

The background of the journal cover features a top-down view of a desk. On the left, a pair of black leather brogue shoes is partially visible. In the center, an open notebook with lined pages and a silver pen lies on a light-colored wooden surface. To the right, a black leather bag with a zipper and a black leather watch with a silver face are also visible. A large, semi-transparent white rectangular box is centered over the image, containing the journal's title and ISSN information.

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INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA: A CRITICAL COMPARATIVE STUDY OF JUDICIAL APPROACH AND GLOBAL STANDARDS

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ABSTRACT

Due to the development of international trade and the presence of cross-border investment, the necessity to have an appropriate and neutral channel to settle commercial disputes has gone up tremendously. International commercial arbitration has become the most desirable method of dispute resolution in this global economic set up because it is flexible, confidential, enforceable and grants independence to parties. Arbitration is unlike the traditional court litigation because it provides the businesses with a platform that is not restricted to national boundaries and legal frameworks hence enhancing certainty and stability in the international dealings.

As an emerging country in the quest to be a major economic power in the world, India has made significant legislative reform efforts to empower its arbitration system. The adoption of the Arbitration and Conciliation Act, 1996, which is mostly modeled on the international standards of the Model Law created by UNCITRAL, was a big step in streamlining the Indian arbitration law to the globally recognised standards. Moreover, the New York Convention represents another obligation of India that supports its desire to enforce cross-border dispute resolution and foreign arbitral awards.

Nevertheless, despite the intention which is progressive in legislative reform, the success of any arbitration regime is eventually determined in accordance with judicial decision and implementation. The strategy followed by the Supreme Court of India and other High Courts over the years has been overruling in the development of the arbitration scene in India. Some judicial rulings have been accused of increasing the breadth of judicial intervention especially when it comes to issues involving foreign-seated arbitrations and application of the public policy. Simultaneously, the later judgments show a deliberate movement to the judicial restraint and the increased respect to the arbitral autonomy.

This dissertation analyses the Indian legal practice of courts when it comes to international

commercial arbitration critically and considers how well it is aligned to international arbitration practices. The paper provides a significant insight into the major judicial trends as well as examining areas where India has failed to align with international best practice through the application of doctrinal and comparative analysis and analysing the attributes of the issue on whether India can become a seat of choice in arbitration or not.

The study comes out with the conclusion that despite the modern legislative framework adopted by India, judicial consistency and limited intervention is still necessitated to help instill investor confidence and increase the credibility of India in international commercial arbitration arena.

CHAPTER III

JUDICIAL APPROACH OF INDIAN COURTS: A CRITICAL ANALYSIS

3.1 Introduction

As much as legislative reform has provided the structural background on international commercial arbitration in India, judicial interpretation has defined the efficacy of the system in as much as it applies in practice. The courts are regulators and encouragers of arbitration. But, in cases where the intervention of the judiciary goes beyond the supportive aid and goes into the substantive scrutiny, it would be tantamount to flattening the same principles the arbitration is founded upon.

The history of the arbitration jurisprudence of India did not develop in a straight line. Rather, it is manifested in periods of growth, adjustment, and steady readjustment to international standards. This chapter is a critical analysis of the significant judicial cases that had shaped the future of international commercial arbitration in India, especially the cases by the Supreme Court of India.

3.2 Early Expansion of Judicial Intervention

Bhatia International v. Bulk Trading S.A. was one of the most controversial stages in the Indian arbitration jurisprudence. Here, the Supreme Court took the interpretation of the provisions of the Arbitration and Conciliation Act, 1996 to enable Indian courts to have the jurisdiction in the arbitral proceedings that are not based in India, unless specifically so provided by the parties.

This understanding was far reaching. The Court was in effect permitting Indian courts to award interim measures and to consider challenges to foreign-seat arbitrations by making applicable

to foreign-seat arbitrations Part I of the Act. Although it may have been driven by the need to safeguard domestic parties, the ruling was not consistent with the globally acclaimed standards since they usually limit judicial intervention to the courts where the seat of the arbitration is based.

These developments brought in some confusion in the arbitration law of India. Now foreign investors and multinational corporations were asking themselves whether or not the decision to use a foreign seat would really protect proceedings against local judicial review.

Venture global engineering v. further perpetuated the interventionist approach. At Satyam Computer Services Ltd., the Court granted a challenge to a foreign arbitral award in courts in India. This expanded the judicial review and erased the line between domestic and international enforcement standards.

