CHAPTER - VI

JUDICIAL INTERVENTION IN ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS – A CRITICAL STUDY
In the present chapter, the researcher has study on Judicial Intervention in Enforcement of International Arbitral Awards. The researcher made an attempt to analyze the judicial response in respect of International Commercial Arbitration. In this chapter, it has been explicitly examined Indian viewpoint in addition to other jurisdictions in respect of arbitral awards and its enforcement under Geneva and New York Conventions. Special emphasis has been made to analyze judicial interpretations on the doctrine of Public Policy with the support of landmark judgments with a special reference to UNCITRAL Model Law.

Arbitration is a process of settlement of disputes in the commercial area and is well known to the Indian system of justice. It is an ancient practice through which the panchayats in villages would settle disputes between the parties\(^1\). By the enactment of the Arbitration and Conciliation Act, 1996 was intended to mark a departure from the traditional close supervision of the courts and to reinforce the principle of party autonomy. However, the judiciary plays an important role in support of the arbitration process, where there is a gap or a failure in the arbitration mechanism; where there is a need to make provisional arrangements pending an award; to enforce the award.

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Furthermore, it is necessary to recognize the essential role that courts play in maintaining the integrity of commercial arbitration process².

The main objective of the Arbitration Act is to reduce the role of courts through decision-making in the arbitral process and that every final arbitral award made by the arbitrators enforced as it is a court decree.³ By and large, parties to international transactions choose to arbitrate consequent disputes not because arbitration is simpler than litigation, not because it is cheaper, not because arbitrators may have greater relevant expertise than national judges, although any one of those factors may be of interest; they arbitrate simply because neither will suffer its rights and obligations to be determined by the courts of the other party’s state of nationality⁴.

The intention of the legislation to minimize the judicial influence in the arbitration regime is evident from the insertion of Section 5 that urges to reduce any sort of judicial intervention unless specified in the statutes itself and promote speedy disposal of the matters referred for arbitration. Section 5 of the Act has been derived from Article 5 of the Model Law. The intervention of the courts in arbitral process, under the UNCITRAL Model Law, is limited by Article 5 which establishes that “in matters governed by this Law no court shall intervene except where so provided in this Law”. To put it in another way, it illustrates that the intention of Article 5 was to reach an utmost assurance to the level of no involvement of judiciary with the aid in the international commercial arbitration, all appropriate cases by intervention of court. To articulate in the words of Peter Binder “article 5 can be seen as a provision useful in helping to secure the Model Law’s freedom from disruptive court interferences⁵”. In fact the courts in India in BHEL Vs CN Garg & Ors⁶ examined the scope of Section 5 and held that the scheme of the new Act has done away with court interference during arbitration proceedings. The new Act allots with situations even when there is a challenge to the constitution of the arbitral tribunal; it is left to the

² Key note address by JJ Spigelman AC, Chief Justice of New South Wales at 20th Biennial Lawasia Conference on International Commercial Litigation: An Asian perspective, Hong Kong, (7th June 2007).
³ Supra note 1
⁶ BHEL vs. CN Garg & Ors 2001(57) DRJ 154 (DB).
arbitrator to decide the same. If the challenge is unsuccessful, the tribunal may continue the proceedings and pass an award. Such a challenge to the constitution of the tribunal before the court is then adjourn and it could be only after the arbitral award is made then the party may challenge to make a plea for setting aside the award to the arbitrator and it can take the ground of constitution of the tribunal while challenging the award. The court additionally proves the conclusion that Section 5 was inserted to discourage judicial intervention. It is seen that a party having injury against an arbitrator on account of bias is not without remedy. It only has to wait until the award is made and then it can challenge the award on various grounds under Section 34.

Thus, it is clear that it is undesirable to entirely remove the courts’ inherent jurisdiction in the arbitral process. The 1996 Act permits two broad mandates for judicial intervention in arbitral proceedings. The first is where provision is explicitly enumerated under Part I of the Act regarding judicial intervention. The principle of non-intervention in the words of Russell that

“it has given to the court only those essential powers which
I believe the court should have; that is, rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or alternatively, in the direction of correcting very fundamental errors”.

The alternative flagged in the above comment correcting very fundamental errors provides the second justification for judicial intervention in arbitral proceedings. This is only to occur in most exceptional of cases to ensure that an injustice is not suffered, however. To this end, the court may intervene where the grounds for doing so do not feature in Part I of the Act.

A variety of specific powers are open to the court, not only upon application by one of the parties but also where the court of its own accord thinks appropriate, to intervene at various stages in the arbitral procedure, before, during and after. Therefore, the locus of this chapter is to examine and inquire into some of the powers, the court exercise in aid of arbitration. Taking the Model Law as essence, throughout,

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reference is also made by way of comparison with equivalent provisions under different jurisdictions other than India as the Arbitration and Conciliation Act, 1996 is nothing but a verbatim replica of Model Law.

6.1 Commencement of Arbitral Proceedings

Arbitration law in international and domestic regime occupies a position between the extremes, exhibiting a clear preference in both international and domestic arbitration for private autonomy in dispute resolution. But, when cooperation or relationships break down or disputes over the arbitration process arise, the arbitration may founder unless relief is available through the courts under the applicable law. That relief, at a minimum, prior to the commencement of arbitral proceedings are enforcing the agreement to arbitrate and appointing an arbitrator or confirming the choice of law to such proceedings.

6.1.1 Enforcement of Agreements to Arbitrate

Arbitration is established on a valid agreement to arbitrate. The model law of UNCITRAL and The New York Convention both require that arbitration agreement be in writing and signed by the parties. This calls for two things from the courts. First, it must regulate whether an arbitration agreement is valid and then whether to enforce it or not. The UNCITRAL Model Law is to the effect that prior to obtain an action by a court in an agreement of arbitration should but on request of a party refer them arbitration if void, inoperative or incapable of being performed the agreement is noticed. An arbitration agreement is central to the arbitral process, representing consent to the process in which the parties exercise their autonomy in the resolution of their disputes. Article 8(2) of Model Law, requires the courts in nations that have adopted it as their national arbitration law to enforce written agreements to arbitrate. The laws of all other nations with functioning arbitration systems are in accord, although, not all national arbitration laws require that an agreement to arbitrate is in writing in order to be enforceable. In the large number of cases, when parties have agreed to arbitrate specific disputes or kinds of disputes, there is no need for anyone

8 Article 7 of the UNCITRAL Model Law 1985
9 Article 8 (1)
to ask a court to compel compliance with the arbitration agreement. Parties who have agreed to arbitrate usually attach to their agreements and proceed voluntarily to arbitrate disputes when and if they occur.

The question of whether to enforce an arbitration agreement may proceed before a court in a number of methods. Probably the most common way is for one of the parties to a contract disregard an arbitration clause in the contract, or takes the position that the clause does not apply to a particular dispute, or bring a lawsuit in a court to enforce his alleged rights under the contract. In such a case, the other party, desire to enforce the arbitration agreement, will go to the court to dismiss the complaint. If the court finds that the parties have indeed agreed to arbitrate the dispute, it must decline to hear the case on the merits. Its duty will be to make reference to arbitration by the parties. Another way in which the question of enforcing an arbitration clause may come before a court is for a party to bring an action in court seeking an order compelling the other party to arbitrate. Another possible way that the question of enforcing an arbitration agreement may come before a court and it is possible for a party that wishes to contest the validity of an arbitration clause to bring an action in a court to enjoin the other party from proceeding with arbitration.

There is nothing novel in the notion of the courts severally upholding the integrity of agreements to arbitrate and exercising powers to stay cases brought before them in order to give effect to a binding agreement to arbitrate. What is interesting; however, is the extent to which a culture of comity has or has not evolved among courts in the latter part of the twentieth century in support of this11.

The obligation in the New York Convention which placed on the courts the requirement to compel parties to honour their agreements attained popularity with the judgment of American Court in *McCreary Tire & Rubber Co. v Ceat SpA*12 discharging an attachment of funds order obtained from a court because of the existence of a dishonored arbitration agreement, the court stated that "this complaint does not pursue to enforce an arbitration award by foreign attachment. It pursues to bypass the agreed-upon method of settling disputes. Such a bypass is prohibited by the Convention (New York)…which forbids the court of the contracting state from

entertaining a suit that violates an agreement to arbitrate." In *Mitsubishi Motor Corp. v Soler Chrysler-Plymouth, Inc*\(^\text{13}\) the American Supreme Court observed that "Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the settlement of disputes require that we enforce the parties agreement, even assuming a result which is contrary and the result would be approaching in the domestic context."

The New Zealand Courts held the Crown to its agreement to refer disputes to ICSID arbitration in *AG New Zealand v Mobil Oil New Zealand Limited*\(^\text{14}\), rather than the rule that the dispute is determined before them, notwithstanding the economic significance that the outcome of the dispute would have on that country's economic life. In *IBM Australia Limited v National Distribution Services Pty Limited*\(^\text{15}\) the Australian courts applied the doctrine of arbitrability to disputes under the Trade Practices Act 1974, breaking new ground. In *AGP Industries SA (Peru) v JPS Elastomeric Corp*\(^\text{16}\) a Federal court in Massachusetts, United States of America, stayed arbitration proceedings on the basis that there was no arbitration agreement in writing within the meaning of New York Convention.

The Indian courts have demonstrated a different approach. The Delhi High Court in *Ahluwalia Co v. I.F.S Cooperative Society*\(^\text{17}\), where the arbitration clause gave unilateral option to arbitrate and bound only one of the parties to submit to arbitration, therefore, held that the arbitration agreement was not valid for want of mutuality by reiterating that “it is an essential ingredient of an arbitration clause that either party refer the dispute to arbitration”. In other words, the clause must give bilateral right of reference to both the parties. In *Jagadish Chander v. Ramesh Chander*\(^\text{18}\), the Supreme Court of the view that the use of expression in the contract that “in case a dispute arises, the parties shall refer it to arbitration if they so determine” clearly indicates that the parties were to arrive at a further agreement to go

\(^{13}\) Mitsubishi Motor Corp v. Soler Chrysler-Plymouth, Inc 105 Supreme Court Reports (1985) 3346, USA.
\(^{14}\) AG New Zealand v. Mobil Oil New Zealand Limited IAR 1987 p 725.
\(^{16}\) AGP Industries SA (Peru) v. Jps Elastomeric Corp CA 07-30034-MAP, 2007 WL 2737043 (D Mass, September 20 2007).
\(^{17}\) Ahluwalia Co v. I.F.S Cooperative Society (1994) 1 Arb. LR 186 (Del).
\(^{18}\) Jagadish Chander v. Ramesh Chander 2007 (5) SCALE 719.
to arbitration, as and when the dispute arises. Therefore, any agreement or clause in an agreement requiring a further consent of the parties before a reference to arbitration cannot be treated as an arbitration agreement. Instead, it is merely an agreement to enter into an arbitration agreement in further, if the parties so agree. In *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corporation Ltd*\(^{19}\), the Supreme Court held that where there is a reference in a contract about an arbitration clause, it constitutes an arbitration agreement; therefore, a civil suit was not maintainable and directed to appoint an arbitrator.

