25. (2005) (2) Bom CR 364 [hereinafter *Inventa*] (A single judge bench of the Supreme Court discussed the issue whether the award, which has been made at Switzerland can be challenged by filing an application under § 34 of the Act in India. The court held although Indian law governs underlying contract, the law of arbitration and the procedural law was Swiss law.).
26. (2008) (1) Arb. LR 137 (SC) [hereinafter *Venture Global*] (This two judge bench held that in case of international commercial arbitrations held out of India, provisions of Part-I would apply unless the parties by agreement express or implied, exclude all or any of its provisions.).
27. (2006) 11 SCC 181, at 211 [hereinafter *McDermott*] (The two judge considered (i) whether an arbitrator has the jurisdiction to make a partial award which is the subject matter of challenge under Section 34. (ii) The court also held that additional Award under Section 33 (4) of Indian Arbitration Act, 1940 was not vitiated in law and that Section 33 (4) empowers Arbitral Tribunal to make additional awards in respect of claims already presented to Tribunal.).

of a written agreement for arbitration, made in a territory notified by the Central Government. Convention awards are applicable only if they are not classified as domestic awards. This further makes the ruling as per the *Bhatia* case difficult to reconcile with a plain reading of the statute. If domestic awards are defined as not foreign award and foreign awards are not domestic awards, the definition of both foreign awards and domestic awards falls short. The scheme of enforcement under the two Parts of the Act requires a distinction to be made between the two awards. Domestic awards that are made a subject matter of disputes in India as per Section 34 of the Act can be enforced as if it were a decree of an Indian Civil Courts as per Section 36 of the Act. Foreign Awards are executable as a decree of a foreign court. Foreign awards are executable subject to the existence of a reciprocal arrangement between the territories concerned as allowed by section 44A of the Code of Civil Procedure, 1908. It is important to note that location is not the only relevant criteria in defining a foreign award.

Whether a foreign award falls within the scope of Indian law thereby invoking Part I of the Act is critical in determining its force and effect in India this issue mostly arises in international commercial arbitration as defined by section 2 (1) (f) of the statute and not convention awards. This was discussed in detail by the Honorable High Court of Gujarat in *Nirma Ltd. v. Lurgi Energie Und Entsorgung GMBH, Germany*.²⁸ Further, in the case of *Trusuns Chemical Industry v. Tata International Ltd*²⁹, High Court of Gujarat held that Section 34 of the Act shall not apply to Convention Awards.

It is important to note that in several recent cases³⁰, where the agreement involved a foreign party, the apex court has reinforced the ratio laid down in the *Bhatia* case and held that “the provisions of Part-I of the Arbitration and Conciliation Act, 1996, would be equally applicable to International Commercial arbitrations held outside India, unless any of the said provisions are excluded by agreement between the parties expressly or by implication.”³¹ Such cases demonstrate the propensity of the Indian courts to interfere with domestic as well as foreign arbitral awards. While this risk cannot be eliminated, it is possible to include provisions in the agreement to arbitrate aimed at mitigating this risk.

Thus, it is not important whether the terms of challenge under section 34 of the Act and section 48 of the Act are the same. The legal presumption that a foreign

28. AIR (2003) GUJ 145 [hereinafter *Nirma*] (A two judge bench of the Gujarat High Court identified two issues (a) Whether the Indian Court would have jurisdiction to entertain an application for setting aside the impugned partial award? and (b) Whether an application to set aside the impugned partial award was maintainable under § 34 of the Act?).

29. AIR (2004) GUJ 274 (Single judge of Gujarat Court decided whether the Court had territorial jurisdiction).

30. *Venture Global Engineering v. Satyam Computer Services Ltd*, (2008) (1) Arb. LR 137 (SC).

31. *INDTEL Technical Services Pvt. Ltd. v. W.S. Atkins PLC*, (2008) 10 SCC 308.

award is valid and binding upon receipt by the correct authority in India is relevant to this discussion. Further section 48 (1) (e) of the Act clearly stipulates that foreign awards need to be binding as per the law of the land where the Challenging Jurisdiction rests. This clearly suggests that there is a differentiation between Challenging Jurisdiction and the Enforcement Jurisdiction.