Critically, the moves were an indication of ambiguity as far as territoriality is concerned, one of the principles of international arbitration. Finality and predictability were arguably destroyed by the growth of judicial oversight.

3.3 The BALCO Judgment: A Turning Point

An important change in doctrine was brought about by the landmark verdict in Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc. (BALCO). In the case, the Supreme Court redefined its previous interpretation and revived the territorial principle.

The Court only determined that the Part I of the 1996 Act is applicable to arbitrations in India. The Indian courts would not ever intervene in a foreign-seated arbitration unless at the enforcement phase in Part II. This ruling was a landmark step in ensuring a harmonisation of the Indian law and international arbitration.

The judgment of BALCO restated some fundamental principles:

- The seat of arbitration establishes jurisdiction of supervision.
- Courts ought not to meddle with the autonomy of the parties when it comes to the selection of a foreign seat.
- Judicial intervention should be minimal and organized.

Notably, the Court also realized that earlier judicial rulings had made matters unclear and that the fresh interpretation was to be adopted in the future. This future overruling showed judicial cognizance of business dependence and judicial consistency.

In the analytical sense, BALCO has renewed the confidence in the arbitration system in India. It was the indicator of judicial maturity and readiness to rectify previous errors of doctrine.

3.4 Public Policy and Judicial Review

The other significant point of judicial argument is the meaning of the term public policy which is an argument to stay or deny enforcement of arbitral awards.

First, Indian courts have assumed a wide interpretation of the public policy. In *ONGC v. Saw Pipes Ltd.*, the Court though was mainly a domestic arbitration case, introduced the notion to incorporate the illegal aspect of patents. This enabled the courts to consider awards on error of law hence increasing the judicial interference.

When such broad interpretation was applied to international arbitration cases, it cast doubt. Overdependence on the use of the public policy would have the effect of turning the enforcement proceedings into appellate review, which is opposed to the international practice. The shift towards a corrective one surfaced in the case of *Shri Lal Mahal LTD. v. Progetto Grano Spa* in which the Supreme Court restricted the extent of public policy in matters of foreign awards. The Court made it clear that enforcement would not be denied even when the award had an error of law. Rather, non-concurrence would only be appropriate in cases in which the enforcement would amount to contravention of the basic policy of Indian law or even simple principles of morality and justice.

Additional clarification was made in *Ssangyong Engineering & Construction Co. Ltd. v. NHAH* in which the Court limited the scope of the meaning of patent illegality and upheld limited interference.

These subsequent rulings represent court acknowledgment that arbitration is finality-based. The Court had shifted towards internationally acceptable standards of enforcement by limiting the scope of the public policy.

3.5 Judicial Attitude Towards Interim Measures and Arbitrator Appointments

Interim measures and appointing of arbitrators are also considered as judicial interventions in arbitration. First, courts were very discrete at the appointment phase, and frequently they conducted a thorough scrutiny of the arbitration agreements.

Subsequent jurisprudence has however stressed the fact that at the appointment stage under Section 11 of the Act, it is the role of the courts to merely make a prima facie inquiry as to whether an arbitration agreement does exist. This would help avoid the needless delays and the respect of the competence of arbitral tribunals in deciding their jurisdiction.

On the same note, courts have been using a supportive role as opposed to the supervisory role when it comes to interim relief. This has been done with an aim of supporting arbitration without interfering with its substantive merits.

3.6 Critical Evaluation of Judicial Trends

Indian commercial arbitration in the courts may be summed up into three stages on the judicial front:

1. **Expansion Phase** – Characterised by interventionist interpretations that extended court jurisdiction.
2. **Correction Phase** – Marked by doctrinal clarification in BALCO and narrowing of public policy.
3. **Stabilisation Phase** – Recent efforts to align consistently with global standards.

Despite the fact that there is improvement, the lack of consistency across time has been practically significant. Arbitration is dependent on predictability. The alternating interpretations will deter the parties to choose India as a seat.

Meanwhile, it should be noted that the courts have been responsive to critiques and changing world of business. The remedial resolutions show an increasing knowledge on international arbitration.

Thus, the initial period of intervention could slow down the arbitration aspirations in India, but the subsequent jurisprudence proves a new pro-arbitration trend.



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