DISSERTATION

"JUDICIAL INTERVENTION IN ARBITRATION: CAN A LINE BE DRAWN"

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CERTIFICATE

This is to certify that this Dissertation titled **"JUDICIAL INTERVENTION IN ARBITRATION: CAN A LINE BE DRAWN"** submitted by Akshay Awasthi (992/LLM/2020) in partial fulfilment of the requirements for the award of LL.M. (Business Laws) degree at National Law School of India University, Bengaluru, is a product of candidate's original research carried out under my supervision and guidance. The matter embodied in the dissertation is original and has not been submitted, in whole or in part, for the award of any other degree in any University.

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DECLARATION

I, Akshay Awasthi, do hereby declare that this Dissertation titled **"JUDICIAL INTERVENTION IN ARBITRATION: CAN A LINE BE DRAWN"** is the outcome of original research undertaken by me in the course my Masters of Law (LL.M.- Business Laws) programme (Academic Session: 2020-21) at the National Law School of India University (NLSIU), Bengaluru, under the supervision and guidance of Prof. (Dr.) V. Nagaraj. This is my own work and it has not been submitted, either in whole or in part, in any other University for any award. Other sources of information, wherever used, have been duly acknowledged.

DATE: 20/07/2021 AKSHAY AWASTHI

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With Profound Gratitude

Akshay Awasthi

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JUDICIAL INTERVENTION IN ARBITRATION: CAN A LINE BE DRAWN?

I. INTRODUCTION

The Arbitration and Conciliation Act, 1996 **("Act")** was enacted at a time when India was making a shift towards an open economy. The enactment of the Act brought a progressive change to the earlier existing arbitration regime in India. It was based on the UNCITRAL Model Law, a document aimed to bring uniformity in the arbitral procedures worldwide. It was conceived as a tool for making India a pro-arbitration jurisdiction and to further promote arbitration as a mode of dispute settlement to facilitate cost effective and fast paced dispute resolution.

The Act introduced a minimal judicial intervention provision[1] in order to keep the courts outside arbitration unless the statute permits. The minimal interference has been affirmed by the courts in this country time and again,[2] also supplemented by the aims and objectives of the Act.

However, as opposed to the black letter of law, when in operation the arbitration proceedings under the Act have been susceptible to judicial intervention and thus, clogging in the vicious circle of traditional litigation before the courts. The reasons for which can be many, but two primary reasons are, *firstly,* the clogging of courts with work and pending case in addition to non-availability of any expertise while hearing commercial oriented arbitration matters. *Secondly*, the setting of a low judicial intervention bar by the courts and inconsistency in their rulings has seriously[3] prejudiced the arbitration regime.

An increased judicial interference strikes directly on the quintessential features of arbitration *namely* party autonomy, speedy disposal of matters, time-efficient et al.[4]All these quintessential limbs of arbitration have often been on backseat in Indian scenario, because of the reasons cited above and also due to a poor drafting of the Act by the legislature, with law makers often doing a patchy work as visible from the deletion of subsection (6-A) to section 11 in 2019 in only 4 years from its inception in 2015.

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[1]Arbitration and Conciliation Act, 1996, § 5.

[2] As recent as in NTPC v. Deconar Services Pvt Ltd. [Civil Appeal No. 6484 of 2014 decided on 4 March 2021]

[3]Law Commission of India, Report No. 246 ¶ 22.

[4] Arbitration—an introduction to the key features of arbitration, LEXIS NEXIS, <https://www.lexisnexis.co.uk/legal/guidance/arbitration-an-introduction-to-the-key-features-of-arbitration>

These actions of the courts and the legislature has seriously prejudiced the arbitration regime in India, as India is placed at 163rd place in enforcement of contracts[5] in year 2020 and still dreaming for changing its image as an arbitration hub. The current regime reflects a lack of coordination amongst the legislature and the judiciary, with courts often fulfilling the voids left by the legislature but at the cost of making arbitration framework as to appointment of arbitrators uncertain.[6] This interventionist tendency of courts in India have tarnished and in turn portrayed India's image as an 'arbitral-unfriendly jurisdiction'.[7]Also, it acts as an impediment to the quick disposal of matters in arbitration, because an unwilling party can very well use this provision to delay initiation of arbitration proceedings leaving the matter in loop of judicial decisions.

The provision for appointment of arbitrators[8] and setting aside of awards[9] have always been in the front seat of excess judicial intervention. Both the provisions have been tinkered with by the courts as well as the law makers, thus, creating an uncertainty in the arbitration regime.

This study analyses the impediments in the Act on both the anvils of legislative design and judicial interpretation of it, which are responsible for an increased judicial intervention in arbitration proceedings. Further, an analysis of the outcomes of the approach followed by the law makers and the courts, in realizing the Aims and Objectives of the Act has been made, primarily focusing upon the increased judicial intervention outcome.

1.1 IMPORTANCE OF THE STUDY

The Arbitration regime in India since its inception has evolved immensely and undergone sea change on numerous occasions through legislative amendments and judicial decisions. It, therefore, is pertinent to undertake and assessment of the Act in order to determine whether it has been able to fulfil its objective of making India an arbitration friendly jurisdiction through ensuring minimal judicial intervention. Such an assessment would be beneficial to spot the gap between the desired outcomes and the actual outcomes flowing from its implementation. It also highlights whether the actions of the law makers and of the courts are in coordination

[5] It reflects time, Cost and quality of judicial process in a country, *see*, <https://www.livemint.com/opinion/columns/opinion-contracts-enforcement-india-key-to-perform-well-in-ease-of-doing-business-index-11590311338929.html>
[6]Justice Srikrishna Committee Report to Review the Institutionalization of Arbitration in India (July, 2017) p. 20 available at <https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf>
[7]Srikrishan Committee Report at p.20.
[8] Arbitration Act,§ 11.
[9] Arbitration Act,§ 34.

or not while implementing the Act. This study holds relevance for the legislature and the courts who are the main players behind operation of the arbitration regime in India.

1.2Aims and Objectives

The aim of the study is to identify the impediments in the black letter of the law and its implementation thereon, through an analysis of the law as it is and judicial pronouncement on the same. Further, to highlight the gap between the actions of the legislature and the judiciary while implementing the arbitration framework. The objectives are as follows:

1. To identify the objectives underlying the current arbitration regime and to find out whether the Act in operation confirms to it.
2. To analyze the impact of the arbitration framework on concerned stakeholders.
3. To assess the judicial decisions and legislative changes to the Act, whether in consonance or not.
4. To identify gaps in the legislative design and judicial decisions thereto.
5. To suggest reforms to address the aforementioned flaws and gaps in an attempt to attain the objectives of the Act.

1.3Hypothesis

The flaws in the legislative design of the Arbitration Act as it stands and lack of consistency in judicial decisions has resulted in an uncertainty in the arbitration regime in India. In particular, the process of appointment of arbitrators and the setting aside of awards proceedings have often vitiated the minimal judicial intervention goal of the Act. It has resulted as a setback responsible for failure of the Act to achieve its objectivesi.e. to make India an arbitration friendly jurisdiction and ensuring minimal judicial intervention in arbitration proceedings.

1.4 Research Questions

With regards to the hypothesis undertaken in this Dissertation, the researcher would attempt to answer the following questions as under the scope of this study:

1. Whether the current design of the Act has enough safeguards against an excessive judicial intervention?

2. Whether the actions of the legislature and courts are focused towards fulfilling the objectives of the Act?
3. Whether the judicial decisions pertaining to appointment of arbitrators and setting aside of awards are in line with the objectives of the Act?
4. Whether the recent amendments made to the Act rectifies the judicial intervention problem?

1.5 RESEARCH METHODOLOGY

The researcher has adopted the doctrinal and analytical method of research for studying the relevant cases. Both primary and secondary sources have been referred to for the purpose of this research and have been accordingly enumerated in the Bibliography.

1.6 SCOPE AND LIMITATION

The study here is limited to an analysis of the evolution of the arbitration framework in India through legislative and judicial actions. In particular, the study focuses upon the legislative changes and judicial decisions pertaining to provisions relating to pre-arbitration stage (primarily focusing upon appointment of arbitrators) and post arbitration stage (focusing upon court's power while setting aside of awards especially focusing upon the public policy and patent illegality). The study is limited to domestic arbitrations. Further, no primary data has been collected for the purpose of this work.

1.7 MODE OF CITATION

The Harvard Blue book citation (20th edition) has been adhered to in uniformity.

1.8 LITERATURE REVIEW

The Dissertation "Judicial Intervention in Arbitration: Can a line be Drawn" is an overview and analysis of key provisions that has been in limelight as a key to judicial intervention, mainly sections 11 and 34 of the Arbitration and Conciliation Act, 1996. For the purposes of a thorough analysis of the said provision, a number of varied sources of literature would be relied upon by the Author.

i. **Dushyant Dave, Martin Hunter, FaliNariman, MarikePaulsson,** ***Arbitration in India, (2021),*** in this book the authors provides for a complete guide to arbitration in India. The authors shed light on the journey of arbitration regime in India highlighting

its historical growth in different chapters. In particular, the chapters 4 and 10 are pertinent for this research. In *chapter 4*, the Authors analyze the constitution and establishment of arbitral tribunal under the Indian framework, and thus touch upon the appointment of arbitrators' provision critically. In *chapter 10,* the Authors provide a holistic view on public policy jurisprudence in India and how it has evolved over the period of time.

