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ANALYSING ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS IN INDIA

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ABSTRACT

The global expansion of commerce has made international commercial arbitration a preferred mode of dispute resolution, offering neutrality, flexibility, and ease of enforcement across jurisdictions. However, in India, enforcement of international arbitral awards remains a complex and often cumbersome process, despite legislative efforts to streamline arbitration practices through the Arbitration and Conciliation Act, 1996. This article critically examines the Indian legal framework governing enforcement, highlighting issues like excessive judicial intervention, expansive interpretation of public policy, and jurisdictional ambiguities. It traces the evolution of court attitudes from liberal to interventionist, assesses the impact of key judgments, and analyzes the reforms introduced through the 2015, 2019, and 2021 amendments. The paper also explores the blurred lines between enforcement and challenge of foreign awards under international conventions and Indian law. While India has demonstrated legislative intent to align with global arbitration standards, practical hurdles remain, impeding its ambition to emerge as an arbitration-friendly jurisdiction. Strengthening the commitment to minimal court interference and upholding party autonomy is crucial to enhance India's role in the international arbitration landscape.

KEYWORDS: *International Commercial Arbitration, Enforcement of Foreign Awards, Arbitration and Conciliation Act, 1996, New York Convention, Judicial Intervention, Public Policy, Arbitration Amendments, Party Autonomy, Indian Arbitration Law, Foreign Arbitral Awards.*

INTRODUCTION

The globalisation of commerce has ushered in a marked rise in cross-border commercial disputes, prompting parties to seek resolution mechanisms that transcend jurisdictional barriers. Among these, international commercial arbitration has emerged as a preferred method due to its flexibility, neutrality, and global enforceability. However, in India, arbitration has struggled against the entrenched inadequacies of the judicial system, such as delays, procedural complexity, and judicial overreach. In this context, arbitration, particularly foreign arbitration, offers a streamlined avenue for investors seeking faster dispute resolution, especially given India's

network of more than 2,500 bilateral investment treaties.

Nevertheless, arbitration in India is not without its challenges, particularly in the enforcement of foreign arbitral awards. This note aims to dissect the intricacies of the Indian arbitration regime, focusing on the enforcement of foreign awards and the barriers presented by court intervention.

4.1 INTERNATIONAL COMMERCIAL ARBITRATION: SCOPE OF THE ARBITRATION AND CONCILIATION ACT, 1996

The Arbitration and Conciliation Act, 1996 was enacted to consolidate and amend the law relating to domestic arbitration, international



commercial arbitration, and enforcement of foreign arbitral awards.¹ Section 2(1)(f) defines “international commercial arbitration” (ICA) as arbitration where at least one of the parties is:

- An individual who is a national or habitual resident of a country other than India;
- A body corporate incorporated outside India;
- A company, association, or body of individuals with central management and control outside India;
- The government of a foreign country.

This wide definition brings numerous cross-border disputes within the ambit of ICA, facilitating international cooperation and investment.²

In *R.M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co.* [(1994) 4 SCC 541], the Supreme Court interpreted the term “commercial relationship” under Section 2(1)(f) liberally, holding that promotional consultancy services are commercial in nature and fall within the definition of ICA.³ The Court emphasised that commercial transactions encompass various modern activities like insurance, stock exchange, and banking services, thereby ensuring that evolving forms of business relationships are recognised within the Act’s scope.

4.2 COURT INTERVENTION IN ENFORCEMENT OF ARBITRAL AWARDS

One of the cornerstones of international arbitration is the enforceability of arbitral awards across jurisdictions. The New York Convention, 1958 (to which India is a signatory) provides for the recognition and enforcement of foreign arbitral awards, subject to limited exceptions such as violations of public policy or lack of due process.⁴

India has adopted the Convention through Part II of the 1996 Act:

1. Chapter I (Sections 44–52) deals with enforcement under the New York Convention.⁵
2. Chapter II (Sections 53–60) deals with enforcement under the Geneva Convention.

While the Convention prescribes minimal grounds for denial of enforcement (Article V), Indian courts have often exercised broader discretion, thereby diluting the efficiency of the arbitral process.

