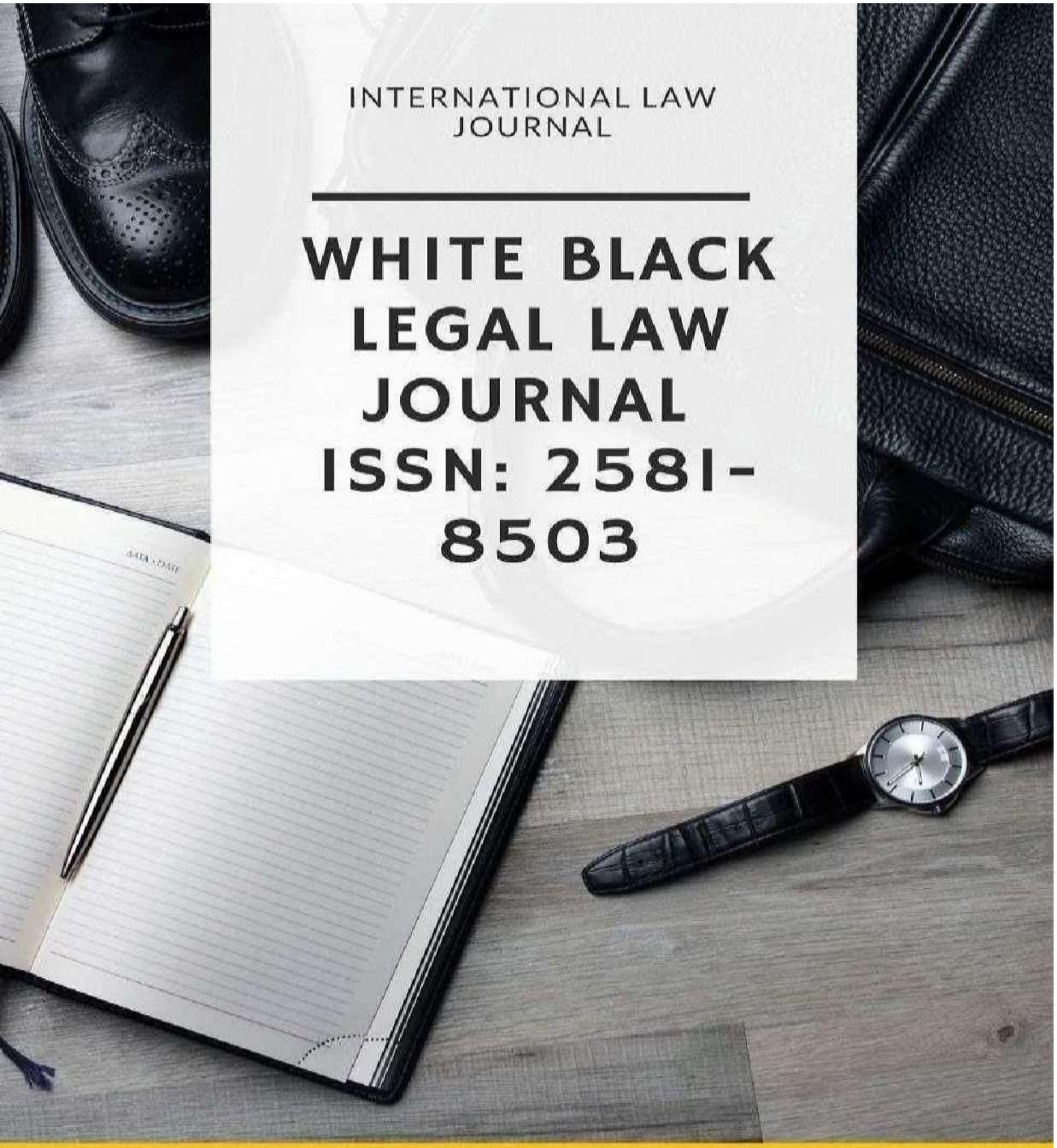

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JUDICIAL INTERVENTION IN ARBITRATION IN INDIA: BALANCING AUTONOMY AND OVERSIGHT UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

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ABSTRACT

The development of arbitration in India has been a trend that has led to reduction of judicial involvement and harmonization of domestic law with international standards. Regardless of this legislative intent, the Indian judiciary has historically contributed immensely and in some cases intrusively to arbitral proceedings. It has introduced a long-standing conflict between the values of party independence and judicial review.