Although, this book gives immense insights into the arbitration regime in India, however, for a more holistic approach a reader must take into account the timely changes made to the law either through legislative action or courts decisions. All said, the book is quite unique and one of its kinds, as it contains work from more than 40 scholars from around the world and can be used for advanced reading.

ii. **P C Markanda, Law Relating to Arbitration and Conciliation (2020),** this book lays down a holistic jurisprudence on Indian arbitration framework. The author, who is a renowned arbitration practitioner in India, provides a practitioners' viewpoint of arbitration in India. A section by section discussion has been mapped by the author in the book. *Chapters* 6, 12, 39, 40 are relevant for the purpose of this research as a discussion on extent of judicial intervention, appointment of arbitrators, setting aside of awards and enforcement *respectively* is provided.

The book is extremely beneficial for advanced reading and research. Also, it can be referred for studying of cases on particular sections of the Arbitration Act.

iii. **Justice R S Bachawat, Law of Arbitration & Conciliation (2017),** the book is complete guide on arbitration in India. It is commentary on the Act. The author provides for a complete historical reference as to UNCITRAL Notes, comments of Model Law, which was referred by the researcher for this study. *Chapters* 7 and 11 provides for a discussion on judicial intervention in arbitration and appointment of arbitrators respectively, and have been referred to for the purpose of this research.

Scholarly Articles

iv. **Gary Born, *The Principle of Judicial Non interference in International Arbitral Proceedings*,** this article discusses the basic principles of arbitration emphasizing upon judicial interference and its practice worldwide. Although, it mostly covers

international arbitration but is useful for understanding the origin and basics of judicial interference in arbitration.

v. **Argus Partners – *'Limited Enquiry Scope by Courts While Appointing an Arbitrator Under Section 11 of the Arbitration And Conciliation Act, 1996',*** this article sheds light on the application of Section 11 of the Arbitration Act, vide which an arbitrator is appointed by the Court pursuant to an application made by any of the parties to the arbitration agreement. The Article further discusses the role of the 2015 and 2019 Amendment Acts, wherein the provision has been amended by the Parliament. Furthermore, the article makes use of several important judgments of the Supreme Court for the purposes of analyzing the relevant provisions.

vi. **Tushar Kumar Biswas – *'Setting Aside of Arbitral Awards and Refusal to Enforce Foreign Awards on Public Policy Consideration, Related Issues and the Judicial Trend'*** (Kluwer Arbitration). As would be seen further in the Dissertation, there are several terms which have been used under Section 34 of the Arbitration Act, such as Public Policy, etc. This Article sheds light on the scope and limitation of Section 34 i.e. setting aside of an arbitral award, by taking into consideration the different provisions of other jurisdictions, the legislative history of the provision, as well as the judicial interpretation.

The article further discusses in detail the applicability of the provision to foreign seated arbitration, as well as the judicial trend with regards to it.

vii. **Rahul Donde, Rishabh Raheja – *'Constitution and Establishment of an Arbitral Tribunal'*** (Kluwer Arbitration), this article deals with the constitution and establishment of an arbitral tribunal, by tracing the legislative history of the provision, from the 1996 Act, to the amendments which have been made by the 2015 and 2019 Amendment Acts; it further compares the Indian Law with the Model Law, as well as the critique of the provision, particularly after the 2019 Amendment Act.

In addition to the above mentioned literature, the Author would further take into consideration the Reports of different Commissions, a comparative analysis with the similar provisions of other jurisdictions, as well as other relevant online tools and relevant matter to further arguments, as well as to draw conclusion as part of this Dissertation.

1.9 CHAPTERISATION

In *chapter I the Introduction and Methodology* has been enumerated. This chapter introduces the fundamentals of arbitration i.e. party autonomy and minimal judicial intervention from courts. It further contains the research methodology.

In *chapter II: section 5 and scope of judicial intervention under the Act,* the researcher has discussed the permissible judicial intervention from courts as provided under the scheme of the Act.

In *chapter III: Section 11* the researcher has highlighted the evolution of law pertaining to appointment of arbitrators in domestic arbitrations in India. A number of cases have been discussed under the chapter in order to trace the development of jurisprudence and how it has adversely affected the arbitration regime in India. Also, an analysis of the legislative changes made to the provision has been made. The author has side by side critically analyzed and opined upon the jurisprudence related to appointment of arbitrators.

In *chapter IV,* the researcher has highlighted the journey of public policy as a ground for setting aside of arbitral awards in India under section 34 along with modification of arbitral awards under the same provision. The researcher herein focuses upon the judicial and legislative tinkering with this provision and how it has affected the idea of minimal judicial intervention.

In *Chapter V,* the researcher has summarized the arguments put forth and provides for suggestions on rectifying the problematic position on the before mentioned issues.

II. A LOOK AT THE EXTENT OF PERMISSIBLE JUDICIAL INTERVENTION UNDER THE ACT

The Act prescribes the extent of judicial intervention permissible under section 5. It reads as:

"*Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.*"

It prescribes courts to not intervene unless specifically provided under the Act. This chapter discusses the spirit of section 5 and the permissible judicial interference under it, along with comparing it with the regime under the 1940 Act.

2.1 UNCITRAL REPORT ON ADOPTION OF MODEL LAW

It is pertinent to take a glance at the history of this provision as discussed during the adoption of UNCITRAL Model law. This provision met with various doubts as to its appropriateness on ground of the permissible scope of judicial intervention and judicial assistance. [¶59,60]

The objection was adduced with the argument of circumscribing the power of courts while using arbitration as a mean of dispute resolution. It was responded to by pointing out the use of judicial route as delay tactic by parties to hamper arbitration process. Article 5 demarcates only the maximum possible intervention and if states have any reservations to the same they can adopt the law as per their domestic needs. [¶ 63]

The response clearly indicates a limited judicial intervention as the goal of the Article 5, thereby highlighting the spirit of this Article to imbibe party autonomy and minimal intervention by courts whereby courts not to act as an appellate body for second guessing the arbitral matters.[10]

Section 5 has been adopted as such in the Arbitration Act. The essence of this adoption lies in striking a harmonious independence between arbitral process and power of courts to intervene therein. The word 'as prescribed under the Act' clearly reflects the intention of the law makers to create an independent framework for conduct of arbitration, devoid of

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[10] Gary Born, *The Principle of Judicial Non interference in International Arbitral Proceedings* , PENN LAW: LEGAL SCHOLARSHIP REPOSITORY, 2014, pg. 1028. Also see HOWARD M. HOLZANN& JOSEPH E .NEUHAUS, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY, 218 (1989).

excessive judicial intervention thereby creating certainty as to the instances (as prescribed under the Act) where some sort of judicial intervention is allowed.[11]

2.2 JUDICIAL INTERVENTION FRAMEWORK UNDER THE ARBITRATION ACT 1940

The Arbitration Act, 1940 (predecessor of the 1996 Act) was an Act wherein only domestic arbitration was dealt with. The Act stipulated a framework imbibing continuous intervention from courts whether it is at the stage of referring a dispute to arbitral tribunal, or during the continuation of proceedings before the tribunal, and post making of an award therein. A comprehensive enquiry into the existence and validity of an arbitration agreement was required to be proved. Enforcement of an award was much more tedious task, as the courts had almost unfettered powers to juggle with it.[12]

It was all chaotic since the 1940 Act had no provision to check or even prescribe for judicial intervention, as can be seen in the 1996 Act. In fact the practice involved an active role of the courts, which included issuing of directions for arbitrators and granting injunctions to name a few. [13]

It can be said that the Act put courts as the supervisory authority over arbitration proceedings, and thereby making the whole arbitration process prone to judicial scrutiny as opposed to a private adjudication. The Act was not in line with the international developments and thus done away by the 1996 Act, which explicitly provides for minimal judicial intervention (s.5).

2.3 AVAILABLE GROUNDS FOR JUDICIAL INTERVENTION UNDER THE 1996 ACT

The permissible limit of intervention by the judicial authorities in matters of arbitration is well prescribed under the Act, as the expression "as so provided by [part I of the Act]" demarcates the four walls of judicial intervention through the following provisions, (which can be divided into pre and post award) *namely*, (sections 8,9,11 in Pre-award enquiry) and (sections 34, 36, 37 in Post- award enquiry).

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[11]Pinaki Das Gupta v. Publicis (India) Communications, (2005) 1 RAJ 115 (Del), read minimal judicial intervention as a condition in line with the object and reasons of the Act; Shree Subhlaxmi Fabrics Pvt Ltd v Chand Mal Baradia, AIR 2005 SC 2161, emphasized on no judicial intervention unless provided under the Act.

[12] Krishna Sarma, MomotaOinam and AngshumanKaushik, *Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution,* Stanford CDDRL WORKING PAPERS ,Number 103, <October 2009, https://cddrl.fsi.stanford.edu/publications/development_and_practice_of_arbitration_in_india_has_it_evolved_as_an_effective_legal_institution>

[13]PC MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION, Chapter I, 18 (Lexis Nexis 2020).