In *Great Offshore Ltd v Iranian Offshore Engineering & Construction Company*\(^{20}\) the Supreme Court of India examined the written form of requirement and extended it to include fax communication. However, the court observed that if the courts were to add a number of extra requirements, it would merely enhance the courts' role and foil the parties' intention to arbitrate. In a more recent case *Indowind Energy Ltd v Wescare (I) Ltd*\(^{21}\) the court held that in the absence of ratification, approval, adoption or confirmation of the agreement, a company could not be said to be a party to a contract containing an arbitration agreement when it did not sign the agreement, with reference to its subsequent conduct. The Supreme Court by an *obiter* in *Hindustan Petroleum Corporation v. Pink City Midway Petroleum* has held that where a court can take an action in a matter regarding an arbitration agreement, the court would not simply refer the matter to the arbitral tribunal (as it would have earlier). It would examine whether there is in existence a valid arbitration clause. The earlier interpretation of Section 8 of the Act was that the court would not entertain contentious issues, but would merely refer the parties to the arbitration and leave it to the arbitral tribunal to determine these. In contrast, Supreme Court in *N. Radhakrishnan v. Maestro Engineers & Ors*\(^{22}\) upheld the decision of lower courts and reiterated that notwithstanding the existence of an arbitration agreement, where a case *inter alia* relates to claim or assertion of fraud and serious malpractices on the respondents, such a case “must be tried in court and the arbitrator could not be competent to deal with such matters which involved an detailed production of

\(^{19}\) *Groupe Chimique Tunisien SA v. Southern Petrochemicals Industries Corporation Ltd* AIR 2006 SC 2422.


evidence to establish the claims relating to fraud and criminal misappropriation”. This judgment provides an escape from Section 8 of the Act, which requires a court to refer parties to arbitration if an action is brought in respect of a matter that formats the subject matter of an arbitration agreement. Nonetheless, the foregoing illustrates first and foremost, party autonomy is at the heart of this provision in that it sets out clearly that parties may agree as to the process of dispute resolution through arbitration to be adopted. Where there is a failure to agree between the parties, this may be intervened by the court upon request by the parties.

However, the 2015 Act amended Sec. 8 having made this provision more pragmatic allowing “persons claiming through or under parties”6 to apply for a referral to arbitration which is in line with Sec. 45 however, the opinion of the judge is non-identical. The amendment widened Sec. 8(2) by presumed that, if the original agreement of arbitration or its copy which is duly certified is not available with the applying party for a reference to arbitration under sub-sec. (1) of sec 8, and the agreement said or duly certified copy is retained to that agreement by the other party, the applying party shall file such application along with petition and the agreement copy in court and inform the party to give before court the unique agreement of arbitration or its properly certified one. 23

The amended Sec. 8 gives that the court can deny a reference to arbitration if it finds that no prima facie valid arbitration agreement exists. This power is different from the one stipulated by Sec. 11 and only prescribing examination of the existence of the agreement. Considering applications under Sec. 11 of this Act does not require searching into the issues of validity of such agreement. Different requirements assign by Secs. 8 and 11 of the Act open avenues for refined judicial interpretation. In case of denial of reference under Sec. 8, a judicial appeal is possible under Sec. 37 of the Act. If the court does not refer the parties to arbitration, the arbitral tribunal can still work kompetenz-kompetenz under Sec. 16. Such legal ambiguity runs the risk of weakening the kompetenz-kompetenz rule under Sec. 16 by taking aside the power of the arbitral tribunal.24

24 Ibid
6.1.2 Appointment of Arbitrators

Appointment of arbitrator(s) is the right of the parties which they appoint on mutual agreement. Another contentious issue in the principal 1996 Act was the provision regarding the appointment of arbitrator or arbitrators in case of a deadlock between the parties. In such cases, a party under Sec. 11 of that Act was allowed to move toward for domestic arbitration the Chief Justice of the High Court of India, and for commercial arbitration of International the Supreme Court Chief Justice, orthe Chief Justice can select any person or institution.25 There is a formal instance whereby a court may intervene in arbitral proceedings prior to their commencement. Courts have the power to make orders regarding the appointment of an arbitrator when one of the parties refuses to participate in the process26.

Under Article 1127 of the Model Law, the parties in arbitration are free to concur how arbitrators are to be appointed. Typically, the arbitration rules agreed to by the parties will specify how arbitrators are to be appointed, either by the parties or, to the extent the parties fail to make appointments, by an arbitral institution or other unprejudiced appointing authority. If, however, the parties have failed to appoint arbitrators, and if any appointment procedure they have agreed to have failed, then the courts are generally authorized by the national arbitration law to make the appointments. Indeed, under those circumstances, if the arbitration process is to go forward at all, the courts must act to save the process. The courts are free to devise their own procedures for making appointments under Article 11(5) of the Model Law and their decisions in this regard are not subject to appeal. Under modern practice, courts are infrequently called on to appoint arbitrators. Although the Section has the potential to be broad in scope given that disagreement between the parties as far as the appointment of an arbitrator is concerned, it seems likely that “the recent direction has been for the court to favor party autonomy unless to do so might fundamentally undermine the arbitral process”28. This is, therefore, an example of an admirable

25 Ibid
26 Tweeddale and Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice, note 40, at 261.
28 Tweeddale and Tweeddale, Arbitration of Commercial Disputes: International and English Law and Practice, note 40.
judicial attitude towards a power which it has over a consensual dispute resolution procedure.

In the UK the court in *R Durtnell and Sons v Secretary of State for Trade and Industry*[^29] noted that it could as in the jurisprudence which had preceded the 1996 Act refuse a remedy to a claimant who had for a long time neglected to take the required steps, it asserted that the means to settle the dispute which resulted in a fair and efficient resolution of the dispute should be that which prevails. If this entailed appointing an arbitrator to facilitate the arbitral process, then this course should be pursued. “The court considered that the exercise of the court’s residual discretion would depend on the circumstances of the particular case”. The second kind of law that a court must respond when it acts on a request to compel arbitration is the law of contracts applicable to the arbitration agreement. Under Article 8(1) of the Model Law, a pretend arbitration agreement will not be enforced if it is void, or unable to perform. The court will not enforce an agreement to arbitrate if, for example, under the governing contract law one of the parties lacked the capacity to make contracts. According to *Engalla v. Permanente Medical Group, Inc.*[^30] case it was held that almost certainly, the court will not enforce an arbitration clause that was induced by fraud, or that is so one-sided as to be void or voidable on the ground i.e., ‘unconscionable’.

In India, contentious issues under the Chief Justice powers pursuant to Section 11 of the 1996 Act, the Supreme Court in a spate of decisions held that the broad issues can be decided by the Chief Justice. In *Sundaram Finance Ltd. v. NEPC India Ltd*[^31] appointment of arbitrator(s) is made as per the provision of Section 11 which does not require the court to pass a judicial order appointing the arbitrator(s). In *Adur Samia (P) Ltd.v. Peekay Holdings Ltd*[^32] the view of the court was that the Chief Justice or his designate under Section 11(6) of the Act, acts in administrative capacity as held earlier, it is, therefore, obvious that this order is not passed by any court exercising any judicial function nor is it a tribunal having the trappings of a judicial function.

authority. This view was reconfirmed by a three-member bench of Supreme Court in *Konkan Railway Corporation. Ltd v. Mehul Construction Co*\(^ {33} \). This decision was challenged in *SBP and Co. v. Patel Engineering Ltd*\(^ {34} \), and the Supreme Court was of the view that where application is filed before the High Court of India or before Chief Justice as the case may be for an appointment of an arbitrator, the nature of powers exercised by the Court shall be judicial power and not an administrative power. This view was reiterated in *Asian Thermal Insulation (I) Pvt Ltd v. Bridge & Roof Co (I) Ltd*\(^ {35} \). The scope of the powers that the chief justice or his or her designate has been examined again when appointing an arbitrator under Section 11 of the act in *National Insurance Co Ltd v Boghara Polyfab (P) Ltd*\(^ {36} \) and in *Indian Oil Corporation v SPS Engineering*\(^ {37} \) wherein the court held that when exercising powers under Section 11 of the act, the chief justice or his or her designate cannot decide on the issues of whether the claims are barred by principles of *res judicata* (i.e., a matter already judged) or by limitation. Furthermore, an application under Section 11 of the act does not extend to a consideration of the merits of the claim or its chances of success. However, this simple provision has engrossed the mind of the judiciary for quite some time. The earlier view, taken in *Konkan Railway* case was that the power to make an appointment is administrative in nature and to be exercised expeditiously, with the minimum judicial procedure. All contentious issues would be left open to be determined by the arbitral tribunal, as it is empowered to under Section 16 of the Act. However, this view now stands overruled by *S.B.P & Co. v. Patel Engineering* and the court would now assume a far more interventionist approach. Since the power now would be judicial (and not administrative) the court would decide contentious issues pertaining to the validity of the arbitration agreement. This decision impacts certain fundamental tenets of the arbitration laws of India. The arbitrators’ has their jurisdiction of own i.e. Competence -Competence principle conferred by Section 16 of the Act stands curtailed. Now the tribunal cannot rule on its own jurisdiction in cases where the same is challenged before the Court in a Section 11 proceeding, and the court makes a finding thereon. In such cases, the court would have jurisdiction and their decision shall be final.


\(^{35}\) Thermal Insulation 9(I) Pvt Ltd. v. Bridge & Roof Co (I) Ltd AIR 2007 SC 2877.


\(^{37}\) Indian Oil Corporation v. SPS Engineering 2011 (2) SCALE 291.
It has time and again been attached by a number of jurists in this country that the Supreme Court should curtail its wide jurisdiction and confine itself to a set of core issues. In several cases before the Supreme Court, it has often been observed that the area of controversy is limited, law well settled and does not require the attention of the Supreme Court to decide such matter. Yet, it has time and again been noticed that the Supreme Court adjudicates on the issue and delivers judgments that run into several pages where no great proposition of law requiring the recognition of the Supreme Court is laid down. One such area of concern is the field of arbitration which is now a growing and fertile field of litigation for lawyers especially for the appointment of an arbitrator under Sections 11(4), (5) and (6) of 1996 Act. This has been joining to the existing burden of the Court and in spite of that, a large number of appeals are filed in the Supreme Court.

The 2015 Amendment Act tries to nullify also the effect which was initiated by this case by the Supreme Court. The Act introduced a limitation in sub-sec. (6A) gives that the Supreme Court or the High Court shall limit its examination only with the existence of an arbitration agreement, and not with other issues such as e.g., live claim, qualifications, conditions for the exercise of power, etc.\(^{38}\) In the case, i.e., the Patel Engineering case provided that hat the Chief Justice can delegate his/her power under Sec. 11 of the 1996 Act only to additional judge of that court but not to any other person or institution considered to have judicial powers as judicial power can only be delegated to a judicial authority. However, the 2015 Amendment Act took this feature into account and stated in a new sub-sec. (6B) that “[T]he designation of any person or institution by the Supreme Court or, as the case may be, the High Court, for the purposes of this section shall not be regarded as a delegation of judicial power by the Supreme Court or the High Court.”\(^{39}\)

### 6.1.3 Choice of Law

Once a request to enforce an arbitration clause is validly before a court, the court’s first task is to consider what laws it must apply in deciding whether and on what terms to compel arbitration. The Model Law and nearly all national arbitration

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\(^{38}\)"The Supreme Court or, as the case may be, the High Court, while considering any application under sub-section (4) or sub-section (5) or sub-section (6), shall, notwithstanding any judgment, decree or order of any Court, confine to the examination of the existence of an arbitration agreement."

\(^{39}\)Supra note 24.
laws now in effect provide that an arbitration clause, to be enforceable, must be in writing. The study of when an arbitration agreement is ‘in writing’ may differ from state to state. Under the Model Law, article 7, the agreement to arbitrate must be in writing signed by the parties or in an exchange of writings between them. Under United States of America law, it appears to be the majority view that the writing requirement is satisfied if the arbitration clause is in a written offer, which offers may be accepted either by writing or by conduct.