This paper critically discusses the role of judicial intervention in arbitration in India and how courts have interpreted and applied key provisions of the Act. It examines high-profile judicial rulings that broadened the boundaries of court interference, especially under the public policy ground as well as the more recent judicial decisions which portend a shift towards a more arbitration-friendly approach. The paper points out the role played by over intervention in creating delays, uncertainty and loss of confidence in arbitration as an effective means of dispute resolution.

Meanwhile, the paper also recognizes that the total lack of judicial checks can threaten the integrity and fairness of procedures. It thus proposes a reasonable middle ground, in which the courts play a facilitating role, as opposed to a controlling role, in the arbitral process. The paper assesses whether India has effectively switched to a pro-arbitration jurisdiction by adopting a doctrinal and analytical approach.

The research concludes that although there has been much improvement concerning judicial restraint and amendments in legislation, there has been a challenge in ensuring consistency, efficiency and minimal interference. To secure the future of arbitration in India, it is crucial to strengthen institutional arbitration and ensure that a clear line is drawn between judicial review and arbitral autonomy.

JUDICIAL INTERVENTION IN ARBITRATION IN INDIA: BALANCING AUTONOMY AND OVERSIGHT UNDER THE ARBITRATION AND CONCILIATION ACT, 1996

Nowadays, arbitration is presented as a more and more important way of settling disputes within the modern commercial system, which is offered as efficient, flexible and final. This change was codified in India by the Arbitration and Conciliation Act, 1996, which aimed to modernise the arbitration law and bring it up to date with international practice, especially the UNCITRAL Model Law.[1] One of the goals of the Act was to reduce the role of the judiciary and encourage the autonomy of the parties.

Nonetheless, judicial interpretation has had a profound impact on the Indian arbitration regime. Though there is a statutory limit on the extent of supervisory jurisdiction courts have often exercised over arbitral proceedings, notwithstanding a statutory limit on such jurisdiction. This has led to a complicated relationship between arbitration and the judiciary whereby courts have alternated between enabling and limiting the arbitral process.

During its initial period, judicial intervention was broad in nature. In ***ONGC v. Saw Pipes Ltd.***[2], the Supreme Court dramatically broadened the definition of the term public policy, making it possible to quash arbitral awards based on the patent illegality. The decision in effect empowered the courts to reconsider the substance of the arbitral awards thereby invalidating their finality.

In the same case, ***SBP & Co. v. Patel Engineering Ltd.***[3], the Court ruled that the authority to appoint arbitrators pursuant to Section 11 is judicial in nature and hence injects greater scrutiny at the initial phase of arbitration.[4] With these advances, there were delays and decreased effectiveness of arbitration as an alternative method to litigation.

The judiciary was aware of these challenges and over time, began to change its approach. In ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO)***[5], the Supreme Court limited judicial intervention in arbitrations that were seated abroad, as a step towards adhering to the international practice of arbitration. Later cases like ***DDA v. Associate Builders*** [6] and ***Ssangyong Engineering v. NHAI*** [7] narrowed the scope of judicial review

[1] UNCITRAL Model Law on International Commercial Arbitration, 1985.
[2] ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.
[3] SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.
[4] Arbitration and Conciliation Act, 1996, § 11.
[5] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[6] DDA v. Associate Builders, (2015) 3 SCC 49.
[7] Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.

further on the basis that the courts were not supposed to be an appellate court to a decision made by an arbiter.

Although such positive changes have taken place, judicial intervention still remains a controversial topic. Slowness, unequal treatment of interpretations and interference into the various stages of arbitration are some of the issues that raise questions about the effectiveness of the current framework.

The current paper aims at critically examining the role of judicial intervention based on the Arbitration and Conciliation Act, 1996. It evaluates the role of judicial control as a fortifier of arbitration by promoting fairness or as a weaker by diluting autonomy and efficiency. The paper will suggest that judicial evolution has been headed towards restraint but that to achieve an arbitration-friendly regime it must be more consistent and balanced.

LEGAL FRAMEWORK OF JUDICIAL INTERVENTION

The statutory basis of arbitration in India is the Arbitration and Conciliation Act, 1996. The Act is based on a clear legislative purpose to ensure that courts are less involved in arbitral proceedings and that the arbitral process should enjoy greater autonomy. Nevertheless, although this framework stipulates that courts should take a minimal role, it also acknowledges that courts should play a limited but crucial role during certain stages of arbitration. The legal system, thus, tries to strike a balance between autonomy and judicial controls.