These grounds are not exhaustive and cover only those which are relevant for this research that too the main enquiry of the research pertains to sections 11 and 34.

The other grounds which do not from the part of the main enquiry can be summarized as follows:

2.3.1 Section 29A

It was added by the 2015 Amendment in order to make arbitration time bound. The provision has been debated for the gateway of judicial intervention it opens for courts to decide any extension of time for completion of arbitral proceedings post 18 months if parties are unable to decide upon it.[14] The concerning question here is that a party not interested in arbitration can misuse it by pleading substitution of arbitrator before the court, as the power of court to read what constitutes *'sufficient cause'* for an enquiry under this section was not clear.

However, the courts have ruled consistently on this question that the intent behind section 29A is to curb the delay in arbitration proceedings only and no other utilization of it can be made otherwise for deciding questions like biasness, correctness of other orders of the tribunal etc.[15]

The courts' have consistently held this position keeping the enquiry to delay in proceedings only and thus, have keep intact the intent behind the provision.

2.3.2 Interim Reliefs under section 9 and 17

Granting of interim reliefs one of the most important powers which exist with both the courts and the tribunal. For a long time the debate around tribunal's power not being at par with that of courts held ground, however, post the 2015 Amendment it has been settled by bringing powers of tribunal at par with that of courts.[16]

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[14] Section 29A, the period has been extended from 12 months to 18 months post 2019 Amendment.

[15] NCC Ltd. v. Union of India 2018 SCC OnLine Del 12699; NileshRamanbhai Patel &Ors.v.BhanubhaiRamanbhai Patel MANU/GJ/1549/2018; FCA India Automobiles Pvt. Ltd. v. Torque Motor Cars Pvt. Ltd. &Anr 2018 SCC OnLineBom 4371. For a further enquiry please *see*, Martin Hunter, ShashankGarg, et al., *Chapter 7: The Conduct of Arbitral Proceedings in India*, in DUSHYANT DAVE, MARTIN HUNTER, ET AL. (EDS), ARBITRATION IN INDIA, KLUWER LAW INTERNATIONAl, (2021) pp.123-144; AmitGeroge, Piyo Harold Jaimon, *Extension of time under Section 29A of the Arbitration Act and the limited scope of examination by the Court*, BAR AND BENCH, (13 Apr, 2020), <https://www.barandbench.com/columns/npacs-arbitration-review-extension-of-time-under-section-29a-of-the-arbitration-act-and-the-limited-scope-of-examination-by-the-court>

[16] Introduction of section 9(3) has been the major contributor in fencing the jurisdiction of courts while granting interim reliefs even if the arbitral tribunal has not been constituted. Also *see*, Interim Reliefs in Arbitral Proceedings Powerplay between Courts and Tribunals, NISHITHDESAI (January 2020), <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Interim_Reliefs_in_Arbitral_Proceedings.pdf>

One such progressive ruling of the Delhi High Court in *Avantha Holdings Limited v. Vistra ITCL India Limited*[17]has laid down a strict test to be satisfied before granting a relief under section 9, meanwhile not usurping the jurisdiction of the tribunal.

One other progressive step by the courts under interim measures provisions has come through recognition of emergency awards in India, which was also suggested by the 246th Law Commission Report, however could not find its place in the Act. The Supreme Court taking a pro-arbitration stance in *Amazon.Com NV Investment Holdings LLC v. Future Retail Limited & others*[18] upheld the validity of emergency awards in India seated arbitration, treating them at par with section 17 orders.[19]

The courts while granting interim reliefs have been lively towards upholding the objectives of the Act at least recently with all the progressive judgments aiming towards a pro-arbitration goal[20] and have recognized its line of excessive intervention.

2.4 SIGNIFICANCE OF SECTION 5 IN CURBING JUDICIAL INTERVENTION

The real purport behind section 5 is not to curb judicial intervention in *toto* but to prescribe certain limited instances of such a practice. Therefore, wherever it is statutorily permissible to intervene section 5 does not object. The main intention underlying it is to prescribe a limited judicial intervention in arbitration proceedings that too in the four walls of the specific provisions as prescribed under the Act.

However, there is a catch in the arbitration framework, as the provisions themselves provides for wide amplitude of judicial intervention, which has been further widened through a repeated loose judicial interpretation of the same by the courts.[21]Resultantly, the current design of the Act has not been able to limit the judicial intervention as warranted by section 5 of the Act.

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[17]2020 SCC OnLine Del 1717.

[18]2021 SCC Online SC 145.

[19] Also *See*, DipenSabharwal and Aditya Singh, *Supreme Court of India paves way for enforcement of emergency arbitration awards in India-seated arbitrations,* WHITE AND CASE (16 AUG 2021), <https://www.whitecase.com/publications/alert/supreme-court-india-paves-way-enforcement-emergency-arbitration-awards-india>

[20]Avantha Holdings 2020 SCC OnLine Del 1717*; See* also, ShashankGarg, PragyaChauhan, *Interim relief by courts in an Arbitration: The battle of Section 9,*BAR AND BENCH (15 Jun, 2020), <https://www.barandbench.com/columns/interim-relief-by-courts-in-an-arbitration-the-battle-of-section-9>

[21] The same has been highlighted in the later part of the work. Though, mostly courts have tried to tame the excessive judicial intervention upholding the spirit of sec. 5. *See* VidyaDrolia v. Durga Trading Corporation, (2021) 2 SCC 1 *and* ICICI Bank Ltd. v. Sidco Leathers Ltd., (2006) 10 SCC 452.

Interestingly this interplay between judicial interference and arbitral autonomy has divided scholars worldwide with some in favour of a more proactive role with the courts while others opposing the same. This interplay has can be seen as a see-saw between parallel coexistence and partnership.[22]However, the researcher argues for a more restricted role of the courts in arbitration matters in order to keep its sanctity as an alternate dispute resolution method which is aimed to not venture into court based litigation. Even though ousting the court's role is not possible and neither desirable, however, there has to be a solid division of roles between the courts and arbitration tribunals, whereby courts should uphold the sanctity of the mandate of an arbitrator and not act as a second guessing authority.

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[22] Lord Mustill arguing in favor of limited intervention in arbitration no matter "however painful it is for them to stand by and do nothing". See Lord Mustill, Foreword to OP MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION & CONCILIATION, 1st Edn, pp.8, 9 (2003). Same has been the position of Gary Bonn, *supra* n.8. On the other hand Claude Reymond and Russell argues against the proposition calling judicial intervention not to be necessarily disruptive of arbitration. *See* Claude Reymond, *The Channel Tunnel case and the Law of International Arbitration,* 109 LQR 337, 341, cited in REDFERN& HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 4th Edn (2004), p 345, and RUSSELL ON ARBITRATION, p. 323 (21st Edn.1997).

III. PRE-ARBITRATION INTERVENTION AND THE APPOINTMENT OF ARBITRATORS SAGA

Arbitration as a method of dispute resolution depends heavily upon the arbitrators conducting it, and is "only good as arbitrators conducting it."[23] This chapter examines the law pertaining to appointment of arbitrators as under the Arbitration Act 1996.

The 1996 Act imbibes the later and spirit of the UNCITRAL, 1985 Model law[24], thereby trying to replicate the principles of minimal judicial intervention (as also discussed in chapter II). However, the subject of appointment of arbitrators since the enactment of the Act has often been debated over for its nature and scope, the available discretion with the courts while making an appointment therein et al. The Arbitration Act under section 11 encapsulates the appointment subject. The provision has seen sea changes since its enactment, with amendments being made to the same in 2015 by the Arbitration and Conciliation (Amendment) Act, 2015 and then in 2019 by the Arbitration and Conciliation (Amendment) Act, 2019.

The legislative modification made to it has led to emergence of a baffling jurisprudence on the judicial side as well, with court speaking differently in all the three timelines.

This chapter firstly mention the scope of enquiry under section 8 and later enters into a threefold enquiry pertaining to section 11, *firstly*, focusing upon the scope of judicial involvement in the appointment of arbitrators in the light of section 11(6) (in all the three regimes)and *secondly*, examining and (later)underlining the extent of enquiry to be resorted by the courts in matters of appointment and allied issues pertaining to the existence and validity of an arbitration agreement. *Lastly*, a discussion on the issue of limitation of filing section 11 application requesting appointment of arbitrators has been made.