The rules governing judicial enforcement of arbitral awards must accommodate two competing policy interests - first, the one limiting the courts' review of the merits of the dispute and the arbitrators' decision thereon in order to give effect to the parties' choice of arbitration; secondly, the other reflecting the courts' inherent supervisory interests in correcting (or at least not giving effect to) genuine excesses or abuses by the arbitrators and in enforcing any relevant mandatory rules of the jurisdiction. In the context of international commercial transactions, the former concern increasingly outweighs the latter. The parties' confidence in the enforceability of the arbitral award without judicial review of the merits is, of course, what makes the system of international commercial arbitration an attractive alternative to domestic litigation in the first place.³²

B. The 'Public Policy' Conundrum

It is submitted that 'Public Policy' as a ground of challenge under Section 34 of the Act also poses hurdles for the enforcement of foreign arbitral awards in India.

In 1824, public policy was described as an 'unruly horse' where in once you get astride it you'll never know where it will carry you and that it is never argued at all, but when all other points fail.³³ Public policy includes fundamental principles of law and justice, instances such as bribery and corruption. The phrase 'the award is in conflict with the public policy of the state' should not be interpreted as excluding circumstances or events relating to the manner in which it was arrived at.³⁴

In 2002, the International Law Association's Committee on International Commercial Arbitration³⁵ conducted a conference on public policy and adopted the resolution that public policy refers to international public policy of the state

32. See David P. Stewart, *National Enforcement of Arbitral Awards Under Treaties and Convention* in RICHARD B. LILICH & CHARLES N. BROWER (EDS.) INTERNATIONAL ARBITRATION IN THE 21ST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY?, 12TH SOKOL COLLOQUIUM (1992).

33. Richardson v. Mellish, 1824 All E R 258 (per BURROUGH J.).

34. See REPORT OF THE UNCITRAL COMMISSION, commenting on public policy as understood in the New York Convention and Model Law, UN Doc. A/40/17, at ¶¶ 297, 303, referred to in Interim Report, Part III, under "UNCITRAL Model Law".

35. See International Law Association, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, REPORT OF THE COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION, adopted at New Delhi in 2002.

and includes:

- (i) *fundamental principles, pertaining to justice or morality that the State wishes to protect even when it is not directly concerned;*
- (ii) *rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and*
- (iii) *the duty of the State to respect its obligations towards other States or international organisations.*

One of the main objectives of the Arbitration and Conciliation Act of India, 1996, was the minimization of the supervisory role of the Courts.³⁶ In this regard, the Act contemplates only three situations where the judiciary may intervene in an arbitral process: matters regarding the appointment of arbitrators³⁷, deciding on whether the mandate of the arbitrator stands terminated owing to his incapacity and inability to perform his functions³⁸ and invalidating an award when it contravenes the provisions relating to its enforcement as stated in the Act.³⁹

With an understanding of this legislation and internationally recognized principles of judicial intervention it can be inferred then that the Courts have no power to get into the merits of an arbitral dispute.⁴⁰ This principle was put to test by the Supreme Court in the *Saw Pipes* Case, where an award was challenged on the ground that the arbitral tribunal had incorrectly applied the law of the land in rejecting a claim for liquidated damages.

It is submitted that two errors of great magnitude have been committed in this case. *First*, while reviewing the merits of this case, the court failed to consider external factors like the effect of the labor strike in entire European continent, something which was neither under the control nor could be predicted by *Saw Pipes*. This particular aspect has been completely overlooked by the court and its impact on the decision. *Secondly*, the decision of the two judges Bench in *Saw Pipes* has bypassed the ruling of the three judges Bench of Supreme Court in the *Renusagar Power Ltd. v. General Electric case*.⁴¹ This shows both judicial indiscipline and violation of the binding precedent of a larger Bench. While the Bench in *Renusagar* case held that the term ‘public policy of India’ was to be interpreted in a narrow

36. Gherulal Parakh v. Mahadeodas Maiya, AIR 1959 SC 781.

37. § 11, The 1996 Act.

38. § 12, The 1996 Act.

39. § 34 and 36, The 1996 Act. *See also* Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 INT. A.L.R. 13 (2003).

40. *Id.*

41. 1994 SCC Supl. (1) 644.

sense, the Division Bench went ahead unmindful of the prior precedent and expanded the same to such an extent that arbitral awards could now be reviewed on their merits. This is a huge step backwards in laws relating to alternate dispute resolution in the era of globalization.

Thus a new expansive head of public policy was created whereby an award is open to challenge under the head ‘public policy’ if it is ‘patently illegal’. The Court went on to explicitly state that public policy shall now include: *fundamental policy of Indian law*; or *the interest of India*; or *justice or morality*, or in addition, if it is *patently illegal*.