A key provision in this respect is the provision of the Act in Section 5 which expressly states that no judicial authority shall interfere with matters governed by the Act unless such is described.[8] This is a provision that reflects the principle of minimal judicial involvement and is meant to make sure that arbitration continues to be an efficient substitute to conventional litigation. Nevertheless, within the Act itself, there are a number of situations in which the judicial system should step in and thus, it creates a structured yet limited supervisory role of the judicial system.

Judicial intervention is most conspicuously evident in three phases, which include pre-arbitration, during arbitration and post-award.

During the pre-arbitration phase, the role of the courts is also present, but in a different section of the act, the appointment of arbitrators is also addressed in Section 11.[9] To begin with, this was initially viewed as an administrative role. In ***SBP & Co. v. Patel Engineering Ltd.***

[8] Arbitration and Conciliation Act, 1996, § 5.
[9] SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.

however, the Supreme Court has found that the power under Section 11 is judicial in nature. This interpretation widened the threshold stage of court involvement in cases where the court is to appoint arbitrators by examining the issues involved in the case such as the existence and validity of the arbitration agreement.

In the course of the arbitral procedure, courts can intervene under the context of Section 9, which establishes interim measures of protection. This enables parties to seek relief in courts in an attempt to preserve assets, maintain the status quo or to place the subject matter of the dispute under the protection of a court. Section 27 also allows courts to facilitate the taking of evidence and thus aids the arbitral process without actually interfering with its merits.

The area of judicial intervention can be considered to have the greatest scope of judicial intervention under Section 34, which allows courts to set aside arbitral awards on certain grounds.[10] They are incapability of parties, invalidity of the arbitration agreement, procedural irregularities and conflict with public policy. In this context, the definition of what constitutes a public policy has been notably controversial and has been traditionally exploited as a means of entering into a broad judicial review.

Moreover, Section 37 permits appeals against some of the orders, such as refusing to refer the parties to arbitration or set aside arbitral awards. Although these provisions are intended to provide a sense of fairness and legal propriety, they also present a route to lengthy litigation, which is likely to undermine the efficiency of arbitration.

Application of arbitral awards is regulated under Section 36 which considers arbitral awards to be similar to judicial decrees.[11] Yet enforcement may be deferred where a challenge under Section 34 is made to the arbitral procedure, in effect reintroducing an element of judicial delay into the arbitral process.

The juridical system is therefore representative of a dual nature. On the one hand, it makes arbitration autonomous and effective as a dispute resolution mechanism with minimum judicial interference. Conversely, it continues to play a supervisory role to the courts to guarantee the fairness, legality, and enforceability of the legal system.

It is not the way the structure is designed but how the structure is interpreted and applied. The judicial extension of some of its provisions, especially those to do with public policy and appointment of arbitrators has sometimes rendered the distinction between supervision and interference difficult. Meanwhile, there are recent judicial tendencies suggesting a deliberate

[10] ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.
[11] Arbitration and Conciliation Act, 1996, § 36.

attempt to regain such balance by reducing the extent of intervention.

This framework is critical in the analysis of how judicial intervention has been changing in practice. The following section thus explores the trends of judicial attitudes and important developments in case laws which have influenced the current direction of arbitration in India.

JUDICIAL TRENDS AND CASE LAW ANALYSES

The course of arbitration in India has been influenced equally by judicial interpretation as by legislative design. A detailed review of case law will show that there has been a definite shift in approach, away from the interventionist approach of the past and towards a more restrained, arbitration-friendly approach. This has changed over time, but at times in varying degrees and it is a reflection of a longstanding tension between judicial regulation and arbitral autonomy.

The judiciary had been very liberal in taking intervention especially at the post-award level. One of the landmark cases in this aspect was the case of ***ONGC v. Saw Pipes Ltd.***[12] in which the Supreme Court greatly extended the meaning of the public policy ground as contained in Section 34. The Court decided that an arbitral award might be quashed in the event that it was patently illegal, thus enabling the Court to review the merits of the case. This was a break with international practice and the beginning of a wide-scale court intervention, subverting the finality of arbitral awards.