3.1 SCOPE OF ENQUIRY UNDER SECTION 8:

The section 8 route has been often used by parties to hamper arbitration proceedings. The question often posed here is of determining the arbitrability of a dispute in question. The position was more unsettling prior to the 2015 amendment to the Act, as courts through various decisions opened the floodgates of detailed examination of validity of arbitration

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[23] Rahul Donde, Rishabh Raheja, *Chapter 4: Constitution and Establishment of an Arbitral Tribunal*, in DUSHYANT DAVE , MARTIN HUNTER , ET AL. (EDS), ARBITRATION IN INDIA, (Kluwer Law International 2021) p. 73-88.
[24] *See* UNCITRAL Model Law art. 11.

agreements and other allied issues thereof. The rulings of the Supreme Court in *Booz Allen*[25] and *Ayyasamy*,[26]extended the scope of examination substantially allowing the courts to not only venture into the question of existence of an arbitration agreement but also to determine its validity and thereby ruling upon the arbitrability of a dispute.[27]

The effect of the earlier position has been undone by the Act of legislature through the 2015 Amendment to the Act. The addition of term *"prima facie examination"* settled the debate more or less as it has been further clarified by the courts through various rulings. The Supreme Court in *Vidya Drolia*[28]clarified the scope of prima facie examination to be limited to *"weed out manifestly and ex facie non-existent and invalid arbitration agreements and non-arbitrable disputes."(¶ 138)*Further, the court cut short the enquiry to not look into debatable questions of facts and keep the threshold only up to determine "*whether there is a good arguable case for the existence of an arbitration agreement."(¶138)*

The judgment set the role of the courts to assist arbitration mechanism and not step into the shoes of the arbitration tribunal. The only crack to heal remains the panel of judges deciding the section 8 applications.[29]

The position can be summarized in the words that if court finds that a prima facie review would not be conclusive or inadequate requiring a detailed examination, the determination of the same shall be left for the Arbitral Tribunal.[30]

3.2 Appointment of Arbitrators

3.2.1 Position prior to 2015

The Supreme Court has had multiple occasions to delve into examining the scope of judicial intervention available at the pre-arbitration stage as under section 11 of the Act. The appointing authority in the 1996 Regime is the Chief Justice of High Court in case of domestic arbitration and Chief Justice of India in case of international arbitrations.[31]All the arbitrations dating prior to October 23, 2015 in terms of their commencement are subject to

[25]Booz Allen & Hamilton Inc. v. SBI Home Finance Ltd. (2011) 5 SCC 532.
[26] A. Ayyasamy v. A. Paramasivam and Others (2016) 10 SCC 386.
[27]ShalakaPatil and IrfanShaikh, *How Much is Too Much? Supreme Court on Scope of Examination of Arbitration Agreement at Pre-Arbitral Stage*, CYRILAMARCHAND MANGALDAS (June 11, 2021) <https://corporate.cyrilamarchandblogs.com/2021/06/how-much-is-too-much-supreme-court-on-scope-of-examination-of-arbitration-agreement-at-pre-arbitral-stage/>
[28]VidyaDrolia v. Durga Trading Corporation, (2021) 2 SCC 1.
[29]Sriskrishna Committee Report (2017) p. 59, on establishment of specialist arbitration benches.
[30]VidyaDrolia*supra* n. 28 at ¶ ¶ 139-140.
[31] Arbitration Act, 1996, §11(4)-11(6) (prior the 2015 Amendment).

this practice. And since the power to appoint an arbitrator is a judicial one, it could not be delegated to an arbitral institution.[32] Thus, the scope of enquiry thus available to them becomes an issue, because if exceeded it might defeat the objectives of the Act.

3.2.2 Debate on nature of order appointing an arbitrator:

The nature of order appointing an arbitrator has been a bone of contention often debated in the judicial corridors as to its nomenclature i.e. whether 'judicial' or 'administrative'. The real issue that entails from this determination of nature is directly proportional to the scope of enquiry available with the courts while deciding upon an application of appointment of arbitrators. Issues like existence of arbitration agreement, its validity, whether it is null and void or voidable et al.; created dilemma as to their determination which whether to be decided upon by the courts or to be left for the determination by the Arbitral Tribunal.

In *Konkan Railway Corp ltd v. Mehul Construction Co.*[33], the Supreme Court speaking through a three judge bench held that an order made under this section by the Chief Justice (in domestic arbitrations) shall be deemed to come under its administrative capacity and not judicial one. Thereby the remedy with aggrieved party would be to reach the arbitral tribunal (so constituted) under section 16 if it wishes to challenge the jurisdiction and other preliminary issues.

The position taken here was a welcome one as it provided for a limited scope enquiry to the courts, because the enquiry was to be made in an administrative capacity, thereby limiting the in depth examination of the issues highlighted above. An enquiry under judicial capacity would have tentamounted to a more in depth analysis on the examination and validity of the arbitration agreement and so on[34]; although, it was not the scheme and objective of the Act and that of the courts.

3.2.3 SBP Ltd. v. Patel Engineering aftermath

This position was reiterated in subsequent decisions of the court and was in place for nearly five to six years[35]until the tables were turned in the *SBP Ltd. v. Patel Engineering*

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[32] S.B.P. and Co. v. Patel Engineering Ltd. and Anr., (2005) 8 SCC 618.
[33](2000) 7 SCC 201.
[34] Rahul Dhonde, *Supra n.23*, at 81.
[35]*See* Konkan Railway Corp Ltd v. Rani Construction Co, AIR 2002 SC 778; it reiterated the Mehul Construction ruling and the same was subsequently followed in KrishakBharati Co-op Ltd v. Alutec Inc., 2002 (3) Arb LR 302 (DB—Del); Rajeev Traders, Tarnaka v. General Manager, South Central Railway, Secundrabad, 2003 (1) Arb LR 624.

Ltd[36]*.,*whereby the Supreme Court speaking through a seven judge bench overruled the earlier position taken in the *Konkan Railway* (supra) case. The power under section 11 as to the appointment of an arbitrator was ruled to be of a *"judicial"* nature.[37] Further, the court, *inter-alia,* also held that such power of appointment cannot be further delegated to any institution (arbitration institution) but only to another judge.

The earlier position was made susceptible to judicial intervention through this ruling, as courts now had powers to look extensively in matters of appointment and thereby into the validity and existence of arbitration agreements. It was heavily criticized[38] as it led to causing of delay in appointment of arbitrators.[39]

The position was further aggravated in the *National Insurance Co. Ltd. v. Boghora Polyfab*[40]case, wherein the court relying upon *Patel Engineering* (supra), pinned down the issues that are to be looked upon by courts while dealing with question pertaining to appointment of arbitrator:

i. *"The issues (first category) which Chief Justice/his designate will have to decide are*
   (a) Whether the party making the application has approached the appropriate High Court?
   (b) Whether there is an arbitration agreement and whether the party who has applied under Section 11 of the Act, is a party to such an agreement?
ii. *The issues (second category) which the Chief Justice/his designate may choose to decide are:*
   (a) Whether the claim is a dead (long barred) claim or a live claim?
   (b) Whether the parties have concluded the contract/transaction by recording satisfaction of their mutual rights and obligation or by receiving the final payment without objection?"

The position taken by the court in the *Patel Engineering* and *National Insurance* bestowed upon courts the impetus to look into not only the existence of arbitration agreement (other

[36](2005) 8 SCC 618.
[37]*Id*. at ¶ 47(i).
[38]NakulDewan, *Arbitration in India: An Unenjoyable Litigation Jamboree*, 3 ASIAN INT'L ARB. J.111 (2007); PratyushPanjwani&HarshadPathak, *Assimilating the Negative Effect of Kompetenz-Kompetenz in India: Need to Revisit the Question of Judicial Intervention?,*2 INDIAN J. ARB. L. 24, 34 (2014).
[39]Darius Khambata, *Kick-Starting Arbitration in India*, 1 NALSAR ADR Review 28 (2012).
[40] (2009) 1 SCC 267.

jurisdictional facts) but also to rule upon issues falling in the second category.[41] It further entailed wide discretion with the court to look into matter as per its whims, and if it chooses to decide upon an issue, the Arbitral Tribunal cannot later re-examine it.[42]In addition, such extensive determination goes against the principle of *Kompetenz- Kompetenz*[43] as recognized under section 16 of the Act.

The position did not adhere with the objectives of the Act emphasizing upon minimal judicial intervention. It thus acted as a catalyst for the legislature to relook at the Act.

3.2.4 246th Report of the Law Commission and the 2015 amendment

After all the uproar the ***246th Report of the Law Commission*** suggested sweeping changes in the legislation in order to rectify the blunder made in the above mentioned cases. The law commission recommended inclusion of a new provision in the Act, namely, section 11(6-A) thereby suggesting a standard of examination much less regressive than the earlier one. It envisaged the position to be in line with the *Shin Etsu Chemical Co. Ltd. v. AkshOptifibre Ltd*[44]*., case* obliging the courts/judicial authority to look into the issues of existence of arbitration agreement, or its validity determining whether it is null or void etc. only on a *prima facie* basis.[45]

The Report also suggested the same test to be applied under section 8 applications in order to prevent an unchecked judicial intervention. It said in ¶ 33:

> *If the judicial authority is of the opinion that prima facie the arbitration agreement exists, then it shall refer the dispute to arbitration, and leave the existence of the arbitration agreement to be finally determined by the Arbitral Tribunal.*

The report was made the basis of the 2015 Amendment whereby section 11(6-A) was introduced. The Amendment clearly in its statement of objects and reasons stated that the High Court or the Supreme Court shall limit its examination to existence of a prima facie

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[41]*See*AniketPandey, Section 11 after 2019 Amendment Act – An Opportunity to Strengthen Institutional Arbitration in India, SCC ONLINE BLOG (December 5, 2020), <https://www.scconline.com/blog/post/2020/12/05/section-11-after-2019-amendment-act-an-opportunity-to-strengthen-institutional-arbitration-in-india/>

[42]Markanda*Supra* n. 13, Chapter XI, p. 550.