4.2.1 . Role of National Courts

Although court assistance is necessary in certain aspects—such as appointment of arbitrators (Section 11), interim relief (Section 9), and evidence collection (Section 27)—Indian courts have overstepped their role by intervening excessively in the enforcement phase.

A landmark case highlighting this is *ONGC v. Saw Pipes Ltd.* [(2003) 5 SCC 705], where the Supreme Court held that an arbitral award could be set aside if it was “patently illegal” or contrary to the “public policy of India.”⁶ This ruling broadened the scope of judicial review and set a precedent for expansive interpretation of the public policy exception under Section 34 (for setting aside) and Section 48 (for enforcement).

In *Renusagar Power Co. Ltd. v. General Electric Co.* [(1994) Supp (1) SCC 644], however, the Court adopted a more restrictive view, limiting the public policy exception to three grounds:

1. Fundamental policy of Indian law
2. Interests of India
3. Justice or morality

This was in line with the New York Convention’s narrow interpretation and was lauded for maintaining international standards.

¹ The Arbitration and Conciliation Act, 1996 (Act No. 26 of 1996), s. 2(1)(f).

² *Ibid.*, s. 2(1)(f).

³ *R.M. Investment and Trading Co. Pvt. Ltd. v. Boeing Co.*, (1994) 4 SCC 541.

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.

⁵ The Arbitration and Conciliation Act, 1996, ss. 44–52

⁶ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705



Yet, the subsequent *ONGC v. Saw Pipes* decision marked a retreat from this internationalist stance. It introduced a fourth category—patent illegality—leading to excessive judicial scrutiny of arbitral awards on merits.

4.2.2. Part I vs. Part II Dichotomy

The distinction between Part I (domestic and ICA seated in India) and Part II (foreign awards) is central to understanding the enforcement mechanism.

In *Bhatia International v. Bulk Trading SA* [(2002) 4 SCC 105], the Supreme Court controversially held that Part I would apply even to international arbitrations held outside India unless expressly or impliedly excluded by the parties. This resulted in Indian courts interfering in foreign-seated arbitrations.

This was corrected in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.* [(2012) 9 SCC 552], where the Court ruled that Part I does not apply to foreign-seated arbitrations, aligning Indian law with global norms and limiting judicial overreach. Despite these efforts, the enforcement of foreign awards remains fraught with challenges. According to enforcement statistics (1996–2003), a significant number of challenges were based on:

- Jurisdiction (29.41%);
- Public Policy (17.64%);
- Technical errors like wrong provisions invoked (17.64%).

4.2.3. Autonomy of Parties and Judicial Review

The UNCITRAL Model Law, which inspires the 1996 Act, upholds party autonomy as its central pillar. Article 34 of the Model Law, corresponding to Section 34 of the Indian Act, allows setting aside of awards only on narrow grounds. However, Indian jurisprudence has evolved inconsistently in this regard.

In *Ssangyong Engineering & Construction Co. Ltd. v. NHA1* [(2019) 15 SCC 131], the Supreme Court reiterated a restrictive interpretation of the public policy ground and upheld the sanctity of arbitral awards. It held that “mere

erroneous application of law or appreciation of evidence” does not amount to patent illegality.

Despite this, lower courts continue to admit broader interpretations, thus hampering India's aspiration to become an international arbitration hub.

4.3 ANALYSIS OF THE AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996

To address these concerns, several amendments to the 1996 Act have been introduced, most notably in 2015, 2019, and 2021.

4.3.1 2015 Amendment

The Arbitration and Conciliation (Amendment) Act, 2015 brought crucial reforms:

- Inserted Section 2(2) proviso, enabling certain provisions of Part I to apply to foreign-seated arbitrations if parties agreed.
- Section 34 was amended to clarify that “patent illegality” applies only to domestic awards, thereby shielding foreign awards from such review.
- Section 48 was clarified to restrict the public policy ground in enforcement of foreign awards.⁷

4.3.2 2019 Amendment

- Established the Arbitration Council of India (ACI) to grade arbitral institutions.
- Introduced a time-bound framework (12 months) for completion of domestic arbitration proceedings (not applicable to foreign awards).