This trend of intervention further became solidified in ***SBP & Co. v. Patel Engineering Ltd.***[13], where the Supreme Court described the process of appointing arbitrators under Section 11 as a judicial and not administrative, responsibility. The decision allowed the pre-arbitration scrutiny to extend to such issues as the validity of the arbitration agreement before the proceedings could be launched. Although it was meant to provide procedural fairness, it helped to cause delays and greater judicial control of the arbitral process.

The same way in ***Bhatia international v. Bulk Trading S.A***.[14], the Court added the applicability of Part I of the Act to foreign-sited arbitrations, which means that the Indian courts can interfere even in international arbitration proceedings. This ruling was highly criticized as it created more confusion and undermined the appeal of India as an arbitration friendly jurisdiction.

As the judiciary started to reappraise its strategy, it became apparent that the negative influence of excessive intervention was increasingly becoming apparent. An important landmark was

[12] ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.
[13] SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.
[14] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105.

made by ***Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO)***[15] whereby the Supreme Court reversed Bhatia International and held that Part I of the Act would not apply to foreign-seated arbitrations. This ruling reinstated the concept of territoriality and placed Indian arbitration law on par with international practice, which was a decisive step towards the reduction of judicial intervention.

The move towards restraint was further reinforced in ***DDA v. Associate Builders***[16], the Court clarifying that in judicial review under Section 34 of the Act, the Court was limited to reviewing the evidence and reconsidering the merits of the case. The Court pointed out that interference ought to be limited to certain grounds including patent illegality and incompatibility with public policy.

Based on this strategy, ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[17] substantially limited the application of the public policy ground, especially following the 2015 amendments to the Act. The Court asserted that judicial interference must be minimal and strictly limited within the boundaries provided in the statute and in so doing, the principle underpinning the finality of arbitral awards was in a way reaffirmed.

Another significant development is in the case ***BCCI v. Kochi Cricket Pvt. Ltd.***[18] where the Supreme Court clarified the potential application of amendments to Section 36 and provided an easier way of enforcing arbitral awards. This ruling minimized the delays due to automatic stays on enforcement and made the arbitration process more effective.

When combined, these cases demonstrate a vivid judicial development. The initial stage was typified by broad interpretation and intervention that often tend to blur the line between arbitration and litigation. The later stage, on the other hand, is a conscious attempt to bring the Indian law of arbitration into line with the international standards by limiting judicial review and promoting finality of awards.

Yet such a transition is not complete. Although, according to recent rulings, the current state of affairs is pro-arbitration, inconsistencies in the application and continued interference at different levels, however, indicate that the balance between independence and control is yet to be established.

This judicial experience brings out what is the major theme of this paper that the effectiveness of arbitration in India does not just depend on what is provided in the statutes but on how the

[15] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[16] DDA v. Associate Builders, (2015) 3 SCC 49.
[17] Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.
[18] BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.

courts interpret and apply the statutes. The following section looks at the practical effect of judicial intervention on the arbitration system, specifically in the aspects of efficiency, delay and investor confidence.

IMPACT OF JUDICIAL INTERVENTION ON ARBITRATION

The influence of judicial intervention on the growth of arbitration in India has been significant and contradictory. Although courts have been playing a very critical role in ensuring procedural fairness and legality, the overreliance or inconsistency has had a significant impact on efficiency, credibility and attractiveness of arbitration as a dispute resolution process.

Delay is one of the most obvious effects of judicial intervention. The purpose of arbitration is to offer a quicker alternative to conventional litigation, but this purpose has been subdued by the frequent recourse of the courts in most stages including appointment of arbitrators, interim relief, setting aside awards, and enforcement. The rulings like ***SBP & Co. v. Patel Engineering Ltd.***[19] widened judicial review at the pre-arbitration phase, which often incurs protracted proceedings prior to arbitration even being opened. On the same note, the issues in Section 34 and further appeals in Section 37 may take a long time to resolve the final adjudication of disputes.

Intimately associated with delay is the problem of higher cost. The judicial intervention makes arbitration more of a hybrid process involving arbitral proceedings and court litigation. Parties also face extra legal fees in either initiating or defending a court proceeding, which undermines one of the key benefits of arbitration, namely, cost efficiency. This issue was also enhanced by the wider meaning of the term public policy in ***ONGC v. Saw Pipes Ltd.***[20] which encouraged appeals against substantive decisions by arbitral bodies.