It is possible that other national courts may adopt comparably broad readings of the writing requirement, although perhaps few courts in states that have adopted the Model Law’s narrow definition of ‘in writing’ will find themselves free to do so. There is other aspect of arbitration law that a court must examine when it is asked to enforce an arbitration agreement, namely, whether the dispute is of a kind that is arbitrable under the national arbitration law or whether it is nonarbitrable. A non-arbitrable dispute is a dispute of a kind that may be resolved only through procedures provided by another of the nation’s laws. The courts must determine whether the dispute is within the scope of national arbitration statute, or whether the dispute must be resolved through another mechanism. In the international context, a court applying article 8(1) of the Model Law, and (if it is in a New York Convention state) the substantially identical language of the Convention, is faced with a amount of choice of law issues. The court must examine what nation’s laws it should apply in deciding whether an arbitration agreement must be in writing, and, if there is such a requirement, whether that requirement has been satisfied.

House of Lords in *James Miller and Partners Ltd v Whitworth Street Estates Ltd*[^40] of the view that where the parties have agreed that the governing law will be a foreign law, the question relating to the chosen arbitral tribunal will also usually be governed by such foreign law. This view was confirmed in *Chartbrook Limited v Persimmon Homes Limited*[^41].

In India in *Bhushan Steel Ltd v. Singapore International Arbitration Centre and Anr*\(^42\), an arbitration clause contained in a series of contracts made a reference to disputes being referred to arbitration in Singapore, as per international law. *Bhushan Steel*, in a suit before Delhi High Court seeking, *inter alia*, a declaration that the arbitration clause in the contract was vague and indeterminate, and hence void and incapable of being enforced; and asked that the court issue a permanent injunction restraining Singapore International Arbitration Centre (SIAC) from continuing the arbitration proceedings. Rejecting the contention the court held that the law applicable to the arbitration was Singaporean law and, given that the clause clearly provided for Singapore as the seat of arbitration, therefore, the parties had excluded the provisions of 1996 Act. In *Nandan Biomatrix Limited v. D I Oils Limited*\(^43\) the Supreme Court of the view that where the parties do not prescribe any form for the purpose of arbitration agreement, the intention of the parties is required to gather as to whether they have agreed for resolution of disputes through arbitration as per Singaporean law; the parties unequivocally agreed to resolution of the disputes through institutional arbitration and not through an *ad hoc* arbitration; therefore, there exists a valid arbitration agreement between the parties and in the circumstances, all disputes and differences between the parties should be referred to Singapore International Arbitration Centre, which would nominate an arbitrator from its panel. In *Dozco India P Ltd v. Doosan Infracore Co Ltd*\(^44\) the Supreme Court refused to intervene in a dispute where the arbitration clause made a specific reference to arbitration under Korean law, with a seat of arbitration in Seoul. It states that the designation of a foreign seat and an express choice of a foreign governing law amounted to a clear agreement to exclude the operation of Part 1 of Arbitration and Conciliation Act, 1996 and in the *Denel (Proprietary Limited) v Bharat Electronics Ltd*\(^44\), the Supreme Court refused to interfere with an arbitration agreement, on the ground that the parties had undertake into it with full knowledge and understanding of what they were agreeing.

The Australian court in *Transfield Philippines Inc v. Pacific Hydro Ltd*\(^45\) stayed Australian curial proceedings on the basis that the parties had agreed to

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\(^42\) *Bhushan Steel Ltd v. Singapore International Centre and Anr* IA No 11355/2009 in CS (OS) No1392/2009.


\(^44\) *Denel (Proprietary Limited) v. Bharat Electronics Ltd* 2010 (6) SCC 394.

Philippine law arbitration with an “arising out of, or in connection with” arbitration clause.

From the above, a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. Thus, it can be said with a force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.

6.2 During the Arbitral Proceedings

Under this Section, the forms of judicial intervention once the arbitral proceedings have been commenced will be examined, in particular, the assistance that the court can provide to the arbitral tribunal in the form of interim measures and controversial inherent jurisdiction of the court to intervene.

6.2.1 Interim Measures of Assisting the Process

The practical application of the doctrine of concurrent jurisdiction is the right of the parties to apply to the court to obtain provisional or protective relief including, as the English courts define them, anti-suit injunctions. The dilemma posed between the liberality of party autonomy on the one hand and the traditional role of the courts with their concurrent jurisdiction on the other was described by Lord Mustill in the case of Coppee-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Limited. 46

On the one hand, the concept of arbitration as a consensual process, reinforced by the idea of transnationalism, leans always against the involvement of the mechanisms of State through the medium of a municipal court. On the other side, there is the plain fact…that it is only a Court possessing coercive powers which could rescue the arbitration if it is in danger of foundering, and that the only Court which possesses these powers is the municipal Court of an individual state…there is, I believe, a broad consensus

acknowledging that the local court can have a proper and beneficial part to play in the grant of concerned measures. The total consistency cannot be expected. Each domestic Court has its own practical methods...which it will instinctively tend to bear when similar questions arise in the context of arbitration; each country will have its own traditions of arbitration and its own traditions of the relationship between arbitration and the Court. The result is considerable diversity from one country to another...Nevertheless; there is emerging a general measure of agreement about the spirit in which a local court should approach, that it should aim to be at the same time supportive but spare in the use of its powers."

The power to grant interim relief is an important one in the process of arbitration by the local courts. Article 9 of Model Law, recognizes that a party does not waive his right to arbitrate if he applies to a court for interim relief or if a court grants such relief. Most other modern arbitration laws do the same. These statutes do not, however, themselves confer on the courts the power to grant interim relief, or provide guidance on how that power is to be exercised. With respect to the courts’ power to grant interim relief, the Model Law only says, “arbitral proceedings before or during with an arbitration agreement it was not unsuited protection of an interim measure by a court and for a court to grant such measure”. For the rules and procedures governing the granting of interim relief, the courts must look, not to the national arbitration law, but to the laws and rules that govern national courts generally.

Unnecessary to say, the courts’ powers and the way they use them will differ from country to country. In principle, however, the practices in all developed systems are the same; the courts in appropriate cases will issue interim relief to prevent unfair and irreparable injury, and in doing so they will have the same wide discretion in deciding what relief is appropriate as they do in relation to proceedings in court.

48 Article 9 of Model Law.
In Plaza Rakyat Sdn Bhd v Datuk Bandar Kuala Lumpur\(^{49}\), Plaza invoked the arbitration clause in the joint venture agreement and the lease agreement and sought an interim injunction to prevent the defendant from repossessing the land, pending the resolution of the dispute by arbitration. The court did not accept the defendant's contention that it would be required to pay damages that would be large and would ultimately come out of public funds; rejecting the contention the Kuala Lampur High Court granted the injunction, thereby preserved the subject matter of the arbitration.

In Hong Kong, for example, the courts held a *Mareva injunction* (freezing order) to be an interim measure of protection in *Katran Shipping Co Limited v Kenven Transportation Limited*\(^{50}\). An English case of *Green Flower Navigation Malta Ltd (1) Avin International Limited (2) v SC Santieural Naval SA Constanza*\(^{51}\) is a timely and modern example of the attitude of the English Courts both to the sanctity of the arbitration agreement, and the extent to which the Courts are prepared to intervene in upholding it. However, in *Aggeliki Charis Compania Maritima SA v Pagnan SpA*, popularly as *The AngelicGrace*\(^{52}\) being an anti-suit injunction case the High Court held while granting the injunction (on terms):

> "I consider …that there is a real risk that if [the Romanian proceedings are] allowed to remain indefinitely in being before the Romanian Court then the Romanian Court might proceed to make a final order inconsistent with the arbitration proceedings or alternately its continued existence could be deployed by the shipyard in some jurisdictional battle."

The manifestly supportive stance towards international arbitration of English Courts is evident in *Hiscox Underwriting Ltd v Dickson Manchester & Company Ltd*\(^{53}\) the court interpreted Section 44 in a less restrictive way than had been


\(^{50}\) Katran Shipping Co. Limited v. Kenven Transportation Limited 1992 Hong Kong LD G 9.


\(^{52}\) AngelicGrace (1994) 1 Lloyd’s Reports 168; (1995) 2 Lloyd’s Reports 87.

advocated by the Departmental Advisory Committee and in *Belair LLC v Basel LLC*\(^54\), English Commercial Court granted an order for interim relief under the 1996 Act. Its reason for doing so was to preserve the assets involved in the case, a palace in Georgia, pending the outcome of an arbitral tribunal which had yet to be fully constituted. It was, therefore, to use the language of Section 44(5) of the 1996 Act, unable to act effectively and thus, judicial assistance was permissible.

In *Viking Insurance Co v Rossdale and others*, arbitrators in a New York arbitration\(^55\) directed that depositions be taken from witnesses who resided in England and on reluctance in giving evidence by the witnesses the tribunal wrote to "your court" (without specifying which one) a letter of request seeking such assistance. Then, to support such a request, the claimant also applied to the High Court under the UK Evidence (Proceedings in other Jurisdiction) Act 1975. It was held that the English Court had no jurisdiction to respond to a request from a private tribunal\(^56\) and dismissed the application for evidence by deposition. In *Fiona Trust v. Privalov*\(^57\) the House of Lords held that the allegations of bribery should be determined by the arbitrators, not by English Courts and as a matter of construction, the claim that the contracts had been procured by bribery fell within the arbitration clauses in the contracts and by reason of the principle of separability invalidity the contract but not to necessitate the invalidity of the arbitration agreement and, in this case, even if bribery had vitiating the main contract, it had no effect on the arbitration clauses and rejected the plea of stay of arbitration proceedings. In the case of *West Tankers Inc v.*


\(^{55}\) The seat and curial law was New York.

\(^{56}\) To overcome that problem, the claimant applied under Section 44 and the court commented that on an interpretation of the words in the provision, the court has a wider latitude since the language was permissive rather than prohibitive, permitting evidence to be taken in the form of deposition, and concluding that even though the arbitration had its seat in New York, and the curial law was of New York, the English court had jurisdiction to make an order requesting witnesses based in England to be examined and provide evidence in depositions for the purpose of that arbitration. The fundamental ground was that the US procedure of deposition was not similar, or similar enough, to any comparable English one. For example, the discovery of witness testimony had never been part of English procedure and the English court has no power to require a person to submit to examination merely for the purposes of finding out if he has anything that may assist the deposing party. Further, in this case, the tribunal did not intend to allow the witnesses to be called who have not been previously deposed; however, the only purpose for an order for their deposition would be to provide the very evidenced in documentary rather than oral form. This was so contrary to English procedure, said the Judge that "this ground alone makes it inappropriate in my view to make the order now being sought."

The issue was whether the English Courts were entitled to grant an injunction to restrain a party from commencing or continuing court proceedings in breach of an arbitration agreement, where the court proceedings were brought in another Member State of the European Union which governs allocation of jurisdiction between courts of Member States, but also expressly excludes arbitration from its Scope. The House of Lords referred the matter to the European Court of Justice (ECJ), it, however, expressed its firm view that the Regulation did not preclude the grant of an injunction to restrain court proceedings in the other Member States which had been brought in breach of an arbitration agreement.