[43]246th Law Commission Report at ¶ 33; Panjwani*Supra* n. 38 at 34.

[44](2005) 7 SCC 234.

[45] 246th Law Commission Report, ¶ ¶ 31-32.

arbitration agreement and not otherwise.[46] All other issues shall be subject to the determination by the Arbitration Tribunal.

Through the 2015 Amendment sub-section (6-A) was inserted into the Act. It reads:

> *"(6-A)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 arbitration agreement.****" [emphasis added]*

This addition was a progressive step taken by the law makers as it strictly restricted the scope of enquiry to existence of arbitration agreement only thereby, halting the earlier prevalent open ended examination. The non-obstante clause in the provision thus overruled the *Patel Engineering* (supra) and *Bogora Polyfab* (supra) essentially.[47]

3.2.5 Judicial decisions post 2015:

The Supreme Court in the *DuroFelguera S.A. v. Gangavaram Port Ltd.*[48], ruled upon the interpretation of sub section (6-A) holding it to be confining the courts to look only into the existence of an arbitration agreement, nothing more or nothing less. Further, it held, "*the legislative policy and purpose is essentially to minimize the Court's intervention at the stage of appointing the arbitrator and this intention as incorporated in Section 11 (6A) ought to be respected.*"

However, this was not enough to lay down a paved path for courts while deciding upon such applications. As later in a series of cases both High Courts and the Supreme Court (as discussed below) seemed somewhat unwilling tofollow the above ruling.

In the *United India Insurance Company Ltd. v. Antique Art Exports Pvt. Ltd*[49]*.,*decision, the respondent approached the Delhi High Court under section 11,alleging the contract of insurance claim to have been entered into through undue influence and coercion. The same was directed towards the Arbitral Tribunal by the court, citing it to be the appropriate authority. Interestingly, the Supreme Court in appeal however, set aside the above order citing their existed no prima facie dispute in the matter, leaving nothing to be decided in

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[46] Arbitration and Conciliation (Amendment) Act, 2015, Statement of Reasons and Objectives (iv).

[47]RanjitShetty and Vatsala Pant, *Limited Enquiry Scope By Courts While Appointing An Arbitrator Under Section 11 Of The Arbitration And Conciliation Act, 1996*, ARGUS PARTNERS, p.3, <https://www.mondaq.com/pdf/933030.pdf>

[48](2017) 9 SCC 729.

[49] (2018) 17 SCC 607.

arbitration. The position seems to be exceeding the courts' playfield of examination and has been criticized by some in that regard.[50]

The Supreme Court here entered into the validity aspect of the arbitration agreement, which was not the intent of the Act.[51]The same inconsistency can be seen in the decisions of the Delhi High Court, wherein firstly it adopted a limited enquiry into the existence of arbitration agreement as advocated in the *Ritika Diwan v. Supertech Ltd.*[52] *and Jindal Stainless Ltd. v. Damco India Pvt. Ltd*[53]*.,* later, digressing from its previous approach, and resorted to the ***dual test of existence and validity***.[54]

Later, in *Garware Wall Ropes Ltd. vs. Coastal Marine Constructions & Eng. Ltd.*[55], an insufficiently stamped arbitration agreement was held to be inadequate by the Supreme Court for triggering appointment of arbitrators under section 11. Interestingly, the Bombay High Court ruled in favor of referring the parties to arbitration, thereby rejecting the insufficiency in stamping as an impediment, in the light of limited scope available for intervention post 2015 amendment.

The author believes that the position adopted by the Supreme Court here is not consistent with the severability principle. An arbitration clause when severed from a contract can survive independently of the contract.[56] The Court should have allowed the initiation of arbitration and in turn leaving the stamp duty compliance on Arbitral Tribunal, it being a curable defect and such actions have been allowed under section 9 applications previously in

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[50] The similar scope of examination pertaining contract in question was adopted in the Oriental Insurance Company Ltd. v. Narbheram Power and Steel Private Ltd, (2018) 6 SCC 534 case. However, the United India Insurance was overruled in the Mayavati Trading v. Pradyuat Deb Burman , 2019 SCC OnLine SC 1164, for laying down a wrong position of law in contrast to the narrow interpretation adopted in DuroFelguera. It further cleared the scope to be limited to examination of "existence" only of arbitration agreement and not "validity".
[51]*See* the 246th Law Commission Report.
[52]2019 SCC OnLine Del 1125.
[53]2016 SCC OnLine Del 6368.
[54] Although, the Supreme Court in Vidya Drolia v. Durga Trading Corp 2019 SCC Online SC 358, restricted the examination to existence only. See, Unique Reality Pvt. Ltd. v. RC Infra Developers Arb. Petition No. 432 of 2019 ; Pave Infrastructure Pvt. Ltd. v. WAPCOS Ltd., Arb. Petition No. 574 of 2019 .
[55]2019 SCC Online SC 515.
[56]Enercon v. Enercon GMBH (2014) 5 SCC 1, *See* alsoAtharv Gupta, *Doctrine of severability in arbitration: A brief review of Indian law and a proposed exception,* ARBITRATION AND CORPORATE LAW REVIEW (Dec 30, 2020), <https://www.arbitrationcorporatelawreview.com/post/doctrine-of-severability-in-arbitration-a-brief-review-of-indian-law-and-a-proposed-exception>

some cases.[57] Also, the Delhi High Court in catena of cases has followed the approach of severing the curable procedural defects to not affect the initiation of arbitration.[58]

Although, the position as to the available scope of examination with the courts was clarified significantly by the 2015 Amendment and judicial decisions through two important rulings of the Supreme Court namely *DuroFelguera S.A. (supra) and Vidya Drolia v. Durga Trading Corp*[59]. Despite, there has been an inconsistency in rulings of the courts in India on the question of scope of examination (as discussed above) with courts crossing its contours often, without following the paved path of limited intervention.

Section 11(6-A) could not serve its purpose for which it was enshrined in the Act. Interpretation of the term "existence" in sub section (6-A), always remained the moot point for all these years (as can be seen in the above discussed cases) and has been finally addressed by the Supreme Court in year 2021, in *Vidya Drolia*.[60] Although ironically, there does not exist any section 11 (6-A) as it is yet to be notified. The author believes that sub section (6-A) was a progressive addition to the Act but the divergence of opinion of the courts and courts' inability to acknowledge the ability of Arbitral Tribunals to rule upon their jurisdiction, led to its short lived life due to which it was repealed by the 2019 Amendment to the Act. It could survive for hardly five years, and the legislature went ahead to bring another amendment to the Act.

3.2.6. B.N. Srikrishna Committee Report and the 2019 Amendment:

The 2015 amendment while being in action for about a year or two was followed by constitution of a High Level Committee headed by Justice B.N. Srikrishna (**"Srikrishna Committee Report"**) as the Chairman in year 2017.[61] The aim was to review institutionalization of arbitration in India and suggest changes in the current framework in order to put India on arbitration friendly jurisdictions map. It recommended to pace up the

[57]Gautam LandscapesPvt. Ltd. v. Shailesh Shah 2019 SCC OnLineBom 563.
[58] JMD Ltd. v. Celebrity Fitness (India) (P) Ltd., SCC OnLine Del 6483; B.D. Sharma v. Swastik Infra Estate (P) Ltd, 2018 SCC OnLine Del 13279; SandeepSoni v. Sanjay Roy, 2018 SCC OnLine Del 11169; N.D. Developers (P) Ltd. v. Bharathi, 2018 SCC OnLineKar 2938. Although the Supreme Court through Garware Wall Ropes has overruled all these judgments.
[59] (2019) 20 SCC 406.
[60](2021) 2 SCC 1.
[61]SriKrishna Committee Report available at https://legalaffairs.gov.in/sites/default/files/Report-HLC.pdf

current appointment of arbitrators processing in India by shifting the onus from courts to arbitral institutions (to be designated by courts).[62]

The Amendment repealed sub section (6-A)[63] and added *"the appointment shall be made, on an application of the party, by the arbitral institution designated by the Supreme Court, in case of international commercial arbitration, or by the High Court, in case of arbitrations other than international commercial arbitration, as the case may be."*

The appointment now is to be done by an arbitral institution as designated by either the Supreme Court or the High Court as the case maybe. The scope of this amendment was analyzed by the Supreme Court in *Mayavati Trading Pvt. Ltd. v Pradyut Deb Burman*[64] whereby it reiterated the objectives of the Amendment i.e. to ensure minimal judicial intervention by leaving the questions of existence and other preliminary issues as to arbitration agreement with the Tribunal to be constituted. *Inter alia,* it also observed that appointment of arbitrators is now to be done by Arbitral Institutions and thus subtracting the requirement of looking into existence of arbitration agreement, as used to be done by courts in the prior regime.

The amendment though is progressive in nature; however, in order to achieve its objective there needs to be built a robust infrastructure in terms of building world class arbitral institutions, consisting of an esteemed panel of arbitrators who are experts in the field. The path for the same has been laid in the recommendations[65] of the Srikrishna Committee Report, however, it is to be seen when does the legislature wakes up to ponder upon it and implement it.