4.3.3 2021 Amendment

Empowered courts to stay enforcement of an award unconditionally if the court finds prima facie evidence that the arbitration agreement or award was induced by fraud or corruption (Section 36). This has been criticised for potentially increasing judicial intervention and delaying enforcement.

Despite India's progressive legislative framework and its commitment to the New York

⁷ The Arbitration and Conciliation (Amendment) Act, 2015.



Convention, the enforcement of foreign arbitral awards continues to be mired in judicial intervention, especially through the expansive interpretation of public policy and procedural challenges.

In the words of the Delhi High Court in *Glencore International AG v. Hindustan Zinc Ltd.* [(2009) 17 SCC 341], "The role of the Court should be to support and not to supplant the arbitral process." Adopting this principle in both letter and spirit is crucial for the advancement of arbitration in India.⁸

4.4 ENFORCEABILITY OF & CHALLENGING FOREIGN AWARDS

4.4.1 The Blurred Lines between Enforcement and Challenge

The distinction between the jurisdiction for the enforcement of foreign arbitral awards and the jurisdiction for challenging them is often blurred. This confusion arises primarily from the dual layers of jurisdiction created by international conventions like the New York Convention and domestic legislation such as the Arbitration and Conciliation Act, 1996 ("the Act").

4.4.2 Convention Framework: Enforcement vs. Challenge

Article 3 of the New York Convention mandates that foreign arbitral awards shall be recognized and enforced in accordance with the procedural laws of the enforcing territory.⁹ Article 5 of the Convention provides the limited grounds upon which recognition and enforcement may be refused.

The Indian legislature, via Section 48(1)(e) of the Act (Part II), provides that enforcement may be denied if the award has not become binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.¹⁰

Thus, the Convention and domestic law distinguish between the jurisdiction of

enforcement (the territory where recognition is sought) and the jurisdiction of challenge (the territory where the award was made). Yet, this distinction becomes murky in practice.

4.4.3 Jurisdictional Ambiguity: Concurrent Jurisdiction

This raises the question of whether the current structure under international conventions and Indian law allows concurrent jurisdiction between the territory where the award is relied upon and where it is enforced.

As per a plain reading of the New York and Geneva Conventions, the courts of the enforcing jurisdiction are not meant to entertain challenges to the binding nature of an arbitral award. Their role is limited to examining the grounds under Article 5 or Section 48. Judicial overreach into the merits or validity of an award undermines the finality envisaged by these conventions.

The Act discourages concurrent jurisdiction. Enforcement under Part II and challenge under Part I should ideally remain separate, with the latter being limited to domestic awards.

4.5. INDIAN LEGAL FRAMEWORK FOR CHALLENGE AND ENFORCEMENT UNDER THE ACT

The Act provides two separate mechanisms for enforcement and challenge:

- Section 34 under Part I allows challenges to domestic arbitral awards.¹¹
- Section 48 under Part II provides limited grounds for refusing enforcement of foreign awards.

Section 44 defines a "foreign award" as an award made in a territory notified by the Central Government and arising out of legal relationships considered as commercial under Indian law. Section 44A of the Civil Procedure Code, 1908 also facilitates execution of decrees passed by foreign courts under reciprocal arrangements.¹² The Indian courts, however, have often gone beyond the scope permitted

⁸ *Glencore International AG v. Hindustan Zinc Ltd.*, (2009) 17 SCC 341

⁹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. 3, June 10, 1958.

¹⁰ The Arbitration and Conciliation Act, 1996, s. 48(1)(e).

¹¹ The Arbitration and Conciliation Act, 1996, s. 34.

¹² The Arbitration and Conciliation Act, 1996, s. 44



under these provisions, thereby creating confusion.

4.5.1 Judicial Pronouncements and Analysis

i. **Bhatia International v. Bulk Trading S.A. (2002)**¹³

In this landmark case, the Supreme Court held that Part I of the Act applies to international commercial arbitrations held outside India unless expressly excluded. Thus, even foreign-seated arbitrations could be subjected to interim reliefs and challenges under Part I.