In Canada, the rule of the Court in Delphi Petroleum Inc v Derin Shipping & Trading Limited was that article 9 expressly bestowed jurisdiction on the State courts to consider a request for the third party to give evidence in arbitration. In the United States Section 1782 of the United States Code governs the obtaining of evidence in the US for use in judicial proceedings abroad, described as those of "foreign and international tribunals". In short, the US courts will assist in the production of evidence for use in proceedings of those tribunals. The question is, do arbitral tribunals, whose seats and curial law are not within the United States, come within the Section? In Application of Technostroyexport, the Southern District of New York in 1994 refused to assist an arbitration taking place in Stockholm and Moscow because to do so on those facts would be to usurp the authority of the tribunal, whose consent to the application before it had, apparently, not been obtained. It held the view, obiter, that the purpose of Section 1782 was to include foreign tribunals, but it cited no authority supporting that view. In Application of Medway Power, the court again declined jurisdiction to assist an English arbitration, ruling expressly that international arbitration was not intended by Congress to be included within the scope of Section 1782, dealing international arbitration a body blow in the process. Later, in NBC v Bear Stearns & Co, Inc, the Second Circuit (an appellate court) was confronting

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59 Delphi Petroleum Inc v. Derin Shipping & Trading Limited Federal Court of Canada, the trial Division 3 December 1993 (unpublished)
60 853 F. Supp 695 (SDNY, 1994)
61 985 F. Supp. 402 (SDNY, Nov 20 1997)
with a similar issue of the view and held that “Section 1782 intended to cover arbitrations under the aegis of the Arbitration Court of the International Chamber of the Commerce, and the phrase "foreign and international tribunals" must be given its ordinary and natural meaning and stated that "the legislative history reveals that when Congress in 1964 enacted the modern version of Section 1782, is intended to cover governmental and intergovernmental arbitral bodies and conventional courts and other state-sponsored adjudicatory bodies." Argumenum ex silentio, the court held, in paraphrase, that if Congress meant the phrase to cover private international arbitration as well”. In contrast, the view in Medway Power and NBC v Bear Stearns & Co\textsuperscript{63} was that Congress did not intend to include private international arbitration with Section 1782. In the above context, it is important to note that a systemic difference in opinion on state courts involvement in international arbitration, (admittedly on a comparatively narrow though important point of procedure) between not only two common law jurisdictions, but one which has incorporated elements of the Model Law within its statute, and one which does not. That said, and it is clear from the above decisions, there is a limit to the extent that the courts will apply judicial assistance to arbitration, and that limit, or at least an element of it, is comity not of law, but procedure.

It is not unusual for a party after obtaining an interim measure prior to the commencement of the arbitration to simply sleep over the matter. This issue has been raised in numerous cases before the Supreme Court first in the case of Sundaram Finance Ltd. v. Nepe India Ltd.\textsuperscript{64} stating that “before processing the interim order the court must be satisfied with the arbitration agreement existence and the applicant’s ‘manifest intention’ to take the matter to arbitration. The court must pass a conditional order to ensure the applicant has taken effective steps which is used to start the arbitration proceedings.”

Later in Firm Ashok Traders v. Gurmukh Das Saluja\textsuperscript{65} the Supreme Court held that “under Section 9 of the Arbitration Act, the court should make sure that arbitral proceedings are actually contemplated or manifestly intended and certainly going to commence within a reasonable time. The time gap between the applying of the

\textsuperscript{63} Medway power and NBC v. Bear Stearns &Co165 F.3d 184 (2d Cir. 1999).

\textsuperscript{64} Sundaram Finance Ltd v. Nepe India Ltd. (1999) 2 SCC 479.

Section 9 application and the commencement of arbitral proceedings should not be such as to destroy the nearby relationship between the two events. The party cannot nap over its rights under Section 9 and not commence arbitral proceedings.” The rules given effect through the Supreme Court judgments are nowadays codified under the 2015 Amendment Act also stating details respecting the time limit in which arbitration proceedings shall commence by inserting sub clause 2 to Sec. 9 through the Amendment Act. 66

In order to diminish court interventions and to restrict the courts’ power to grant interim injunction after the constitution of arbitral tribunal, sub-clause 3 of Sec. 9 was introduced stating that “once the arbitral tribunal has been constituted, the court shall not entertain an application under sub-section (1), unless the court finds that circumstances exist which may not render the remedy if under Section 17 efficacious.” Through this provision, the opportunities for the courts to deal with such applications are not excluded during the arbitration proceedings. However, the courts can grant injunctions only in exceptional circumstances. To give effect to this provision, the powers of arbitral tribunals has been balanced with the powers of the court in giving interim injunction in the time of arbitration proceedings or after creation of arbitral award but it should be before enforcement, but according to Sec. 36 by inserting sub-clause 1 to Sec. 17 of the 2015 Amendment Act. 67 Furthermore, the interim order passed by arbitral tribunals is enforced in the same manner as the

66 “Where, before the commencement of the arbitral proceedings, a Court passes an order for any interim measure of protection under sub-section (1), the arbitral proceedings shall be commenced within a period of ninety days from the date of such order or within such further time as the Court may determine.”

67 “17. (1) A party may, during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to the arbitral tribunal – (i) for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or (ii) for an interim measure of protection in respect of any of the following matters, namely: (a) the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement; (b) securing the amount in dispute in the arbitration; (c) the detention, preservation or inspection of any property or thing which is the subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid purposes any person to enter upon any land or building in the possession of any party, or authorizing any samples to be taken, or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence; (d) interim injunction or the appointment of a receiver; (e) such other interim measure of protection as may appear to the arbitral tribunal to be just and convenient, and the arbitral tribunal shall have the same power for making orders, as the court has for the purpose of, and in relation to, any proceedings before it.”

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court order, i.e., through the insertion of sub-clause 3 to Sec. 17 of the Amendment Act.  

6.2.2 Inherent jurisdiction of the Courts

The English Law especially Arbitration Act 1996, provides for inherent jurisdiction of the courts and to articulate in the words of Aeberli “the court retains its inherent jurisdiction to determine, by declaration and injunction, an arbitral tribunal’s jurisdiction at any time and irrespective of whether the party seeking such relief satisfies the requirements for recourse to the court under Sections 32, 67 or 72 of the 1996 Act” and according to Blanch points “it is not possible to entirely exclude the court’s role with wording in an arbitration agreement.” This notion, however, draws attention and in the words of Russell that “Parties, however, sometimes conduct themselves in such a manner as to induce the Court of Chancery to restrain them from proceeding in a reference”.

The common law cases of Sneddon v Kyle and Ontario Danforth Travel Centre Ltd. v British Overseas Airways Corporation are early authorities for the proposition that the court has an inherent jurisdiction to restrain arbitration proceedings where it would be right and just to do so. In Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corporation Ltd while granting an injunction for restraining arbitral proceedings the court ruled that it has an inherent jurisdiction to deal with a delay of prosecution in the arbitral process. In ABB Lummus Global Ltd v Keppel Fels Ltd the court held that Section 1(c) of the Act prevented it from determining the jurisdiction of the tribunal unless the requirements under Section 32 were fulfilled. The case that followed was Vale de Rio Doce Navegacao

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68. “Subject to any orders passed in an appeal under section 37, any order issued by the arbitral tribunal under this section shall be deemed to be an order of the Court for all purposes and shall be enforceable under the Code of Civil Procedure, 1908, in the same manner as if it were an order of the Court


SA v Shanghai Bao Steel Ocean Shipping Co Ltd\textsuperscript{76}, which although considered the former case but refrained from following it. The Court held that the restriction on court intervention in Section 1(c) was not, like Article 5 of the Model Law, and expressed as an absolute prohibition, it, therefore, did not remove the court’s inherent power to consider jurisdictional issues surrounding arbitral proceedings. In \textit{FT Mackley & Co Ltd v Gosport Marina Ltd}\textsuperscript{77}, the court accepted that Section 1(c) did not exclude the court’s inherent power to grant declaratory relief in respect of a question concerning the tribunal’s jurisdiction. In \textit{Fili Shipping Co Ltd and others, v Premium Nafta Products Ltd and Others}\textsuperscript{78} the trial court refused an application for a stay of arbitral proceedings, which is a positive support for the arbitration process. However, in \textit{Youell v La Reunion Aerienne}\textsuperscript{79} the court of appeal ruled that a mere fact that the claim was the subject of an arbitration agreement, it did not deprive a court of its jurisdiction under the Brussels Regulation. The appropriate remedy for a party alleging breach of an arbitration agreement was to seek a stay of the court proceedings under Section 9 of the Arbitration Act.

In India, in \textit{P.A. Ahmed Ibrahim v. Food Corporation of India}\textsuperscript{80}, where an arbitration clause exists in the agreement between the parties and one of the parties on dispute requested for institutional arbitration proceedings under Section 20 of 1940 Act, the trial court dismissed the application as it did not disclose any dispute referable to arbitration and on appeal the High Court allowed under inherent powers of the court. On further appeal, the Supreme Court opined that there was no scope for exercising the inherent powers of the court as it would have resulted in the nullifying the proceedings prescribed by the CP Code.

In \textit{Naval Gent Maritime Ltd Vs Shivnath Rai Harnarain}\textsuperscript{81} taking the spirit of an English court’s decision in \textit{The Channel Tunnel Group Vs Balfour Beatty Construction Ltd & Ors}\textsuperscript{82} that the English courts possessed inherent powers to grant interim relief even where the seat of arbitration was not in England, the Delhi High

\textsuperscript{78} Fili Shipping Co Ltd and others v. Premium Nafta Products Ltd and Others (2007) UKHL 40.
\textsuperscript{79} Youell v. La Reunion Aerienne (2009) EWCA Civ 175.
\textsuperscript{80} P.A. Ahmed Ibrahim v. Food Corporation of India (1999) 7 SCC 396.
\textsuperscript{81} Naval Gent Maritime Ltd vs. Shivnath Rai Harnarain 2000(4) RAJ 512 (Del).
\textsuperscript{82} The Channel Tunnel Group vs. Balfour Beatty Construction Ltd & Ors1993(1) All ER 64.
Court of the view that it has now acquired statutory sanction in terms of the English Arbitration Act; this is the ubiquitous view internationally; there is no reason to adopt a pedantic approach, thereby rendering the legal regime in India dissimilar to that prevailing in other parts of the world and held that so long as the territorial jurisdiction of the court is present, relief should not be declined on technicalities which are not representative of any equities in favour of the Respondent. Since the Respondent's properties are founded in India, the umbilical cord of territoriality is clearly visible.

In *NBCC Limited v. JG Engineering Pvt. Limited*\(^{83}\) Supreme Court of India while recognizing the primacy of party autonomy in arbitration proceedings held that time limits, and provisions regarding extensions of time, provided for in an arbitration agreement must be adhered to and where the arbitration could not be completed within the time limit fixed in the arbitration agreement, the court held that, although there are no provisions to extend deadlines under 1996 Act or the old Arbitration Act 1940, the appropriate court does have an inherent jurisdiction to extend time.

Inherent jurisdiction in the context of arbitration process often considered as a controversial power of the court to intervene. Although this jurisdiction to intervene in arbitral proceedings has been carved out by the courts themselves, there would appear to be emerging a more deferential attitude towards arbitration on the part of the courts in its application. It remains, in contrast to the Model Law, however, within the remit of the judge to restrain arbitral proceedings which, in theory at least, represents a significant power over arbitral proceedings with no significant restraints.

### 6.3 After Arbitral Proceedings

This aspect of judicial intervention represents the most contestable interference in the arbitral procedure. From a critical perspective court interference at this stage necessarily entails an undermining of the meaning of arbitral awards. Where parties are able to challenge, appeal or overturn the outcome of the arbitration, the finality and currency that such an award is compromised. The relative merits and demerits of court interference after the conclusion of arbitral proceedings will henceforth be examined.