The latest decision of the Honorable Supreme Court on the point of setting aside foreign awards for reasons of public policy as allowed as per Section 34 of the act is the *Venture Global* case. Relying on an earlier judgment in *Bhatia* the Honorable Supreme Court found that it is up to the parties to exclude the application of the provisions of Part I of the act by expressed and implied agreement, failing which Part I of the Act would entirely be applicable. Further, it held that the application of Section 34 to a foreign award would not be inconsistent with Section 48 of the 1996 Act, or any other provision of part II and that the judgment-debtor cannot be deprived of *his right under Section 34 to evoke the public policy of India, to set aside the award*. Thus, the extended definition of public policy cannot be bypassed by taking the award to foreign country for enforcement.

In the *Mc Dermott* case, the Supreme Court admitted that the decision laid down in the *Saw Pipes* case was “subjected to considerable adverse comments and went on to observe that only a larger Bench can consider its correctness or otherwise”.⁴² One is left wondering as to why the court shied away from referring the matter to a larger bench?

C. Consequential drawbacks in enforcement of Foreign Awards

The root cause of all the delays in enforcement/challenging the awards has been the ever-widening powers of the court to review the awards, be it domestic or international. Excessive judicial interference resulting in admission of large number of cases which should never be entertained in the first place is yet another evil that hampers the settlement of commercial disputes in turn retarding the growth and development of the economy.

Indian courts have so grossly misinterpreted the Act to suit their whims and fancies that it is impossible to achieve results conducive to healthy business with Indian companies. The innumerable errors on the part of the courts to pass decisions in accordance with the

42. *Mc Dermot*, *supra* note 27.

Conventions is not only frustrating but also setting a negative trend, possibly discouraging parties from opting for arbitration as a means of dispute settlement in India.

Other very prominent criticisms that are identified to be flowing from the interpretation of the Act is that the *time period* for the enforcement of the arbitral award is not provided, which is indeed counter-productive. By not setting a time limit for the enforcement of the awards one finds that the inordinate delays in arbitral proceeding are no different from that of the innumerable pending court cases, thus defeating the very provisions of the Act. The parties and arbitrators, who are mostly retired judges, treat arbitration as a long standing litigation process and bank on the long and frequent adjournments, to delay the process as much as possible.

Further, the reason why arbitration was picked over litigation as the ultimate legal procedure to be followed, the reason why it held such an appeal for the masses was its *cost-effectiveness*. Traditional litigation cost a humungous amount primarily because it was excruciatingly time consuming. Although conceived as a cheaper alternative to litigation, arbitration has become quite expensive now. The first occasion for considering any question of jurisdiction does not normally arise until the arbitral tribunal has issued at least six adjournments.⁴³ It must be noted that arbitral process proves to be inexpensive only when the number of arbitration proceedings is limited.

Thus, issues of speed and cost-efficiency are the hallmarks of the procedure, and are often identified as the core reasons why arbitration very clearly surpasses litigation as a suitable choice for dispute resolution, especially with respect to commercial disputes. It must be remembered that these shortcomings are capable of hindering the progress of international trade and commercial arbitration, and with the constant inflow of business this might in effect hamper our economy. One way to mitigate the risk of court intervention is to provide for an appointing authority, since this limits the ability of the parties to apply to the local courts under Part I of the Act for the appointment of arbitrators in default of the agreed process.⁴⁴

IV. PROPOSED AMENDMENTS TO THE ACT— AN ANALYSIS

The Act provides a single effective framework for the recognition and enforcement in India of the arbitration agreements and foreign arbitral awards and thus, it is believed that a review of the Act is a natural warranted progression if India is to be properly equipped to meet the challenges of the 21st century. The Act

43. Law Commission of India, 176TH REPORT ON ARBITRATION AND CONCILIATION (AMENDMENT) BILL, 2001, at 68.

44. Frances Van Eupen, *Reach of Judicial Review of arbitral award*, INT. A.L.R., N-75 (2008).

is set for a major overhaul, in the form of ‘Proposed Amendments’, a consultation paper suggesting various changes to Part I and Part II of the Act. It is believed that the intention of the legislature in creating such a consultation paper is a stoic attempt to curtail the extensive scope and intrusion of the judiciary in the process of arbitration. However, when reviewed closely, the proposed amendments suggest otherwise. This part of the note is a detailed analysis of the proposed amendments.

First, the amendment to Section 2(2)⁴⁵ of the 1996 Act [Part I] implies that it applies only to arbitrations held in India. However, this is immediately negated by extending the applicability of the very loosely worded Section 9 and Section 27 of the 1996 Act, to an international commercial arbitration in which the award would be enforceable under Part II of the 1996 Act. Thus, these amendments would, in effect, give license to the judiciary to interfere, even in international commercial arbitrations under the pretext of protecting the essential issue of the arbitration, by invoking authority under Section 9 and Section 27 of the 1996 Act.?