In addition, the amendment provides for setting up of Arbitration Council of India (**"ACI"),** a body to grade arbitral institutions in India. However, due to its composition with great executive and governmental[66] control it might lead to red-tapism, lack of fairness and objectivity while grading of institutions.[67] In addition, the choosing of arbitral institution in matters involving the government or its bodies is susceptible to biasness and nepotism due to

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[62]RanjitShetty, *Supra* 47.
[63] Though, it is yet to be notified.
[64](2019) 8 SCC 714.
[65] For recommendations *See*Srikrishna Committee Report at 50-87.
[66] See section 43C, THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019.
[67]SubhikshVasudev, *The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward?*, KLUWERARBITRATIONBLOG (August 25, 2019) , <http://arbitrationblog.kluwerarbitration.com/2019/08/25/the-2019-amendment-to-the-indian-arbitration-act-a-classic-case-of-one-step-forward-two-steps-backward/>

a substantial presence of executive in the ACI. Nonetheless it can be said that the move is a progressive one, provided the amendment is enforced post addressing these roadblocks.

3.3 THE LAW AS IT STANDS TODAY

3.3.1 Position settled on extent of intervention:

The question as to extent of permissible judicial intervention pertaining to the question of "existence" of an arbitration agreement as under section 11 (6-A) was answered by the Supreme Court as recently in 2021 in *Vidya Drolia* (supra). The court here observed that the term "existence" shall mean an arbitration agreement which is valid and legal i.e. *"fulfilling the requirements of both the Arbitration Act and Contract Act".Inter alia* it also said that *Limited, yet effective intervention is acceptable as it does not obstruct but effectuates arbitration*. (¶147.6)

Court here advocated a *prima facie* test (as applied under section 8) to be applied while dealing with the question of "existence". It further held that "*when it appears that prima facie review would be inconclusive, or on consideration inadequate as it requires detailed examination, the matter should be left for final determination by the arbitral tribunal selected by the parties by consent."* (¶ 89)

3.4 DO THE AMENDMENTS CLARIFY THE POSITION?

The 2019 or even the 2021 Amendments to the Act in itself does not provide for any clarification as to the earlier anomalies it seeks to address. For example, *firstly*, no indication as to scope of examination of arbitration agreement would be available with the arbitral institution while dealing with appointment issue, *secondly*, no clarification as to the recourse available against such order in the form of an appeal whether exist or not?[68]. Also, the amendment does not clarify the grading criteria of institutions, neither does it clarifies the number of institutions that can be recommended by the courts, which thereby has left all stakeholders clueless.[69]

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[68]AniketPandey*Supra* n. 41.

[69]The Report highly relied upon the Singapore Model of Arbitration, where there is only one institution bestowed with the job of appointing arbitrators. But neither the report nor the amendment failed to foresee it, and implanted the job on the courts to choose from various institutions. *See* also, George Burn, *The Arbitration and Conciliation (Amendment) Act 2019: Improving Institutional Arbitration In India,* PRACTICAL LAW ARBITRATION BLOG, (OCTOBER 17, 2019) <http://arbitrationblog.practicallaw.com/the-arbitration-and-conciliation-amendment-act-2019-improving-institutional-arbitration-in-india/>

There is an urgent need to address these questions, and that should have come from the legislature provided all the urgency it showed in bringing then 2019 and then 2021 Amendment to the Act, in order to rectify the old practice.

The lack of intent from the legislature in effect ignites complexity in the current applicable regime as to appointment of arbitrators, due to the anomalies between the actions of legislative and judicial actions. The 2019 Amendment even though repealed section 11 (6-A) of the Act, has not been notified until March 12, 2021, implying continuation of the old regime.In addition, both the Amendments (2019 and 2021) do not reflect any effort on the part of the legislature to address the issues faced as to the appointment in the previous regime. What only it reflects isnon application of mind and proper due diligence from the legislature before bringing these amendments. As a result, yet again the ball has been rolled on the side of to pave the way forward, the effect of which can be irreparable. Aswithout the clarity on point of law, divergence in opinions is bound to arise as evident from the past decisions.

Thus, there is an urgent need to pour some certainty as to the process of appointment, primarily from the legislature's side, because implementation of the new appointment regime would require existence of robust arbitral institutions in order to achieve the objectives behind it. Such institutionalization of arbitration might substantially help to reduce the intervention from courts, rest would be more apparent once it is implemented.

In addition a more progressive approach from courts is also required, as demonstrated in the *Sun Pharmaceutical Industries Ltd. & Nigeria-based Falma Organics Ltd.,* matterwherein the Supreme Court referred the appointment request to the Mumbai Centre for International Arbitration,even prior to the 2019 Amendment mandate. A harmony and consonance in the approach from both the legislature and the courts can only help the Act realizing its objectives and ensure the previous horrors to reincarnate.

3.5 LIMITATION AS TO FILING OF APPLICATION UNDER SECTION 11 FOR APPOINTMENT OF AN ARBITRATOR-

Kick starting an arbitration process is a tedious task as it requires parties to be in a cohort. However, in a numerous circumstances they are not. Thus, the resort to section 11 for appointment of arbitrators is a remedy with utmost importance. However, there is a catch in

the provision as it does not prescribe any time limit for filing of an application if a party refuses or does not act, to appoint an arbitrator within thirty days of receiving of such notice from the other party under section 21.

The Limitation Act, 1963 is applicable to arbitration however; it does not prescribe any time limit as to the filing of an application under section 11, when one party approaches the court for the same. In current practice the court follows Article 137 of the Limitation Act which provides for a limitation period of 3 years for such filing from the date of accrual of such right.

This void was highlighted by the Supreme Court in the *Bharat Sanchar Nigam Ltd. v. Nortel Networks India Pvt. Ltd*,[70]whereby it observed *inter alia* that the scheme of the Act of not providing any statutory time limit for a section 11 application runs contrary to the intention of the Act. Since, all other provisions like sections 8, 9, 16, 34, etc. provides for a time limit within the Act itself, while section 11 does not. The court highlighted this legislative vacuum and pointed to a need for a legislative action on the same.

The author suggests that an amendment shall be made providing for a statutory time limit within section 11 for filing of application for appointment of an arbitrator. It could be shaped to provide a 60 days limitation period for filing of an application for such appointment from the date of refusal by the other party after receiving a notice for the same under section 21.[71]

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[70] 2021 SCC Online SC 207, C.A. No. 843-844 of 2021.

[71]Vaibhav Niti, *Nortel Network's case: Need to further amend Section 11 of the Arbitration Act*, THE DAILY GUARDIAN (April 12, 2021), <https://thedailyguardian.com/nortel-networks-case-need-to-further-amend-section-11-of-the-arbitration-act/ >

IV. POST AWARD STAGE AND SETTING ASIDE OF ARBITRAL AWARD: SECTION 34 SAGA

In arbitration proceedings post making of an award it is subject to enforcement, whereby the parties applies before the court to enforce the same as a decree of court. Under the Act a party can challenge such enforcement on limited grounds. At first look, the process of enforcement seems pretty clear and cogent, in reality it isn't. Courts in India have struggled to pavecertain and sound path while interpreting the grounds of challenges to an award. Disputing parties in India have often resorted to using of this lack of consensus to challenge arbitral awards, not favorable to them. The most misused ground has been the *"public policy*" one, as the Act does not provide for any guiding light on the same. In order to understand other limbs of it, it is pertinent to look into the practice of Indian courts while interpreting it. This chapter encapsulates various limbs of public policy and how it has evolved over the period of time in India along with a discussion on modification of awards under section 34. Also, it discusses the enforcement of an award regime under the Act and how the law as it stands today is prejudicial to the Objectives of the Act.

4.1 HISTORICAL BACKGROUND OF PUBLIC POLICY UNDER PREVIOUS REGIMES

The arbitration regime in India contained provision for setting aside of arbitral awards since the first legislation on arbitration in India i.e. Indian Arbitration Act, 1899.It was the Arbitration(Protocol and Convention) Act, 1937 which introduced public policy as a ground for setting aside of awards. And later the Foreign Awards (Recognition and Enforcement) Act, 1961 provided for non-enforceability if an award is found to be contrary to the public policy of India. Although, it is interesting to note that the Arbitration Act, 1940 did not contain public policy as a ground for setting aside of an award amongst the other grounds it provided for.[72]

4.2 PUBLIC POLICY UNDER THE 1996 ACT.

India while taking part in the globalizing world, committed itself towards the requisite standards pertinent for the process. The likes of New York Convention, 1958**(NY Convention)** and UNCITRAL Model law **("Model Law")**already ignited the requirement of

[72] For a detailed discussion on the historical development of Arbitration framework in India please *See* Darius J. Khambata, *Chapter 10: Challenge and Enforcement of Awards: The Brooding Omnipresence of Public Policy,* in DUSHYANT DAVE , MARTIN HUNTER , ET AL. (EDS), ARBITRATION IN INDIA, Kluwer Law International 2021) pp. 195 – 234.

uniformity in arbitration framework worldwide. In line with the same the Arbitration and Conciliation Act, 1996 came into place. It mirrored the provisions of the Model Law more or less. The provision for setting aside of an award is also inspired from there. The section 34 of the Arbitration Act is a replica of Article 34 of the Model Law. It sets out some limited grounds for setting aside of awards see Annexure I.