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\(^{83}\) NBCC Limited v. JG Engineering Pvt. Limited (2010) 2 SCC 385
When litigation proceedings come to an end and a judgment is rendered, all national legal systems provide for the enforcement of the court’s judgment, as the enforcement is one of the most important prerogatives of state sovereignty. As far as arbitration is concerned, the enforcement of the award is not a consequence of state sovereignty. Arbitration rests upon the parties’ agreement, which has specifically been stipulated for the purpose of settling disputes arising out of or in connection with a particular contract. Accordingly, the arbitral tribunal is a private tribunal which does not have sovereign power. Once it has rendered its final award, its mandate is terminated and in no case can it provide for enforcement. Enforcement depends on specific national provisions which assign national courts the task of recognizing and enforcing arbitral awards. Accordingly, when it comes to the enforcement of the award, the arbitration system is confronted with a paradox, on the one hand, the parties have opted for arbitration because they wanted to avoid litigation (the relative autonomy of arbitration with respect to litigation is what renders the former particularly attractive); on the other hand, the parties must ultimately rely on domestic courts for the enforcement (or rejection) of their award.\(^84\)

Contemporary statutes and treaties dealing with the issue of enforcement of arbitral awards attempt to accommodate this paradox by resorting to two principles: 1) a general presumption in favor of enforcement of arbitral awards; 2) a limited number of grounds on which enforcement of these awards may be refused. The path followed by the New York Convention is a country that has ratified the New York Convention, the country’s courts must recognize and enforce awards made in other countries. Article 35(1)\(^85\) of the Model Law includes this international obligation into the national arbitration law.

The level and form of review for arbitral awards vary between jurisdictions. In most of the countries with an effective arbitration regime, a winning party in arbitration may present his award to a specified court, and, upon application of that party, the court must recognize and enforce the award. Under the Model Law, this

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\(^{85}\) In accord are, e.g. FAA, ss. 9, 207; English Arbitration Act 1996, §§ 66, 101; and French Code of Civil Procedure, arts 1477, 1498.
necessity applies with respect to both domestic awards and foreign awards. If a claimant has obtained an award requiring the respondent to pay damages or providing for some other form of relief, the court, on the application of the claimant, is needed to enforce the award to issue a judgment giving effect to the award.

The function of enforcing legally valid arbitration awards being an essential function that the court must perform, if a system of arbitration is to succeed and the obligation to recognize and enforce arbitral awards is not absolute, however. The Scholar, therefore, discuss in the following Section the grounds on which the courts may set an award aside or decline to recognize or enforce it.

### 6.3.1 Setting Domestic Awards aside and Refusing Recognition and Enforcement of Foreign Awards

Earlierly, in India arbitration was prolonged and difficult one. Every single arbitrator on account of absence of proper rules are controlled the arbitral process. Due to some uncertainties the arbitration was troubled because of various judicial decisions regarding the challenges to awards and interference of judiciary in the process of arbitral. These uncertainties assist for lengthy proceedings of arbitrations in court and the ambiguity arising due to by which the final awards could be executed. These drawbacks effected arbitration to develop as an effective means of dispute resolution. The courts have inherent powers to scrutinize the arbitral awards in the light of the applicable law as agreed by the parties and also on the basis of public policy ensuring a fair trial by the arbitrator providing equal opportunities to the parties who submit their disputes to the arbitrators. The judicial scrutiny of awards in various aspects for domestic as well as international arbitrations has been described below.

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86 Model Law Article 35 (1).
87 http://www.theindianlawyer.in/blog/2016/08/23/setting-aside-arbitral-award/
6.3.1.a Domestic Awards

There are two ways that a failing party in a domestic\(^{88}\) arbitration may challenge the award. First, the failure may bring an action in a competent court in the jurisdiction where the award was made to have the award set aside. Article 34 of the Model Law gives the losing party that right, as do all other functional arbitration laws\(^{89}\). Model Law, article 34 provides six grounds and is the only grounds on which a court may set aside an award made in the country where the court sits. These six grounds include denial of a fair arbitration procedure, an arbitral award that goes beyond the issues submitted to arbitration, an award with regard to a subject matter that is not arbitrable under the laws of the nation where the court sits, and an award contrary to that nation’s public policy. The same is accurate under most modern arbitration statutes. Another way that the losing party in arbitration may challenge a domestic award is by entering a defense in a court action brought by the winner seeking recognition or enforcement of the award. The court may deny recognition and enforcement if one or more grounds specified in article 34 are present. In India, these grounds are the same as in Model Law under article 34 i.e., for setting a domestic award aside.

The new amendments firstly pursue to clarify the meaning of public policy under Sec. 34 of the 2015 Act regarding the extent of review that courts should enter in, which persisted a matter of concern for the last few years. Particularity after the decision in ONGC v. Saw Pipes Ltd. 24 and ONGC v. Western Geco25, the explanation to Sec. 34(2) (b) explained as an award which is against the Indian public policy, firstly, the award making was affected by fraud or corruption or in violating the provisions of Sec. 75 or Sec. 81, secondly, it contradicts or conflicts the fundamental policy of Indian law; thirdly, it contradicts the concepts of morality or justice. Furthermore, an explanation states that in order to avoid any doubts, in law of

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\(^{88}\) Some awards have a ‘domestic’ nature, though they may involve international transactions or parties of different nationalities. For the enforcement and challenge of awards, it is the place of arbitration that makes them ‘domestic’. However, under the FAA certain awards made in the USA may be enforced or denied enforcement by US courts under the New York Convention, as if they were rendered in another country, if they bear significant relationships with another country (FAA, § 202); and that an award made in France may be enforced or denied enforcement by the French courts in the same manner as an award made in another country if the award ‘implicates international commercial interests’ (French Code of Civil Procedure, arts. 1492, 1502). For purposes of recognition and enforcement of awards under the Model Law, however, the distinction between ‘domestic’ and ‘foreign’ awards made valid.

\(^{89}\) e.g., FAA, § 10; French Code of Civil Procedure, art. 1486; English Arbitration Act 1996, § 67.
India law the fundamental policy has certain denial then it cannot appraise dispute on merits. Awards in arbitrations only between Indian parties can be challenged on the ground of patent illegality but only if it is “on the face of the award” and without entering into a merits review and without re-appreciation of evidence.26 A time limit has also been fixed to dispose of the application filed under sub-sec. (6) of Sec. 34 of the 2015 Amendment Act27 to reduce the delay in the disposal of such applications.90

6.3.1.b Foreign Awards

Due to lack of provisions in the Arbitration and Conciliation Act, 1996, foreign arbitral awards may set-aside under which laws of the country such award was made. A challenge to a foreign award raises slightly different considerations. Generally, the challenge to a foreign award will occur when the party that has succeeded in arbitration in one country applies to a court in another country for a judgment recognizing or enforcing the award. The other party may oppose the application by asserting that one or more of the grounds for denying recognition or enforcement specified in article 36 of the Model Law or article 5 of New York convention are present91.

When the question of recognizing or enforcing a foreign award comes before a court, the court’s powers will be different than with respect to a domestic award. The court has no ability to lay a foreign award aside. Only the courts in the jurisdiction where the award was develop have that power. Article 34, authorizing the setting aside of awards, applies only to awards made in the country where the court is sitting. Therefore, when it hears a challenge to a foreign award, a court, if it agrees with the challenge, may refuse to recognize or enforce the award, but it may not set the award aside. The party pursuing to enforce the award remains discharge to attempt to enforce it in another jurisdiction. The grounds set out in article 36 on which the denial of recognition and enforcement of a foreign or domestic award may be based, are precisely the same word for word as the grounds specified in the New York Convention, article V as the only grounds on which the courts in a signatory state are

90 Supra note 24
91 In US, the courts of the view that whether the parties, by agreement, can enlarge the jurisdiction of a reviewing court so as to permit it to set aside awards for errors of law or because findings of fact are not supported by sufficient evidence. Lapine Technology v. Kyocera Corp., 130 F. 3d 884 (9th Cir. 1997) with Chicago Typographical Union No. 16 v. Chicago Sun-Times Inc., 935 F. 2d 1501 (7th Cir.1991).
allowed to deny recognition and enforcement of a foreign award. The grounds specified under Article 36 of Model Law culminated in Section 34 on the grounds of Section 34 of Arbitration and Conciliation Act, 1996 to make it more comprehensive.

In the above context, the Scholar made an attempt to make an objective analysis discreetly on most possible grounds on which the court intervene either upholding the award or refusing to enforce the award the parties seek from the court and thus, to make a novel contribution to academic discourse by discussing the reasoning adopted by the courts in upholding or refusing the recourse to awards.

6.4 Enforcement of Foreign Arbitral Awards – Its Judicial Intervention

The recognition and enforcement of arbitral awards in foreign nature is of fundamental importance in the arbitral process. Sub-sections (1) and (2) of Section 48 of 1996 Act, gives discretion power to the courts that they may refuse to enforce a foreign award or overrule the defense put up by a party even if such party has proved the existence of one of the grounds listed in this section.

The ruling of the Supreme Court in Badat & Co v. East India Trading Co92 stated that “foreign awards and foreign judgments based upon awards are enforceable in India on the same ground and in the same circumstances in which they are enforceable in England under the common law on the grounds of justice, equity and good conscience” has a setback in its own dictum in Venture Global Engineering v. Satyam Computers Services.93 In this case the supreme court Venture Global Engineering v. Satyam Computer Services, Ltd94 broadly interpreted public policy considerations that were previously grounds for challenging only domestic arbitration awards are now appropriate grounds for challenging foreign arbitration awards and upheld a challenge in India to a foreign arbitration award on the grounds that the relief contained in the award violated certain Indian statutes and was therefore against to Indian public policy followed to Part I of the Indian Arbitration and Conciliation Act, 1996. The Supreme Court in its decision basing on the earlier judgment in Bhatia International95 held that “it is open to the parties to exclude the application of the

94 Ibid.
provisions of Part I by express and implied agreement, losing which the whole of Part I would apply”. Additionally, it would not be inconsistent with Section 48 of the 1996 Act to apply sec 34 (foreign award), or II Part provision and that under sec 34 the judgment-debtor can’t deny his right to evoke the Indian public policy, to set aside. The effect of Supreme Court judgment in Venture Global Engineering case is that foreign awards can be challenged on merits on the ground that it is “patently illegal”, notwithstanding the enforcement proceedings in any other jurisdiction. Therefore the decision makes no distinction between a foreign award and a domestic award if the execution of the award is to be done as per the laws of India. Under the 1996 Act, not mentioned about set aside award of foreign natured, this variation of a foreign award and a domestic award has been obliterated in Venture Global case and intervention in the Venture Global Engineering case on grounds of public policy is most unfortunate.

6.5 Bhatia International Overruled

But in recent cases, the Supreme Court is adopting a positive approach by distinguishing its decision from earlier cases. In Dozco India (P) Ltd v. Doosan Infracore Co. Ltd96 Supreme Court held that when the substantive law of arbitration agreement is a foreign law as agreed by the parties, Part – I of the Arbitration and Conciliation Act, 1996 would not apply and thus limited the scope of judicial intervention in international commercial arbitration. In Yograj Infrastructure Ltd.97 Supreme Court stated that “where the rules regulating arbitration and place of arbitration is foreign country then Part – I of the Arbitration & Conciliation Act, 1996 is excluded” and permitted the parties to exclude the applicability of the Part – I of the Act either expressly or impliedly. The effect of this judgment is that it limits the scope and application of Bhatia International case98 and Venture Global case99.

The five-judge Bench of Supreme Court has overruled Bhatia International and Venture Global Cases in Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc.100 (BALCO). ‘The Judgment on these points is clear and convincing, and ends two long-standing misconceptions: that the omission of the word “only” from

96 Dozco India (P) Ltd v. Doosan Infracore Co. Ltd (2011) 6 SCC 179.
97 Yograj Infrastructure Ltd (2011) 9 SCC 735.
98 Supra Note 95.
99 Supra Note 93.
100 Bharat Aluminium Co. v. Kaiser Aluminium Technical Service Inc. (2012) 9 SCC 552
Section 2 (2) of the Arbitration Act, 1996, was intended to make Part I of the Act applicable to arbitrations in which the seat is outside India, and that it is for the courts to “construe” the Act liberally to provide interim relief in aid of foreign-seated arbitrations. The difficulty in enforcement of foreign awards that enlarging the application of Part I of the Act to international arbitrations conducted outside India has been resolved by this judgment.