Secondly, the Consultation Paper heightens the ambiguity that could be imparted in interpreting the phrase ‘public policy’ under Section 34(2) (b) of the Act, by giving it a restrictive definition and a definite scope. This has been done by permitting the court to consider a challenge to an arbitral award on the very nebulous grounds of ‘*patent illegality*’ or if it is ‘likely to cause substantial injustice to the applicant’; as has already been discussed above. Such phrases would be more susceptible to an open and wide interpretation than ‘public policy’.

Thirdly, while parties have autonomy in appointing the arbitrators (as per Section 11 of the Act), where they are unable to amicably agree on the arbitral tribunal, the Chief-Justice of the High Court and the Chief-Justice of India (in the case of international commercial arbitrations) are granted the power to appoint the arbitrator(s) by Section 11(6) and (9) of the Act respectively. Whether this power of appointment is an administrative or judicial power is an on-going debate.

The primary implications of the power being judicial are twofold: the Chief-Justice would have to go into the arbitrability of the claim, validity of the arbitration agreement and other jurisdictional issues and; the order passed by the Chief-Justice would be subject to an appeal before the Supreme Court under Article 136 of the Constitution of India.

45. The proposed amendment to § 2 (2) provides that: “Sections 8, 9, 27, 35 and 36 of this Part shall apply also to international arbitration (whether commercial or not) where the place of arbitration is outside India or is not specified in the arbitration agreement.” Thus, sections 8, 9, 27, 35 and 36 are to be applied to international arbitrations where the place of arbitration is *outside India* or *where the place of arbitration is not specified*. Also that Part I of the Act will apply to the cases of purely domestic arbitrations between Indian nationals and in cases of international arbitrations where at least one party is not an Indian national, and in both such arbitrations, the place of arbitration is in India.” (emphasis supplied).

The Supreme Court in the landmark decision of *S B Patel Engineering*⁴⁶ declared the power of appointment to be a judicial power. The Court concluded that this power could not be exercised by a non-judicial authority and hence the power to delegate the power of appointment (which is statutorily provided) was restricted to delegating the power of appointment to another judge of the High Court/ Supreme Court. Such power could not even be delegated to a judge of the district court, the Court concluded. As a result, the provisions in Sections 11(4), (5), (7), (8) and (9) which permit the Chief Justice (of the High Court and Chief Justice of India in case of Section 11(9)) to delegate their power to “a person or institution”, have, to the detriment of institutional arbitration been rendered nugatory. The Consultation Paper also proposes to transfer the power of appointment to the High Court (and Supreme Court in the case of Section 11(9)) and to grant the High Court the discretion to delegate the power to any person or arbitral institution.

In order to check the possibility of appeals arising from orders passed under Section 11, before a Division Bench of the High Court, the Law Ministry has proposed the insertion of a provision stating that “no appeal including a letter patent appeal shall lie against such decision”. However, such a provision does not rule out a special leave petition before the Supreme Court under Article 136 of the Constitution of India since a mere statutory provision cannot take away a constitutional right.

Fourthly, to address the issue of transparency, it has been suggested that the arbitrator disclose any circumstances, such as the existence of any past or present relationship, either direct or indirect, with any of the parties or their counsel, or any financial, business, professional, social or other kind, or in relation to the subject matter in dispute, which are likely to give rise to justifiable doubts as to their independence or impartiality. This change is welcome, yet there are apprehensions that such disclosures might become another bone of contention between the parties thereby resulting in further delay.

Fifthly, in order to preclude the escalating costs of arbitration, a significant amendment in the form of a deemed arbitration clause in every commercial contract having a consideration of Rs 5 crores or more (Rupees 50 million or more) has been suggested. This stipulation, however, is not mandatory and parties will be given the freedom to choose the mode of dispute resolution, including the intention of the parties to resort to an ad hoc arbitration.

Sixthly, there is also a proposal to include an obligation on the High Court/ Supreme Court/ delegate of the High Court or Supreme Court to exercise the

46. *SBP Co. v. Patel Engineering*, (2005) 8 SCC 618.

power of appointment within 60 days. While this provision is welcome, it may prove difficult to implement unless some modifications are made to the language of the proposed clause (4), (5) & (6) of Section 11 as in its present state it is ambiguous enough to be interpreted to mean that the Courts may take up to 60 days to authorize an arbitral institution/ individual to make an appointment, which/who will necessarily require more time to make the appointment. In such a scenario, the delegate may be unable to dispose of the application within 60 days of the application first being filed before the Court. It is suggested that a time limit of 30 days be set, for the Court to delegate its power to an individual or an arbitral institution would be a step in the right direction, providing the delegate another 30 days to exercise its power.