The finality of arbitral awards has also been influenced by judicial intervention. Arbitration is based on the fact that rulings made by arbitrators are final and binding. But when courts have gone to the extent of conducting a thorough review of awards, especially in the area of merits then this finality is compromised. The broad-based approach that was employed in the previous decisions created confusion on the enforceability of the arbitral awards and as such arbitration became less predictable.

The other effect is that it is going to affect investor confidence and the reputation of India as an arbitration-friendly jurisdiction. Certainty, low interference and enforcement are some of

[19] SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.
[20] ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.

the critical aspects of international commercial arbitration. The objections to the extension of judicial intervention to foreign-seated arbitrations in ***Bhatia International v. Bulk Trading S.A.***[21] were highly criticized as they created unpredictability and discouraged foreign investment. The former practice, though later rectified by ***BALCO***[22], has already had an impact on the perception of India in the international arbitration arena.

Simultaneously, it should be noted that judicial intervention has had positive impacts as well. The courts have also been instrumental in setting up the basic principles of law of arbitration such as fairness, accountability and compliance with natural justice. The decisions like ***DDA v. Associate Builders***[23] and ***Ssangyong Engineering v. NHAI***[24] have helped to illuminate the boundaries of the judicial review and helped to restore the confidence in the arbitration.

Judicial intervention has also served as a corrective measure in situations of procedural anomaly, bias or violation of the fundamental principles. Unless so regulated, arbitration might be at risk of becoming arbitrary or unjust, especially in cases where there is unequal bargaining power between parties.

But the main question is the level and uniformity of intervention. Although there should be minimal judicial interference, it should be excessive and unpredictable, which defeats the very essence of arbitration. The question is not, then, whether the courts ought to intervene, but how and to what degree.

Recent events suggest that there has been a change toward a more balanced approach where courts are seeking to facilitate rather than control arbitration. This decrease in automatic stays on enforcement, narrower interpretation of the public policy as well as the focus on the minimal interference, all reflect the increasing understanding of the necessity to preserve the arbitral autonomy.

Although these developments have improved, the legacy of previous interventionist trends remains evident through delays, backlog and cautiousness towards arbitration. This highlights the need to maintain judicial restraint and exercise pro-arbitration principles uniformly.

The role of the judicial intervention, therefore, indicates a fundamental clash in the Indian arbitration system: on the one hand, the judicial intervention is also necessary to achieve legitimacy and fairness but on the other hand, the judicial intervention may also be too involved in the process, thus compromising efficiency and finality. In the following section, the attempts

[21] Bhatia International v. Bulk Trading S.A., (2002) 4 SCC 105.
[22] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc., (2012) 9 SCC 552.
[23] DDA v. Associate Builders, (2015) 3 SCC 49.
[24] Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.

of legislative reforms and judicial developments to resolve this tension and bring India closer to a more arbitration-friendly regime are discussed.

SHIFT TOWARDS A PRO-ARBITRATION REGIME

To address the long-standing efforts to reduce excessive judicial intervention and delays in arbitral proceedings, India has made significant legislative and judicial reforms to place itself as a more arbitration-friendly jurisdiction. This change is indicative of the intentional move to harmonize domestic arbitration practices with the international ones and to restore the trust in arbitration as an effective dispute resolution tool.

The Arbitration and Conciliation (Amendment) Act, 2015, was a significant milestone in this transformation.[25] The amendments aimed to reduce the judicial meddling, especially at the point of setting aside arbitral awards. Among the most significant amendments was the elucidation of the ground of a public policy under section 34. By limiting its application to cases of fraud, corruption, contravention of fundamental policy of Indian law and a clash with fundamental notions of morality or justice, the amendment narrowed its application. This effectively overturned the broad-based interpretation followed by the courts in ***ONGC v. Saw Pipes Ltd.***[26] and narrowed down the scope to allow courts to re-examine merits of arbitration awards.

Another provision in the 2015 amendment was to deal with the delays in enforcement by amending Section 36. In the past, the fact that an application to set aside an arbitral award had been filed led to an automatic suspension of its enforcement. This automatic stay was removed by the amendment, making a separate application to stay more efficient and thus ensuring that arbitral awards could be more effectively enforced.

The second major reform was the establishment of timelines of arbitral proceedings under Section 29A which were meant to ensure that arbitration is still a time-bound process. This was meant to ensure there would not be unnecessary delays so as to make the process of dispute resolution more efficient.