6.6 Judicial Scrutiny of Awards: Error of Jurisdiction

According to this rule, parties may challenge either the arbitral tribunal’s ruling because it lacked jurisdiction; or its award on the merits on the ground that it did not have jurisdiction and apply for an order that it does not affect award. However, the Model Law gives the party the right to appeal the award for lack of jurisdiction only after the award has been issued. To some extent, it supports the principle of Kompetenz-Kompetenz, however, given that it leaves a determination of jurisdiction ex-post facto to the courts, therefore, this assertion can be made in a theoretical sense, since, in reality, recourse will always be necessary where the arbitrator makes an erroneous decision on jurisdiction at the outset of proceedings.

In Dallah Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan, the English Supreme Court applying principles of French law, analysed whether there was a common intention between Dallah and the government of Pakistan that the government was to be bound by the arbitration agreement and concluded that both the Court of Appeal and the High Court had been right to refuse to enforce an award obtained by Dallah, a Saudi Arabian company, against the government of Pakistan as Pakistan was not a party to the relevant arbitration agreement and therefore refused to enforce the award. The resulting judgment is a comprehensively reasoned determination of the power of the English courts to reopen jurisdictional issues when asked to enforce an award under the New York Convention.

In China, in *Chongqing Baodao Pearl Co Ltd v. Chongqing Shapingba Mall Group Inc*\(^{104}\) where one of the parties to the agreement was a Chinese company and the other was a foreign related company invested and controlled by Taiwanese and the Higher People’s Court of Chongqing province resisted enforcement of the award and on appeal the Supreme People’s Court considered it as domestic rather than foreign related reasoning that, because all the parties were registered in China, they were, therefore, Chinese entities and as such there is no foreign element. This ruling clearly shows that a JV entity or local subsidiary of a foreign company even if controlled by foreign investors considered as Chinese legal entities and therefore, obliged to enter into arbitration and comply with an award under the domestic arbitration regime.

In *Jiecheng Foreign Co Ltd v. Zhonghua Tianjin Import & Export Co Ltd*\(^{105}\), where the parties entered into a contract with an arbitration clause providing all disputes related to the contract would be referred to Beijing International Arbitration Court with an exchange of correspondence. According to this correspondence, China International Economic and Trade Arbitration Commission (CIETAC) dismissed the jurisdictional challenge by Zhonghua and rendered an award in favor of Jiecheng. The Second Intermediate People’s Court and Higher People’s Court of Shanghai both ruled that the correspondence exchanged by the attorneys could not constitute a valid arbitration agreement and the arbitration clause in the original contract was invalid due to lack of an explicitly expressed arbitration institution and on appeal the Supreme People’s Court of China affirmed the view expressed by the Second Intermediate People’s Court and Higher People’s Court of Shanghai.

In *Titan Corporation v Alcatel CIT SA*\(^{106}\) in which an arbitral award was rendered in a dispute between a French company (Alcatel CIT SA) and two companies domiciled in the United States (Titan Corporation and Titan Africa Inc). The dispute troubled a telecommunications system to be installed in Benin. The arbitration clause mentioned to the International Chamber of Commerce Rules on Arbitration and appointed Stockholm as the place of arbitration. The sole English arbitrator bears a meeting to take evidence in Paris and accomplished the rest of the

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104 Chongqing Baodao Pearl Co Ltd v. Chongqing Shapingba Mall Group Inc (2004) 8 (2) GFCMT 44.
106 Titan Corporation v. Alcatel CIT SA Case T-1038-05
work in England. Thus, meeting is not took place and no work was performed in Sweden. However, Stockholm had been chosen as the place of arbitration, both parties and the arbitrator regarded Swedish arbitration law as the law applicable to the arbitral proceedings. On application to set aside the award the court found procedural hindrance i.e., whether the court had jurisdiction over a challenge to the award and that the only connection of the arbitration with Sweden was the choice of Stockholm as a forum and the fact that the parties recognized Swedish arbitration law as the law applicable to the arbitral proceedings. The court wondered whether there was a Swedish judicial interest, which is a condition for Swedish courts to deal with a dispute. The court held that such judicial interest presupposes that the dispute has at least a minor connection with Sweden and concluded that there was no judicial interest and therefore, no Swedish jurisdiction over the dispute and hence refused to enforce the award. It is, however, clear that a mere reference to Swedish arbitration law in the parties' submissions and the award is not sufficient to enforce it but, must create the necessary Swedish connection.

The Delhi High Court in Schlumberger Asia Services Ltd v. ONGC set aside the award of the majority arbitrators and affirmed the views and award of the minority arbitrator holding that the majority had committed two jurisdictional errors. The majority's first error was to ignore the well-recognized principle of law governing the construction of a contract. The second error committed by the majority, which again relates to its mandate, was to render redundant the words 'return to point of origin', which are an inherent and integral part of the concept of demobilization and thus, observed that the majority award was contrary to the contractual terms and the same was liable to be set aside on the grounds that the arbitrators had acted in excess of their jurisdiction.

The Supreme Court in Steel Authority of India Ltd v. J.C. Budharaja, Government and Mining Contractor, observed that “it is settled law that the arbitrator derives authority from the contract and if he acts in manifest disregard of the contract, the award given by him would be an arbitrary one; that this deliberate

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107 Schlumberger Asia Services Ltd v. ONGC FAO(OS) No. 712/2006 Date of judgment, January 9th, 2009
108 Steel Authority of India Ltd v. J.C. Budharaja, Government and Mining Contractor (1999) 8 SCC 122
departure from the contract amounts not only to manifest disregard of the authority or misconduct on his part, but it may tantamount to mala fide action......” and further observed that “the Arbitration Act does not give any power to the arbitrator to act arbitrarily or capriciously. His existent depends upon the agreement and his function is to act within the limits of the said agreement”. In W.B. State Warehousing Corporation & Anr. v. Sushil Kumar Kayan & Ors.\textsuperscript{109}, it was perceived that “If there is a certain term in the contract or the law which does not permit the parties to raise a point before the arbitrator and if there is a specific bar in the contract to the raising of the point, then the award passed by the arbitrator in respect thereof would be in excess of the jurisdiction” and in the case of Bharat Coking Coal Ltd. v. Annapurna Construction\textsuperscript{110}, the court reiterated the legal position that

“There lies a clear distinction between an error within the jurisdiction and error in excess of jurisdiction. Thus, the role of the arbitrator is to arbitrate within the terms of the contract. He has no power alone from what the parties have given him under the contract. If he has traveled beyond the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned on the ground that it contains an error apparent on the face of the record.”

In MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd\textsuperscript{111} the court took the similar view and observed that

“an Arbitral Tribunal is not a court of law; its orders are not judicial orders; its functions are not judicial functions; its power ex debito justitiae; the jurisdiction of the arbitrator being confined to the four corners of the agreement, he can only pass such an order which may be the subject-matter of reference”

\textsuperscript{109} W.B. State Warehousing Corporation & Anr. V. Sushil Kumar Kayan & Ors (2002) 5 SCC 679.
\textsuperscript{111} MD, Army Welfare Housing Organisation v. Sumangal Services (P) Ltd (2004) 9 SCC 619
and the dictum in *Associated Engineering Co. v. The government of Andhra Pradesh & Anr.*[^112], *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors*[^113], *State of Rajasthan v. Nav Bharat Construction Co*[^114], *Food Corporation of India v. Surendra, Devendra & Mahendra Transport Co*[^115] sufficiently speaks the judicial response in scrutinizing the awards on the question whether an arbitrator can make an award contrary to the terms of the contract executed between the parties.

### 6.7 Judicial Scrutiny of Awards: Error of Law

The court can examine and scrutinize an award on a challenge where a serious irregularity or misconduct of the arbitrator is alleged. Conversely, the Model Law makes no reference to serious irregularity in article 34; instead, it provides an exhaustive list of circumstances whereby an award may be set aside.

The error of law ground may facilitate a restricted right of appeal in enforcing the awards. This goes to the notion that a limited right of appeal is consistent with the fact that the parties have chosen to arbitrate rather than litigate. For example, many arbitration agreements contain an express choice of law clause to govern the rights and obligations arising out of the bargain made subject to that agreement. It can be said with a force that in such circumstances, the parties have agreed that the law will be properly applied by the arbitral tribunal, with the consequence that if the tribunal fails to do this, it is not reaching the result contemplated by the arbitration agreement.

The English courts in *Egmatra AG v Macro Trading Corporation* recognized the point of law as broad and warned that the courts should apply it carefully on decision of tribunal. The underlying principle which should be applied in respect of this provision was articulated by the Appeal Court in *BMBF (No 12) Ltd v Harland Wolff Shipbuilding and Heavy Industry*[^116] stated that “it is not for the courts to substitute its own view for that of experienced arbitrators on questions such as this”. In *Geogas SA v Tammo Gas Ltd*, it was opined that “the arbitrators are the masters of the facts. On an appeal, the court must resolve any question of law arising from an

[^113]: *Jivarajbhai Ujamshi Sheth & Ors. v. Chintamanrao Balaji & Ors* AIR 1965 SC 214
[^114]: *State of Rajasthan v. Nav Bharat Construction Co.* AIR 2005 SC 4430
award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is unrelated whether the court considers those findings of fact to be right or wrong. It also does not matter how clear a mistake by the arbitrators on issues of fact might be or what the scale of the financial consequences of the mistake of fact might be”. At this point, it is to be noted in the words of Davidson that “the trend in legal systems around the world has been towards immunizing the award from a challenge on the ground of error of law”.

The question of error/ point of law come into being in circumstances where the proper law of the contract is a foreign law, where the parties have chosen a foreign law as the procedural law and where there arises a question of fact. In Fence Gate Ltd v NEL Construction Ltd and Hallamshire Construction plc v South Holland DC, the court held that an arbitral tribunal’s award cannot be challenged on the basis that it has made an error of fact. The question of law must arise from the arbitration award. In Fence Gate Ltd v NEL Construction Ltd it was held that “it is never easy to define what is meant by a question of law in the context of an arbitration appeal” referring that where an arbitral tribunal does not account for certain factors in its reasoning or where it confuses law and fact, this may lead to an error of law and cautioned that where the latter occurs, a confusion of law and fact, this could lead to an error of principle and thus a question of law is likely to arise in this instance. The court further warned that the discretion given to an arbitral tribunal must not be used in a way which is contrary to the intentions of the parties who have conferred such power on it, and also in accordance with the law. Moreover, it must not be exercised in a manner in which a reasonable arbitration tribunal properly directing itself could not have reached. In Lesotho Highlands Development Authority v Impregilo SpA the essential question before the court was where the tribunal has made an error of law, but the parties have expressly excluded the right to appeal under Section 69 of 1996 Act, can a party nevertheless challenge an award characterising the error of law as an ‘excess power’ and therefore, a ‘serious irregularity’ under 1996 Act?. The High Court, the Court of appeal agreed that the tribunal made an error of law by awarding interest in various European currencies, contrary to the agreement of the parties and

118 Fence Gate Ltd v. NEL Construction Ltd (2001) All ER (D) 214
error of law amounted to an ‘excess of power’ and therefore, a ‘serious irregularity’ under 1996 Act. In contrast, the House of Lords disagreed that there had been an ‘excess of power’. **Lord Steyn** giving leading judgment held that any error of law by the tribunal was merely the ‘erroneous exercise of an available power’ rather than ‘an excess power’ and accordingly the award was not open to challenge. His conclusion focused on the purpose of the 1996 Act to reduce drastically the extent of the intervention of courts in the arbitral process.