A party making the application if establishes on the basis of the record of the arbitral tribunal that-

Clause (2) of the act sets out two additional grounds namely,

i. Non arbitrable nature of the subject matter; or

ii. Arbitral award not in conformity with the '***public policy'*** of India.

An additional ground of '*patent illegality*' is also there for awards other than international commercial arbitration, if there is an error on apparent on the face of the award.

The above mentioned grounds for setting aside have been in the Act since its inception. It becomes interesting to map their journey especially the *public policy* and *patent illegality* ground. An analysis of legislative changes made to them and opinion of court on the same becomes important.

4.2.1 The interplay between Public Policy and Arbitration:

Public policy is an undefined term in the Arbitration Act, 1996. Therefore, over the years it has acted like a blank canvas for the courts to paint. The term does not look that intricate in the black letters of law; however, in practice it has haunted the courts in India, which have struggled to deal with it. The situation can be encapsulated in the lines of Justice Burrough, who called it a "*very unruly horse and once you get astride it you never know where it will carry you*"[73]Courts in India have been riding this unruly horse since the inception of arbitration regime and are still struggling with the same, as captured in the discussion below.

4.2.2Public Policy in Renusagar vis-à-vis foreign awards

In the initial years it was the foreign awards that were challenged on this ground. The most landmark is the decision in ***Renusagar Power Co. Ltd v General Electric Co***., [74]wherein the

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[73]Richardson v Mellish [1824] 2 Bligh 229, 242.
[74]Renusagar Power Co Ltd v General Electric Co (1994) SCC Supl (1) 644.

Supreme Court defined the contours of public policy to be domestic (as applied by courts in India) and not international public policy.[75] Further, the Supreme Court advocated a narrow view saying the purpose of Foreign Awards Act was to further international trade and commerce, and a narrow interpretation would facilitate this objective.[76] The court pocketed the contours of public policy into the following heads:

a) "fundamental policy of Indian law; or

b) the interest of India; or

c) justice or morality."[77]

Public policy bar thus, can be attracted only if something bigger than a mere violation of Indian law is shown.[78]Court also noted that no review of an award on merit is allowed under the public policy examination, reiterating the position across various jurisdictions.[79]

4.2.3The Renusagar view and Domestic Awards

The initial approach of courts in India post *Renusagar* (supra) was in favor of adopting a narrow approach towards domestic awards. The Supreme Court cited India's liberalization policy and the objectives behind passing of the Arbitration Act i.e. to minimize judicial intervention over arbitral process by restricting the grounds of challenges against an award.[80]A mere erroneous application of substantive law would not render the award in contravention of the public policy of India[81] was the prevailing view.

4.2.4 Saw Pipes and the Broad view on Public policy:

In stark contrast to the view adopted in *Renusagar* (supra) the Supreme Court in *Oil & Natural Gas Corp v Saw Pipes,*[82]advocated a wider view of public policy for domestic awards. While hearing the section 34 application, the Supreme Court devised a new ground of challenge in addition to the earlier three in the form of "*patent illegality*". It said that an award would be against public policy if it is patently illegal i.e. it suffers from illegality up to

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[75]*Id*. at ¶ 63.
[76]*Id* .at ¶ ¶64-65.
[77]*Id*,.¶ 66.
[78]*Id* at ¶ ¶ 65-66.
[79]*Id* at ¶ ¶ 34-36, 43-44.
[80]Konkan Railway Co. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201 ¶ 4.
[81]Vijaya Bank v. Maker Development Services Pvt. Ltd. (2001) 3 Bom. CR 652, ¶ ¶ 17,26.
[82][2003] 5 SCC 705.

the root of the matter or is so unfair or unreasonable that it shocks the conscience of the court. Any error in application of law would lead an award patently illegal.[83]

The Supreme Court went into scrutinizing the award heavily while looking into the terms of the contract pertaining to the damages clause it had. This intrusion oriented approach from the court opened floodgates[84]whereby courts stated looking into merits of awards through the backdoor of public policy along with mapping any erroneous application of law. This position has been heavily criticized[85] by numerous scholars.

Interestingly the Supreme Court did not explain what it amounts to illegality going to the root of the matter, even in its later decisions.

4.2.5 Legacy of saw pipes

The tremors of *Saw Pipes* were observed in later judgments also. In *McDermott International Inc v Burn Standard Co Ltd*[86]the Supreme Court shed lights on the adverse comments against *Saw Pipes* but did not go into its correctness. Though, it added two more grounds to look into i.e. if award is vitiated by internal consideration and reasoning of the award is vitiated by the perversity in evidence.[87]

Post this court started to undergo a merit based review of awards, which goes against the objectives of minimal judicial interference. Various High Courts followed the *'patent error of law'* as a new ground of intervention.[88]A full fledged merit based review was adopted by the courts jeopardizing the sanctity of arbitration as an alternative dispute resolution. It led to setting aside of awards in numerous matters with courts doing almost a merit based review.[89] Worst of all, following Saw Pipes, courts have set aside awards wherein arbitrators have made a decision in contravention of the contract.[90]

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[83]*Id.* at ¶ ¶ 54-55, 64, 68.
[84]ONGC Ltd v Garware Shipping Corporation Ltd [2007] (13) SCC 434; Delhi Development Authority v RS Sharma,[2008] (13) SCC 80.
[85] S. Kachwaha, *Enforcement of Arbitration Awards in India*, (2008) 4 ASIAN INTERNATIONAL ARBITRATION JOURNAL 65; N. Dewan, *Arbitration in India: An Unenjoyable Litigating Jamboree!*, [2007] 3(1) ASIAN INTERNATIONAL ARBITRATION JOURNAL99.
[86](2006) 11 SCC 181.
[87]*Id* at ¶ 65.
[88]Jagmohan Singh Gujral v. Satish Ashok Sabnis (2004) 1 Bom CR 307; Bharat M.N. v. Satish Ashok Sabni (2003) 6 Bom CR 257.
[89] ONGC Ltd. v. Western Geco International (2014) 9 SCC 263; McDermott *Supra*86 ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation (2006) 4 SCC 445.
[90]Konkan Railway Corporation Limited v. M/s. Oriental ConstructionCompany Limited (2013) 3 Bom CR 140; In Hindustan Zinc, *Supra* 89, the court went into the price variation formula in the contract in question and set aside the award for being contrary to that.

These tremors jolting arbitration in India were identified as an impediment to its pro arbitration goal and thereby Government of India launched a consultation paper in year 2010 asking for recommendations on prospective changes that can be made to the Arbitration Act.[91] Another step towards rectifying the ever growing judicial intervention was the 246th Law Commission Report[92] which suggested for amending the section 34 of the Arbitration Act.

4.2.6 Wednesbury Principle Extended to public policy Review:

The Supreme Court in the *ONGC ltd. v. Western Geco International*,[93] extended the Wednesbury rule to the examination of awards. The court here tried to elaborate upon what would constitute 'fundamental policy of law' in India saying that the following elements would be part of it: 1. Following a judicial approach, i.e. bonafide, fair and reasonable and not affected by extraneous consideration; 2. to act in accordance of natural justice principles; and 3. the decision reached must be subject to Wednesbury reasonableness.[94]

However, this has been undone by the 2015 Amendment when it prescribes that contravention of fundamental policy of India law 'shall not entail a review on the merits of the dispute'. It is aimed to prevent the use of Wednesbury unreasonableness as the review standard. However, there is a catch in the situation as the Supreme Court as recent as 2020 set aside an award on the ground of that no reasonable person could reach the conclusion reached by the tribunal.[95]

4.2.7 Perversity and irrationality under patent illegality

The Supreme Court in *Associate Builders v. Delhi Development Authority*[96]summarized the Indian position on public policy, meanwhile cautioning the courts for a narrow approach, and not to act as a court of appeal. In no circumstance courts to correct errors of fact,"*must allow*

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[91]Proposed Amendments to The Arbitration & Conciliation Act, 1996, Ministry of Law And Justice Government Of India, <https://www.legallyindia.com/images/stories/docs/Arbitration-Act-LawMin-ConsultationPaper-on-Arb-Act-April2010-1.pdf>.

[92] Available at <https://lawcommissionofindia.nic.in/reports/report246.pdf >

[93]Western Geco*Supra* 89.

[94]*Id*. at 39.

[95] Patel Engineering v. NEEPCO, 2020 SCC OnLine SC 466; Also, the Bombay High Court applied the Wednesbury standard while hearing a section 34 application related to an award passed by an arbitrator appointed by the same court, Board of Control for Cricket in India v. Deccan Chronicle Holdings Ltd., 2020 SCC OnLineBom 8819.