Seventhly, the application of the suggested amendment⁴⁷ to Section 36 of the Act will ensure that the filing of an appeal will not automatically delay the execution of an award. Nevertheless, this does restate the tremendous importance given to the function of the court in such matters. With the help of these amendments a broader range of discretion will be granted to the judiciary which may render the whole purpose of amending the Act futile.

Furthermore, it is suggested that, a separate international organization on the lines of the International Convention on the Settlement of Investment Disputes (Hereinafter ICSID) and Court of Arbitration for Sport (Hereinafter CAS) be formed. This, it is submitted, becomes imperative, in the light of proposed amendments. . Such organization would have the authority to deliberate upon the issues that are considered by courts at the seat of the arbitration as well as the matters considered by courts at the place or places of enforcement. On receiving the award it should be automatically enforceable upon registration in accordance with national procedures but no national courts should be empowered to review it.⁴⁸ Time limits for rendering a decision should be imposed upon the new organization so as to ensure speedy disposal of arbitral disputes. The procedure adopted must be standardized just like the procedure followed by CAS. Also such an organization dealing with international commercial arbitration should adopt a self-contained review process much like the ICSID.

47. § 36 of the Act in its current state provides that the enforcement of the award will come to a stop upon the filing of an application under sub-section (1) of § 34 to set aside the award. So parties are now filing such applications even though there is no substance whatsoever in such applications. §36 is therefore proposed to be amended by designating the existing section as sub-section (1) and omitting the words which state that the award will not be enforced once an application is filed under sub-section (1) of § 34.

48. Mark Mangan, *With the Globalisation of Arbitral Disputes, is it time for a new Convention?*, 1 INT ARB. L. R. 133 (2008).

CONCLUSION

The business and operating conditions in the present globalised economy underscore the advantage of arbitration as a process of dispute resolution, over litigation, especially in cross-border disputes. The 1996 Act was enacted to achieve quick and cost-effective dispute resolution. An examination of the working of this system in India reveals that arbitration as an institution is still evolving, and has not yet become effective to fulfill the ever changing needs of the world economy incidental to commercial growth.

In theory, arbitration; whether international or national, has become the duplication of a Court process that even provides for appeals. Further, the rulings in the *Saw Pipes* and *Venture Global* cases clearly make it unfruitful for any investor or individual seeking to arbitrate in India.

Mr. Javed Gaya⁴⁹ has stated that the Supreme Court's judgment in *Saw Pipes* would encourage further litigation by the aggrieved party, and in doing so diminish the benefits of arbitration as a mode of dispute resolution. The harsh reality is that courts are totally inept at dealing with the task of meeting the basic expectations of the litigating community. Mr. Kachwaha⁵⁰ opines that these very courts cannot be leaned upon to salvage the perceived inadequacies of the arbitral system through their greater intervention. Rather, the courts must take the law forward based on trust and confidence in the arbitral system. In our opinion, these discrepancies highlight that '*law in action*' and '*law in books*' are not one and the same. Legal Realism is not that which exists only in Statutes and Acts but in the Judges' interpretations thus resulting in the *politics of law*.

Thus, it has been suggested that a global commercial arbitration system would promote international trade and commerce by reducing the risk that potential commercial disputes would be determined by counter-parties' home courts.⁵¹

Notwithstanding the open questions that plague the model organization suggested, one must remember that rational men and women do not intend the inconvenience of having the possible disputes arising from their transactions potentially litigated before three (or more) very different echelons i.e. the arbitral body, the courts at the seat of arbitration and the courts at the place of enforcement.

The above highlighted issues concerning the enforcement of foreign arbitral awards in India reinforces the premise that arbitration in India is not for the faint-hearted. Therefore, it is imperative to remove the difficulties and lacunae in the Act

49. Javed Gaya, *Judicial Ambush of Arbitration in India*, 120 L. QUAT. R. 571 (2004).

50. Sumeet Kachwaha, *The Indian Arbitration Law: Towards a New Jurisprudence*, 10 INT. A. L. R. 17 (2007).

51. Holtzmann, *A Task for the 21st Century: Creating A New International Court for Resolving Disputes on the Enforceability of Arbitral Awards*, INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION: THE LCIA CENTENARY CONFERENCE, 111 (1995).

coupled with efforts to establish an international organization so that arbitration as a method of ADR becomes a favoured and popular choice of international commercial dispute resolution. These steps will also go a long way in fulfilling the objectives of the Arbitration law in India.