The Arbitration and Conciliation (Amendment) Act, 2019 further enhanced the institutionalisation of arbitration in India.[27] It led to the development of the concept of the Arbitration Council of India which is meant to promote institutional arbitration and enhance the quality of arbitral institutions. Confidentiality of the arbitral proceedings and simplification

[25] Arbitration and Conciliation (Amendment) Act, 2015.
[26] ONGC v. Saw Pipes Ltd., (2003) 5 SCC 705.
[27] Arbitration and Conciliation (Amendment) Act, 2019.

of some aspects of the procedure were also highlighted by the amendment to make the process more efficient.

These legislative reforms have been supplemented by judicial developments. One of the ways in which courts have taken a more pro-arbitration stance has been through the adoption of a more minimalist approach to intervention and respecting the autonomy of arbitral tribunals. In ***Ssangyong Engineering & Construction Co. Ltd. v. NHAI***[28], the Supreme Court made it clear that after the amendment, the scope of the interference that is provided by Section 34 is considerably limited. Equally, in ***BCCI v. Kochi Cricket Pvt. Ltd.***[29], the Court helped to effectively ensure that the amended enforcement regime was actually implemented, and this served to reinforce the intention of ensuring that delays were minimized.

Moreover, courts have exercised restraint at the point when named arbitrators are appointed by restricting its inquiry to the question of whether there is an arbitration agreement. This is an indication of a change of direction in terms of a broader scrutiny that was accorded under the earlier decision of ***SBP and Co. v. Patel Engineering Ltd.***[30].

All these developments point to the fact that we are moving towards a form of intervention that is more efficient, final and leaves the parties to their own devices. India has gone to the extent of promoting itself as a seat of international arbitration by enhancing infrastructure, promoting institutional arbitration and adopting internationally accepted practices.

Nevertheless, the shift is still in progress. Although a definite pro-arbitration can be seen in terms of legislative amendments and judicial pronouncements, issues of consistency in application, institutional capability and judicial backlog reduction are all problematic. The effectiveness of these reforms ultimately depends on their implementation in practice.

The move to a pro-arbitration regime is therefore a substantial yet incomplete change. It also shows appreciation of the previous failures and a desire to reform, yet it is also an indication of the fact that there is still a lot to do in order to make sure that arbitration in India runs the way it should and the way it can.

In the second section, a critical analysis is done to determine whether these reforms have been effective enough to make India a truly arbitration-friendly jurisdiction, or whether structural challenges still limit their effectiveness.

[28] Ssangyong Engineering & Construction Co. Ltd. v. NHAI, (2019) 15 SCC 131.
[29] BCCI v. Kochi Cricket Pvt. Ltd., (2018) 6 SCC 287.
[30] SBP & Co. v. Patel Engineering Ltd., (2005) 8 SCC 618.

CRITICAL ANALYSIS: IS INDIA TRULY PRO-ARBITRATION?

The change in the law of arbitration in India is clearly an indication of the over-reaching roles of the courts being reduced towards a more moderate and arbitration-friendly approach. Amendments to laws and statements by judges have attempted to rectify previous aberrations and bring Indian arbitration to the international levels. The definitive question though is whether these developments have been extensive enough to make India a really pro-arbitration jurisdiction in practice.

The framework seems to be strong at a normative level. A robust belief in limiting the role of the judiciary and encouraging efficiency is reflected in the Arbitration and Conciliation Act, 1996, especially following the 2015 and 2019 amendments. Cases in the recent past have strengthened this purpose by reducing the scope of review under Section 34 and reinforcing the finality of arbitral awards. Such developments portend to the deliberate attempt to rebrand India in the international arbitration environment.

However, a more detailed analysis shows that there are entrenched structural and institutional issues. Among the key issues, there is discordancy in judicial application. Although higher courts, especially the Supreme Court have taken the pro-arbitration approach, it does not seem that lower courts have uniformly adopted the same approach as their higher counterparts. This leads to unpredictability, with similar cases possibly being handled differently based on the forum. This lack of uniformity undercuts the assurance which arbitration aspires to offer.

Another burning problem is the delay within the judicial system itself. Despite the attempts of amendments that aim to simplify the processes, the challenges of Section 34 and appeals of Section 37 still play a part in the long resolution of disputes. Procedural inefficiencies and judicial backlog can still postpone the enforcement of arbitral awards, despite reforms. This undermines one of the fundamental strengths of arbitration- speed.