In **Indian Oil Corp v Coastal (Bermuda) Ltd**⁹²¹, the English court narrowed down the scope of serious irregularity and the award in question before them remitted back to the arbitral tribunal where a deficiency in procedure had occurred as followed in **Lesotho Highlands Development Authority v Impregilo SpA and Others**⁹²². In **STMicroelectronics NV v Credit Suisse Securities (USA) LLC**⁹²³ the Appeal Court of USA refused to vacate an arbitral award under the United States Federal Arbitration Act, where a party argued that an arbitrator had failed to disclose prior experience that rendered the arbitrator potentially biased.

In Australia, there is no English style “error of law” for refusal of an award. The Queensland Supreme Court in **Resort Condominiums Inc v. Bolwell**⁹²⁴ read Article VII of New York Convention enforcement exceptions as inclusive and decided to retain a general discretion as to whether to enforce a foreign award even where none of the grounds for refusing are made out. In contrast, the Supreme Court of New South Wales in **Cargill International SA v. Peabody Australia Mining Ltd**⁹²⁵, of the view that the relevant arbitration clause provided that disputes “shall be referred to International Arbitration under the ICC Rules” and as such no implied agreement between the parties to opt out and therefore, the Model Law to be applied to the arbitration, rather than Commercial Arbitration Act of 1984 of NSW, accordingly held more restrictive grounds available for recourse against an award. The Federal Court of Australia in **Comandate Marine Corporation v. Pan Australia Shipping**⁹²⁶ recognised the public interest in international arbitration and displayed a

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⁹²¹ Indian Oil Corp v. Costal (Bermuda) Ltd (1990) 2 Lloyd’s Law Rep 407
⁹²² Lesotho Highlands Development Authority v. Impregilo SpA and Others (2005) UKHL 43
⁹²³ (STMicroelectronics) 10-3847-cv (2d Cir June 2 2011).
strong pro-arbitration attitude and corresponding pro-arbitration bias towards foreign awards unifying characteristic of non-arbitral matters like bankruptcy, insolvency and intellectual property ownership as a sufficient element of legitimate public interest in these subject matters making the enforceable private resolution of disputes concerning them outside the national court system inappropriate.

In *Singapore Yonghang Private Co Ltd v. Ningxia National Chemical Group Inc*, the Chinese Higher People’s Court (HPC) of Ningxia province ruled that the enforcement of award should be refused on the ground that the claim was beyond the scope of arbitration. On appeal the Supreme People’s Court (SPC) overruled the HPC decision holding that the courts could not review the substantive payment amount determined by the arbitral tribunal determining that the contract clearly stipulated that all disputes arising out of performance of the contract or related to the contract should be referred to arbitration; payment for breach of actions and payment for occupying actions were substantive issues that should be determined by the arbitration tribunal; that the amount of payment awarded by the tribunal was beyond the stipulation of the contract did not mean that the tribunal acted beyond its authority. The SPC holding so ruled that the reasonableness of the determined substantive issue was not subject to review and thus, the award should be enforced.

The law with regard to scope and ambit of the jurisdiction of the courts to interfere with an arbitration award has been settled in a catena of judgments by the Supreme Court. In *State of Rajasthan v. Puri Construction Company Limited & Anr*[^127^], it was observed that the arbitrator is the final arbiter for the dispute between the parties and it is not open to challenge the award on the ground that the arbitrator has drawn his own conclusion or has failed to appreciate the facts, and in *Sudarsan Trading Co. v. Govt. of Kerala*[^128^] it has been held that there is a distinction between disputes as to the jurisdiction of the arbitrator and the disputes as to in what way that jurisdiction should be applied, there may be a conflict as to the power of the arbitrator to grant a particular remedy. In *Municipal Corpn. of Delhi v. Jagan Nath Ashok Kumar*[^129^] it has been held that appraisement of evidence by the arbitrator is ordinarily never a matter which the court questions and considers. Further, in *Arosan*

Enterprises Ltd. v. Union of India\textsuperscript{130} the court upon analysis of numerous earlier decisions, held that “it is now a well-settled principle of law that re-appraisal of evidence by the court is not acceptable and as a matter of fact exercise of power by the court to reappraise the evidence is unknown to proceedings under Section 30 of the Arbitration Act” and in Kwality Manufacturing Corporation v. Central Warehousing Corporation\textsuperscript{131} the court of the view that "At the outset, it should be noted that the scope of interference by courts in regard to arbitral awards is limited. A court considering an application under Section 30 or 33 of the Act, does not sit in appeal over the findings and decision of the arbitrator nor can it re-assess the evidence or examine the sufficiency or otherwise of the evidence”; the same was reiterated in Madhya Pradesh Housing Board vs. Progressive Writers and Publishers\textsuperscript{132} that the finding arrived at by the arbitrator in this regard is not even challenged by the Board in the proceedings initiated by it under Section 30 of the Act. It is fairly, justly and equitably well settled and needs no restatement that the award of the arbitrator is ordinarily final and the courts hearing applications under Section 30 of the Act do not exercise any appellate jurisdiction and reappraisal of evidence by the court is impermissible.

Supreme Court of the view in Bhatia International Ltd v Bulk Trading SA\textsuperscript{133}, in an international commercial arbitration the award was passed in a non-convention country, though not enforceable accord to Part II, would be used as a domestic award and would be enforceable under the provisions of Part I of the 1996 Act. Relying on section 2(f) of the 1996 Act, defines international commercial arbitration, the Supreme Court was of the opined that there is no distinction between international commercial arbitration taking place in India or outside India in definition part. In Badat & Co v East India Trading Company\textsuperscript{134} the view was that an award passed in a foreign country can afford a cause of action only when it is final, i.e. a judgment established on the award as per the law of the country where the award was passed has been rendered, by itself, the award cannot give rise to any fresh cause of action.

\textsuperscript{130} Arosan Enterprises Ltd. v. Union of India (1999) 9 SCC 449.
\textsuperscript{132} Madhya Pradesh Housing Board v. Progressive Writers and Publishers (2009) 5 SCC.
\textsuperscript{134} Badat &Co v. East India Trading Company AIR 1964 SC 538.
This would mean that the viewing in Bhatia, regarding the enforcement of non-convention country awards, cannot be relied on.

6.8 Judicial Scrutiny of Awards: Public Policy Considerations

The term ‘Public policy’ means the matter which covers public good and interest. The Arbitration and Conciliation Act, 1996 does not define the term “Public Policy of India”, but there is a reference under Section 34 (2) (b) (ii) of Part I, Section 48(2) (b) of Part II–Enforcement of Certain Foreign Award (New York Convention Awards) and Section 57 (I) (e) of Part II- (Geneva Convention Awards), which inter alia states that the awards made, be not contrary to the “Public Policy of India”.

Section 34 of the Act provides limited grounds for challenging the award, and it is also accepted that the courts have no power to get into the merits of the dispute. Supreme Court in Renusagar Power Plant Co. Ltd. v. General Electric Co\textsuperscript{135} while establishing or formulating the title named ‘public policy’ in Section 7(1) (b) (ii) of New York Convention, applied the principles of private international law and stated that “an award would be opposing to public policy if the enforcement is against (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality”. This was a narrower interpretation of the expression “public policy of India” in the context of enforcement of foreign awards.

However, this basic proposition has suffered a setback in ONGC v. Saw Pipes Ltd\textsuperscript{136}. Supreme Court in this case held that where the validity of award is challenged, it was required to give a wider meaning of “public policy of India” used under Section 34 and inter alia including patent illegality as one of the grounds for challenge and strongly relied upon Section 28 of the Act, which requires the arbitrator to follow the substantive law in force in India. Instead of limiting the concept of public policy as enunciated in the Renusagar Power Plant Co. Ltd, it was widened to include ‘patent illegality’ or erroneous in law. While the Renusagar case narrowed the term ‘public policy of India’, the ONGC case vastly enlarged the scope and expanded the same.\textsuperscript{137}

\textsuperscript{136} ONGC V. Saw Pipes Ltd (2003) 5 SCC 705.
\textsuperscript{137} Supra note 102.
The imprecise meaning of international public policy continues to cause disagreement and even bewilderment among judges, arbitrators, and scholars. The overlapping categories of domestic, international and transnational public policies also risk unruly applications of the public policy exceptions. The diversity of terminology, increasing conflation of private international law and public international law conflate the already overlapping categories of public policy. For instance, the public policy against corruption exemplifies the coalescing international and transnational public policy.\(^{138}\)

In *Westacre Investments Inc v. Jugoimport-SPDR Co Ltd.\(^{139}\)*, the arbitrators rejected *Jugoimport* claim that the relevant contract was procured by bribery and was, therefore, the award is illegal in the place of performance. On refusal to set aside the award by the supervisory court *Jugoimport* raise the plea of corruption again before the enforcement courts in England. The judges divided into two groups as to whether the court should reopen the decision of the arbitrator on corruption or whether the court should enforce the award. They are, however, against the reopening of the foreign award on the basis of fraud. The general view was that enforcement of an award purporting to enforce an illegal contract would indirectly enforce that illegal contract, and would, therefore, damage the integrity of the judicial process; such abuse of judicial process arising from judicial enforcement or endorsement of illegality should fall within the public policy exception and thereby rendered the award unenforceable.

The Technology Construction court in England in *L Brown & Sons Ltd v. Crosby Homes (North West) Ltd.\(^{140}\)*, refused to grant an extension of time for an application that an award was obtained by fraud or was contrary to public policy following the rule laid down in *Kalmneft JSC v. Glencore International AG.\(^{141}\)*, and expressed its view that the twin principles of party autonomy and finality of awards, particularly in the field of international arbitration, demand minimum intervention of court in relation to claims of serious irregularity.

\(^{138}\) Winnie (Jo-Mei) Ma, Recommendations on Public policy in the enforcement of arbitral awards, CIIrb’s International Journal- Arbitration Vol. 75 (1) 2009, Sweet & Maxwell.
In *Polytek Engineering Co Ltd v. Hebei Import & Export Corporation*\(^{142}\), *Hebei’s* failure to raise promptly objections to improper communications between the parties was the primary reason for enforcing the award. The Hong Kong Court of Final Appeal unanimously approved the enforcement of the award in question on its factual finding that it is because of due process and public policy violations. It illustrates that failure to raise due process objections during the arbitral proceedings may preclude a party to place a reliance on public policy exceptions. Similarly, the US Court of Appeal in *AAOT Foreign Economic Association (VO) Technostroy Export v. International Development & Trade Services Inc*\(^{143}\) commented that the defendant’s failure to object the arbitrator’s corruption and lack of impartiality may result in a waiver of the right to raise the public policy exception.

In *OAO Lenmorniproekt v. Arne Larsson & Partner Leasing*\(^{144}\) (ALPL), a request was made before the Supreme Court of Sweden for the recognition and enforcement of an arbitration award between the parties which was provided by the ICA court at the Chamber of Commerce and Industry of the Russian Federation. Swedish Supreme Court found that pursuant to Section 53 of the Swedish Arbitration Act, a foreign award which is based on a written arbitration agreement shall, according to the main rule, be recognized and enforced in Sweden. Taking into consideration the legislature's comments in conjunction with the implementation of the New York Convention the court was of the opinion that the evidentiary requirement could not be made particularly stringent since it must be proved and differed from what is customary through a party (in this case ALPL) being required to prove that the opposing party has failed to fulfill its duty of notice. The decision gives consideration to the due process requirements under the public policy exception which the parties have every right to demand. The Supreme Court concluded that it was not acceptable that an award could be recognized and enforced against a party which had not been notified of the arbitration proceedings. The respondent's receipt of notification of the proceedings is a fundamental requirement and in this case, it found that ALPL had proven that no service of process of the request for arbitration had

\(^{142}\) Polytek Engineering Co Ltd v. Hebei Import & Export Corporation (1999) HKLRD 552, Hong Kong Court of Final Appeal.