This judgment opened the door for judicial intervention in foreign arbitral awards and was heavily criticised for going against the spirit of the New York Convention.

ii. **Inventa Fisher GmbH & Co v. Polygenta Technologies**¹⁴

This case reinforced the principle in Bhatia, even though the arbitration was seated in Geneva. It created further inconsistency with the Convention's mandate, showing Indian courts' willingness to stretch jurisdiction to foreign awards.

iii. **ONGC v. Saw Pipes (2003)**

Though this case pertains to domestic awards, it introduced the concept of "patent illegality" as a ground for challenge. This concept was later used in interpreting challenges to foreign awards, further broadening the scope of judicial scrutiny.

iv. **Venture Global Engineering v. Satyam Computer Services Ltd. (2008)**¹⁵

Here, the Supreme Court once again held that Part I applies to foreign awards unless expressly excluded. It upheld the challenge to a foreign award under Section 34, setting a precedent that further muddled the jurisdictional clarity.

v. **McDermott International Inc v. Burn Standard Co. Ltd. (2006)**¹⁶

This case is significant for drawing a distinction between errors of law and judicial review. It reinforced the idea that courts should not act as appellate authorities over arbitral tribunals. However, this principle was not uniformly applied in foreign award enforcement cases.

vi. **Nirma Ltd. v. Lurgi Energie (2002)**¹⁷

The Gujarat High Court rightly clarified that foreign awards under Part II are not subject to challenge under Section 34 of Part I. The court drew a clear distinction between enforcement and challenge jurisdictions.

4.6 THE DEFINITION DILEMMA: DOMESTIC VS. FOREIGN AWARDS

Section 2(1)(f) defines "international commercial arbitration" while Section 44 defines "foreign award." The lack of mutual exclusivity in these definitions creates overlap.

If an award is not domestic, it should be foreign. But judicial interpretations like Bhatia and Venture have made this dichotomy ambiguous. This has led to overlapping applications of Part I and Part II, despite the original intent to keep them separate.

4.6.1 Impact of Bhatia and Judicial Overreach

Post-Bhatia, the Indian courts have repeatedly used Part I to intervene in international commercial arbitration. This has led to:

- Excessive delays in enforcement.
- Uncertainty for foreign investors.
- Incompatibility with India's obligations under the New York Convention.

Although Bhatia was eventually overruled by *BALCO v. Kaiser Aluminum (2012)*, it still applies to agreements made before 6 September 2012.¹⁸

¹³ *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105

¹⁴ *Inventa Fisher GmbH & Co. KG v. Polygenta Technologies Ltd.*, 2011 SCC OnLine Bom 859

¹⁵ *Venture Global Engineering v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190.

¹⁶ *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181

¹⁷ *Nirma Ltd. v. Lurgi Energie*, (2002) AIR Guj 254

¹⁸ *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552.



4.7 THE ISSUE WITH PUBLIC POLICY

4.7.2 International Understanding of Public Policy

In 2002, the International Law Association's Committee on International Commercial Arbitration proposed a well-balanced approach to public policy.¹⁹ According to it, international public policy of a State includes:

- Fundamental principles of justice and morality that a State wants to protect universally;
- Laws that safeguard essential political, social, or economic interests—often termed *lois de police*;
- Obligations that the State owes to other States or international organizations.

This broad, principled approach ensures that public policy remains an exception, not the rule, while enforcing foreign arbitral awards. However, Indian courts have struggled to maintain this narrow view.

4.7.3 Patently Illegal – A Judicial Overreach?

The *Saw Pipes* judgment has been widely criticized for diluting the finality of arbitral awards. By holding that an award is liable to be set aside for patent illegality, it essentially converted Section 34 into an appellate provision, which defeats the very purpose of arbitration.²⁰

The subsequent decision in *McDermott International Inc. v. Burn Standard Co. Ltd.*, (2006) 11 SCC 181d admitted the controversial nature of *Saw Pipes*. The Court candidly acknowledged the criticism but stopped short of referring the matter to a larger bench for reconsideration, thereby perpetuating ambiguity.

i. The Venture Global Case

The landmark judgment in *Venture Global Engg. v. Satyam Computer Services Ltd.*, (2008) 4 SCC 190 further complicated the situation by holding

that Part I of the Act (including Section 34) can apply to foreign awards unless excluded by the parties through express or implied agreement.