The issue of institutional capacity also plays an important role. Though the Arbitration Council of India was introduced by the 2019 amendment to encourage institutional arbitration, ad hoc arbitration still prevails in practice. Institutional arbitration that is more efficient and streamlined is not yet fully developed and practiced. This reduces the capacity of reforms which are directed towards enhancement of arbitration infrastructure.

Moreover, judicial intervention, albeit minimal, has not been completely abolished. The courts are still dealing with arbitral proceedings on various different stages and the line between supervision and interference is not always strictly followed. Although some degree of control is needed to bring fairness and observance of the law, overindulgence or lack of consistency in

control remains a challenge.

Another problem of perception is also wider. In the case of international investors and commercial parties, trust in an arbitration regime is not just based on legal provisions but also on the uniform and effective application of the law. The previous reputation of judicial overreach in India has continued to impact perceptions and whilst reforms have helped to improve the situation, longer term and visible consistency in judicial practice will restore complete confidence.

Simultaneously, it would be an overstatement to say that India has not achieved anything substantial. The judiciary has shown a growing sensitivity of the necessity of restraint and legislative reforms have tackled major areas of concern. The trend is unmistakably toward a regime which is more arbitration friendly, although the shift is not yet fully implemented.

The fact then, is that it is between desire and accomplishment. India is no longer as interventionist as it was before but it has not yet entirely achieved the normative ideal of minimal judicial intervention. The present model demonstrates a mixed stance in which the principles of pro-arbitration co-exists with the still present institutional and procedural issues.

This discussion indicates that the problem is not just a legal one, but a problem of implementation and consistency. It takes more than merely well-designed statutes and progressive judicial judgments to achieve a truly pro-arbitration regime.

The conclusion is a summary of these findings, and the overall implications of these findings about the future of arbitration in India.

CONCLUSION

The growth of the concept of arbitration in India can be seen as a constant struggle to balance two competing imperatives: the need to have minimal judicial intervention and the need to have judicial intervention to ensure fairness and legality. The Arbitration and Conciliation Act, 1996 was established with the aim of establishing an effective and independent dispute resolution system. Nonetheless, the trend of its implementation shows that the role of the judiciary has been not only influential but also, at times, intrusive.

The initial period of arbitration in India was characterised by a large-scale judicial intervention, especially through wide interpretations of the term public policy and greater judicial scrutiny at many steps of the arbitral process. Although it was aimed to protect justice, this approach usually impaired the efficiency and finality of arbitration. It led to procrastinations, high expenses and uncertainties hence undermining trust in arbitration as an alternative to litigation.

Since the legislature and the judiciary have realized these challenges, they have gone out of their way to reform the arbitration framework. A series of progressive judicial decisions, the amendments of 2015 and 2019 all indicate a clear shift towards a more restrained and arbitration-friendly approach. The importance that courts have given to the principles of party autonomy, limited interference and finality of awards has increasingly been emphasized.

Although these are some of the positive changes, the change is not complete. The structural problems (i.e. court delay, failure to apply the law consistently and failure to arbitrate effectively through the system) still impede the efficiency of the system. The fact that these challenges persist shows that reform should go beyond statutory reform to include improvements in implementation and institutional capacity as well as judicial consistency.

It has been argued in the central part of this paper that judicial intervention is not necessarily harmful to arbitration; the effect of judicial intervention depends on the extent and the use. Small and clearly defined intervention may help to increase the legitimacy and fairness of arbitration, whereas excessive or irregular interference may diminish the main benefits of arbitration.

Today India is in a transitional phase. It has long since ceased to be an overtly interventionist form of government and has made significant strides towards becoming consistent with international arbitration principles. But, to create a genuinely pro-arbitration environment, it is necessary to maintain a long-standing commitment to judicial restraint, effective enforcement mechanisms and the creation of strong arbitral institutions.

To sum up, the future of arbitration in India lies in the delicate balance of autonomy and control. The role of judicial intervention needs to evolve to being a facilitating force rather than an inhibiting one to enable the arbitral process to proceed. Such a balanced approach is the only way in which such a system of dispute resolution can serve its purpose of being a reliable, efficient and globally competitive regime of dispute resolution in India.

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