\(^{143}\) AAOT Foreign Economic Association (VO) Technostroy Export v. International Development & Trade Services Inc 139 F 3d 980 (2nd Cir, 1998).

\(^{144}\) OAO Lenmorniproekt v. Arne Larsson & Partner Leasing (ALPL) Ö 13-09, dated April 16, 2010.
taken place and that ALPL, therefore, lacked knowledge of the proceedings and therefore, refused to enforce the award.

In *Compagnie X SA v Fédération Y*\(^{145}\) the Swiss Supreme Court annulled International award on grounds of procedural public policy infringement holding that it will intervene *ex-post facto* only on restrictive grounds, particularly in cases in which fundamental or generally recognised mandatory procedural principles have been disregarded i.e., on procedural public policy grounds according to article 190(1)(d) of Swiss Private International Law Act so as to contravene the sense of justice in an intolerable way, resulting in an award that appears to be completely incompatible with the values and legal order of the state.

The New South Wales Supreme Court in Australia when opposed the ground of Indian Public policy in *Xiaodong Yang v. S&L Consulting*\(^{146}\) by the award debtor contending that a guarantee relating to permanent residency, which was part of the contract, upheld by the arbitral tribunal (which sat in China), was an illegal element of the agreement in respect of which the award was made and that the enforcement of the award would offend Australian public policy generally, the court ruled that public policy considerations did not prevent the enforcement of the award, finding that even if the contract contained a guarantee with an unlawful purpose, it would not be contrary to public policy to enforce an award in respect of it unless the guarantee was unenforceable under ordinary contractual principles. The court further made it clear that the threshold for the public policy exception to enforcement is significantly higher than if public policy is considered in the context of the validity or enforceability of an agreement to arbitrate.

In the case of *Shenzhen Baosheng Jinggao Environmental Development Co Ltd v. Hefei City Appearance Environmental Hygienically Bureau*\(^{147}\), the Hefei City representing the state, imported set of equipment that did not function well; the award was resisted on the public policy ground before Higher People’s Court in Anhui, China which refused to enforce it reasoning that enforcement would substantially

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\(^{145}\) Decision 4A_403/2008 of the Swiss Supreme Court issued on December 9 2008, to be published in the Court's Official Reports.


\(^{147}\) Shenzhen Baosheng Jinggao Environmental Development Co Ltd v. Hefei City Appearance Environmental Hygienically Bureau (2006) 12 (1) GFCMT 46.
damage state assets. On appeal, the Supreme People’s Court disagreed the view expressed by the HPC and held that violating the public interest meant violating fundamental interest of China; idle machinery did not meet the required standard for damaging the public interest and was not caused by the arbitration, therefore, award required to be enforced.

In the US under the FAA (Federal Arbitrator Act) the courts have fashioned ‘manifest disregard of law’ doctrine under the domestic FAA, which permits domestic arbitral awards to be vacated if they depart sufficiently from the clear dictates of applicable law. The ‘manifest disregard of law’ formula derives from the dicta in Wilko Vs. Swan\textsuperscript{148}, wherein the Supreme Court remarked that the interpretation of arbitration is not subject by federal courts to review derror. Though the discussion on the main point decided in the case was overruled in RD Quijas v. Shearson/American Express\textsuperscript{149} the exception as to ‘manifest regard’ has survived. However, it appears very likely that the manifest disregard conception is so deeply entrenched in domestic law that it cannot be abandoned\textsuperscript{150}. It is accepted in the US that manifest disregard of the law is nevertheless a necessary ground for the effective functioning of the arbitral process. Few courts apply the principle of ‘irrationality’ of the domestic award or even lack of factual basis. In Ainsworth v. Kurnick\textsuperscript{151} ignoring the unambiguous contract language, and in Shearson Lehman Brothers Inc. v. Hedrich\textsuperscript{152} and other decisions suggest demonstrably wrong decisions need not be recognized. The scrutiny of domestic awards by the courts for ‘manifest disregard of law’ as accepted in Wilko v. Swan as an exception introduced in the American system considered as ground by dictum for the vacation of an award. In the United States of America the court’s proposition in the case of US Northrop Corp v. Triad International Marketing\textsuperscript{153}, and Ludwig Honold Mfg. Co v. Fletcher\textsuperscript{154} was that “For decisions applying the ‘manifest disregard’ standard to international arbitration decisions that are not subject to the New York Convention”.

\begin{itemize}
\item \textsuperscript{148} Wilko v. Swan 201 F. 2d 439 (2d Cir.1953)
\item \textsuperscript{149} RD Quijas v. Shearson/ American Express 109 S.C 1917 (1989)
\item \textsuperscript{150} First Options of Chicago Inc Vs. Kaplan: 514 US439 (1995)
\item \textsuperscript{151} Ainsworth v. Kurnick 960 F.2d. 939 (11 Gr.1992)
\item \textsuperscript{152} Shearson Lehman Brothers Inc. v. Hedrich 639 N. Y. 2d 228 (Illinois App.1994)
\item \textsuperscript{153} US Northrop Corp v. Triad International Marketing 811 F.2d 1265 (9th Cir 1987) and 405. F.2d 1123 (3rd Cir 1969).
\item \textsuperscript{154} Ludwig Honold Mfg. Co v. Fletcher 405. F.2d 1123 (3rd Cir 1969).
\end{itemize}
In India the Supreme Court in *Oil & Natural Gas Corporation. Ltd. v. Saw Pipes Ltd.*, *inter alia*, held that where the validity of award is challenged, the phrase “public policy of India” used in Section 34 (which deals with challenge to an arbitral award) was required to be given a wider meaning and *inter alia* including patent illegality as one of the grounds for challenge and strongly relied upon Section 28 of the Indian Act which needs the arbitrator to follow the law.

In the case of *Renusagar Power Plant Co. Ltd. Vs. General Electric Co*155 the court in view of the absence of a workable definition of “international public policy” found it difficult to construe the expression “public policy” in article V (2) (b) of the New York Convention signify international public policy as it could be, construed both in narrow or wide sense. The Supreme Court, while construing the term ‘public policy’ in Section 7(1) (b) (ii) of New York Convention, applied the principles of private international law and held that an award would be against to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

The trend in India is similar to that of in England i.e. public policy could be explained in a narrow sense and a broad sense. It may be taken into consideration that in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH Vs. Ras Al Khaimah National Oil Co*156 the English Court of the opinion that “Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution.”

**Summing up**

In evaluating the judicial interpretation of international commercial arbitration the scholar has explored the various judicial decisions of the courts. The Supreme Court’s judgment in *Saw Pipes*157 expanded the concept of public policy to add that the award would be contrary to public policy if it was “patently illegal”. The court distinguished *SAW Pipes* case from that of *Renusagar*158 on the ground that the *Renusagar* judgment was in context of a foreign award, while the ratio of *SAW Pipes* would be confined only to domestic awards; and in the name of public policy, the

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156 Deutsche Schachtbau-und Tiefbohrgesellschaft mb H v. Ras Al Khaimah National Oil Co. 1987 2 All ER 769
157 Ibid
158 Renusagar Power Plant Co. Ltd v. General Electric Co. 1994 SC 860
court went on to re-appreciate the question of facts, mixed question of fact and law and refined question of law, which is most undesirable in international commercial arbitration, as it would lead to uncertainty, a factor which no businessman in international business transaction would like to have. The Supreme Court in its recent decision on the subject of setting aside an award on the ground of public policy under Section 34 in Venture Global Engineering Vs. Satyam Computer Services Ltd basing on the earlier judgment in Bhatia International held that Part I provisions are suggests by expressly or impliedly. Moreover, it cannot be inconsistent with Section 48 of the 1996 Act in applying sec34and judgment-debtor cannot be disadvantaged his right to evoke the Indian public policy to set aside. Thus, the extensive definition of public policy could not agreed by taking foreign country award for enforcement. This judgment is contrary to the object and scheme of the New York Convention and also in violation of Article III of the Convention, in as much as it introduces an extra ground for challenging a foreign award. The decision is contrary to the intention of the Indian legislature and intervention in the Satyam case on grounds of public policy is most unfortunate, as it does not take the decision of the three judges bench in Renusagar case.

The decision, in Satyam case, exposes foreign awards to challenge on merits on the ground that it is “patently illegal”, notwithstanding the enforcement proceedings in any other jurisdiction. In effect, the decision uses a foreign award as a domestic award, if the execution of the award is to be done as per the laws of India.

There is no uniformity in national laws governing the applications and exercise of the right of appeal from or the power of review of arbitral decisions and awards. The above case law analysis suggest that the courts often meddle in commercial arbitration, it is, however, unfair to say that they reflect, as a whole, the working relationship between the courts and arbitral tribunals. Whilst there is no doubt that such judgments are based on sound reason and are arguably required in the realm of the grey area that existed in the laws that lead us, the larger question that these judgments throw up remains open. That being whether parties would, using these judgments as precedents, be encouraged to try their luck before the courts, where systemic delays abound.

159 Venture Global Engineering v. Satyam Computer Services Ltd., AIR 2008 SC 1061 (April)
Recent Supreme Court judgments are paving way for India to shed its anti-arbitration image, and helping India to emerge as a favorable jurisdiction for enforcement of international arbitral awards. In *Shri Lal Mahal Ltd. v. Progetto Grano Spa*\(^{160}\) Supreme Court held that under section 48 (2) of the Act the concept of public policy was liable to be interpreted in a narrower sense as laid down in *Renusagar*\(^{161}\) case and not in the wider sense as expanded in *ONGC Ltd.*\(^{162}\) case and further held that Section 48 does not offer an opportunity to have a second look at the foreign award at the enforcement stage, or permit review of the award on the merits. This is a welcoming judgment and helps in the easy enforcement of foreign awards in India. As observed by Justice D.R. Dhanuka stated as “it shall not be appropriate to set aside foreign awards by Indian Courts directly or indirectly on merits or on the ground of ‘patent illegality’ if the subject-matter were to be adjudicated under Indian law”.\(^{163}\) In *Associate Builders v. Delhi Development Authority*,\(^{164}\) the Supreme Court while limiting the scope of public policy even for domestic arbitrations observed that arbitral awards could be set aside only in very limited cases where the domestic award in question was either capricious, arbitrary or shocked the conscience of the court. To quote *Aakanksha Kumar* “the international outlook and the pragmatic approach followed by the Supreme Court is clear evidence that the arbitration law in India has finally evolved to meet the demands of ever-dynamic arbitration jurisprudence”\(^{165}\). The government of India has amended the Arbitration and Conciliation Act, 1996 in the year 2015 by which Section 34 of the Act has been made inapplicable to international commercial arbitrations and in applying Section 48 court cannot delve into the merits of the case, excluding the application of the ground of patent illegality. Therefore the scope of public policy for both domestic and foreign awards has been narrowed down considerably and brought in line with internationally accepted standards. The present judicial approach and as well as the intention of the government of India is to accord a very narrow interpretation to the expression ‘public


\(^{161}\)Supra Note 135.

\(^{162}\)Supra Note 136.


\(^{164}\)Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.

\(^{165}\)Aakanksha Kumar, *Foreign arbitral awards enforcement and the public policy exception - India's move towards becoming an arbitration-friendly jurisdiction*, available https://www.academia.edu/8617775.
policy’ and to establish India as an international commercial arbitration destination, which is much desirable in the context of international trade policy.

Basing on the research work carried out by the scholar, the scholar has summarized the entire research work and produced in the next following chapter. In the concluding chapter, the scholar has also come up with certain suggestions for effective enforcement of international commercial arbitration which is the need of the hour in the present day globalized economy.