This decision, relying on *Bhatia International v. Bulk Trading S.A.*, (2002) 4 SCC 105, meant that foreign awards could be challenged in India on the expansive grounds of public policy as evolved in *Saw Pipes*. The Court ruled that enforcing a foreign award without examining it under the broader public policy lens would defeat the rights of the judgment-debtor.

This led to considerable discontent in the international arbitration community, as it created significant barriers to enforcing awards in India and encouraged forum shopping.

4.7.4 Judicial Pushback: Towards a Narrower Interpretation

It wasn't until *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 SCC 433 that the Supreme Court attempted to restore the *Renusagar* principles. The Court held that the *Saw Pipes* standard of 'patent illegality' would not apply to the enforcement of foreign awards under Section 48. The Court reiterated that only violations of the fundamental policy of Indian law, justice or morality, and national interests can constitute valid public policy grounds.

4.8 CONSEQUENTIAL DRAWBACKS IN ENFORCEMENT OF FOREIGN AWARDS

4.8.1. Erosion of Finality in Arbitration

A key drawback emerging from the expanded interpretation of public policy is the erosion of finality in arbitral awards. The spirit of the UNCITRAL Model Law—on which the 1996 Act is based—is to grant finality to arbitral awards, limiting judicial scrutiny to the most egregious violations of fairness or legality.²¹

By permitting challenges to foreign awards on merits under the garb of patent illegality, Indian courts have significantly diluted this finality. This delays resolution and undermines confidence in arbitration.

¹⁹ International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards (2002)

²⁰ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705

²¹ *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705



4.8.2 Prolonged Enforcement and Judicial Delays

The absence of a definite time limit for enforcement proceedings further exacerbates the problem. Although the 2015 Amendment introduced Section 34(3) (limiting the time to file a challenge to three months), the enforcement timeline under Section 48 remains unregulated. This has resulted in arbitral delays mirroring judicial delays, thus defeating arbitration's core purpose—speed and efficiency.

Frequent adjournments, prolonged hearings, and poor docket management contribute to a system where even straightforward enforcement proceedings can drag on for years.

4.8.3 Rising Costs: From Efficiency to Expense

Arbitration was initially lauded for being a cost-effective alternative to litigation. However, the Saw Pipes-era of judicial interference has reversed this trend. With increasing court scrutiny, arbitrators now adopt litigation-like processes to future-proof their awards. Arbitrations have become longer and more procedural, involving multiple adjournments and interlocutory proceedings.

Additionally, arbitrators—often retired judges—tend to mirror court practices, including frequent adjournments. The *McKinsey Report on Arbitration in Asia* (2020) noted that the cost of arbitration in India can often exceed traditional litigation when factoring in tribunal fees, delays, and associated legal costs.

4.8.4 Arbitrator Appointments and Judicial Intervention

While Section 11 of the Act allows courts to appoint arbitrators when parties fail to do so, the absence of institutional mechanisms has led to excessive court filings. The lack of an appointing authority in many contracts results in litigation even before arbitration begins.

One way to reduce such intervention is by explicitly naming an appointing authority or

opting for institutional arbitration, such as SIAC or ICC, which helps bypass the need for court intervention in appointments.

Foreign investors and international corporations view India's arbitral regime with caution. The fear that arbitral awards—especially foreign awards—can be set aside on ambiguous grounds of public policy discourages investment.

The 2011 Queen Mary Survey on International Arbitration ranked India among the least arbitration-friendly jurisdictions due to these factors. In an era where ease of doing business is key, judicial delays and unpredictability in enforcement of awards can significantly impair India's global commercial standing.

Unless India's courts uniformly adopt a narrow and internationally accepted view of public policy, the enforcement of foreign arbitral awards will continue to face unjustified delays and barriers—ultimately impairing India's economic and commercial prospects.