[96]Associate Builders v Delhi Development Authority (2015) 3 SCC 49.

a 'possible view' on facts by the arbitrator to pass muster as 'the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon."[97]

The Supreme Court here recognized 'perversity' and 'irrationality' as grounds for a public policy challenge. Although, with a caveat that the decision of the arbitrator would hold primacy on matters of fact and evidence.[98]The same has been although undone to some extent by the 2015 Amendment; however, the Supreme Court reinstated them in domestic arbitration matters.[99]

The ruling here contradicts the *'error on the face of the award'* standard required for patent illegality. Any sort of error pertaining to evidence cannot be on the face of an award, a detailed examination is required for it. The problem lies in the fact that, the same standard is being followed until now by courts.[100]

The Author feels that 'root of the matter' and 'denial of justice' standard shall be applied in addition to 'on the face of the award' in order to prevent a perversity examination to lead to a merit examination.[101]

4.2.8 The 2015 Amendment

The legislature brought the 2015 Amendment, which clarified upon the scope of *public policy*examination as:

"*(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or*

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice"

The scope of public policy was curtailed by this amendment as evident from the text above and also, the limbs of earlier public policy like *in interest of India*were omitted. In addition it contained the scope of *patent illegality* principle through subsection (2A) under section 34. The wrongdoings from the earlier position were curtailed through exclusion of limbs like

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[97]*Id*. at ¶ 33.
[98]*Id*. at ¶34.
[99]Ssangyong Engineering v. National Highway Authority (2019) 15 SCC 131.
[100] South East Asia Marine Engineering & Constructions v. Oil India Ltd. (2020) SCC OnLine SC 451, ¶ ¶ 34, 37-79; see also Patel Engineering v. NEEPCO, 2020 SCC OnLine SC 466.
[101]Vijay Karia v. PrysmianCavi.ESistemi SRL &Ors. (2020) SCC OnLine 177, ¶ 84; Darius J. Khambata, *Supra* n. 72 at 222.

erroneous application of law and re-appreciating of evidence.[102]The amendment was a progressive one in its approach as it provided a greater clarity for courts as to the things to be included in a setting aside proceeding before the court.

4.2.9 The 2019 Amendment

The 2019 Amendment modified the section 34 in a manner that would be helpful for preventing unfettered review under this provision. It has confined the scope of examination to *'the record of the arbitral tribunal'*. The change would restrict the enquiry to only material before the tribunal and not otherwise. It is a welcome change and in line with the Supreme Court ruling in *M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi 2018 SCC OnLine SC 1019* for the reason that it would confine the courts from looking outside for facts and material which are not part of the proceeding before the arbitral tribunal and thereby hindering any chances of re-trial of the matter.[103]

4.4 POSITION OF LAW AS IT STANDS TODAY

The current position of law encapsulated in the *Ssangyong Engineering & Construction Co Ltd.*[104], wherein the Supreme Court accorded a narrow interpretation to "*Public Policy of India*" in line with the 2015 Amendment. The Supreme Court further encapsulated the practice to be adhered to while examining public policy.

a. Courts not to interfere into awards on a merit basis. Though, it can do so on violation of natural justice principles.[105]
b. Challenge on Wednesbury grounds no longer survives.[106]
c. Justice and morality to mean most basic notions of morality and justice.[107]
d. Patent illegality is to be there on the face of the award and cannot be brought in through back door as of fundamental policy or by any other back door.[108]

However, the Supreme Court spoke in favor of keeping the perversity ground intact under the patent illegality on the face of the award standard.[109]

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[102]Arbitration Act, § 34 (2A).
[103]Amrit Singh, *Pro-Arbitration Policy In M/S Emkay Global Financial Services Ltd. V. GirdharSondhi*, RFMLR (Jan 21, 2019) <https://www.rfmlr.com/post/pro-arbitration-policy-in-m-s-emkay-global-financial-services-ltd-v-girdhar-sondhi>
[104]Ssangyong Engineering & Construction Co Ltd. (2019) 15 SCC 131.
[105]*Id*. at ¶ 34.
[106]*Id.*
[107]*Id*. at ¶35
[108]*Id*. at ¶.37

The author believes, the position post *Ssangyong* is a welcome one as the Supreme Court has also spoken for a narrow interpretation of public policy or for that matter a section 34 application in general. But, whether these safeguards both legislative and judicial will prevent the courts to return to a *Saw Pipes* position cannot be said with certainty.The position of uncertainty still haunts parties to choose seat of arbitration in India, with more and more parties (including the domestic ones)[110] avoid taking a recourse to institutions in India because than that comes with an excessive judicial intervention as seen above.Interestingly until now the courts are examining awards through a wider lens of merit examination, as perversity and irrationality are still popular in judicial corridors.[111]

4.3 Public Policy in other jurisdictions:

The New York Convention does not define the term public policy and leaves the discretion upon the courts of the member states. Thus, there exists no internationally accepted definition of it. Many a countries have defined public policy in the light of internationally floating standards of public policy.

4.3.1 UK

The courts in U.K. have advocated a narrow interpretation of public policy and thereby unwilling to halt enforcement of awards on this ground. Both in *Soinco SACI &Anor. v. Novokuznetsk Aluminium Plant &Ors.*[112]and *Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd.*[113], the English courts were reluctant to refuse enforcement of awards on the basis of public policy claim. Illegality was looked over by the courts to enforce award in *Westacre* case. Though, in some matters courts have also blocked enforcement of awards like in *Soleimany v. Soleimany* and *Barnett*[114], where the courts favoreddispention of justice against a pro enforcement spirit of the New York Convention.

4.3.2 France

Like British courts French courts have also adopted a narrow approach while halting enforcement of awards on public policy grounds. In *Gallay v. Fabricated Metals, Cass.*

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[109]*Id*. at ¶41.
[110] See the SIAC data for that matter, India topped the foreign users list with 690 matters referred, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf
[111]*See* note 100.
[112]Soinco SACI &Anor. v. Novokuznetsk Aluminium Plant &Ors.Court of Appeal, England And Wales [1998] CLC 730.
[113]Westacre Investment Inc. v. Jugoimport-SPDR Holding Co. Ltd. [1999] 3 ALL ER.
[114]Soleimany v. Soleimany [1998] APP.L.R.

Fr.[115], the Paris Court of Appeals did not block the enforcement of an award that was alleged to be in violation of European Competition law. The courts have time and again made it clear that in absence of any grave breach of the public policy it sees no reason to substitute its opinion for that of the arbitral tribunal.[116]

The author believes that the position adopted in both the above discussed jurisdictions is a progressive one and keeps intact the spirit of the NY Convention keeping the judicial intervention to a low. However, the author in no manner suggests for a complete mirroring of these jurisdictions approach at least not in domestic arbitrations. The courts in India should adopt a narrow interpretation approach while implementing foreign awards at least for countries signatory to NY Convention and following the same spirit of a smooth arbitration. The position adhered in *Westorn Geco (supra)* and *Saw Pipes* (*supra*) should be avoided to be reinstated, as should have been in the first place.

4.5 MODIFICATION OF AWARDS UNDER SECTION 34

This is one other burning issue in the Indian arbitration regime which has haunted parties resorting to arbitration as a private mode of settlement devoid of a closer judicial scrutiny. The section 34 provides only for setting aside of an award and an opportunity for the tribunal to cure the grounds of setting aside.[117] However, the courts in India have time and again modified awards. In *Dyna Technologies Pvt. Ltd.* v. *Crompton Greaves Ltd.,*[118]the Supreme Court modified the awards by altering the interest rate and the amount awarded. Interestingly the same has been a well established practice of the courts in India[119] despite a caveat cum restriction by the Supreme Court in its earlier decisions, where it held such powers to modify awards does not exist with courts.[120]

This practice defeats the purpose of arbitration as through such modification courts tinker upon the decision of the arbitral tribunal and thus, undermining its authority. Also, it clearly demonstrates a divergence from the '*minimal intervention'* principle and thereby defeating

[115]Cour de Cassation [CC] [Supreme Court] France, Gallay v. Fabricated Metals (Jan. 5, 1999), Rev. Arb.805 (2001).
[116]NF SAS v. Cytec Industries, Cour de Cassation [CC] [Supreme Court] First Civil Chamber, SNF SAS (France) v. Cytec Industries BV. Netherlands (June 4, 2008), Appeal No. 03-15320.
[117]Arbitration Act § 34 (4).
[118]2019 SCC Online SC 1656.
[119]*See* Oriental Structural Engineers Pvt. Ltd. v. State of Kerala, 2021 SCC OnLine SC 337; M/s J.K. Fenner (India) Ltd. v. M/s Neyveli Lignite Corporation 2020 SCC OnLine Mad 1017.

[120]McDermott, *Supra n. 86.*

the whole purpose of arbitration as this tinkering with awards by awarding interest even if barred by the contract[121] between the parties, defeats the purpose of entering into a contract.

However, as a sigh of relief the position has now been clarified by the court, as recently as July, 2021, in the *Project Director, National Highways vs. M. Hakeem*[122]*,* wherein the Supreme Court has explicitly observed that if courts resort to modify awards under section 34 proceedings than it would be crossing the "*Lakshman Rekha*"[123]. This position correctly interprets the law as courts shall not sit as a body to re-examine what has been already decided by tribunals, if none of the challenge has been proved. However, as said above, due to a long practice of divergence of opinions of the courts in India, it cannot be said with utmost certainty whether the courts would be adhering to this position in full spirit or not.

4.6 Enforcement of awards and the 2021 Amendment

The Arbitration Act in its original text provided for an enforcement regime which was time consuming and costly and therefore it was difficult to enforce an award in India.[124] It is evident from the fact that an application for setting aside automatically triggered stay on proceedings for execution in turn delaying enforcement. [125] It was further plagued by the wide interpretation of setting aside applications as discussed above. The horrors of previous regime have been remedied by the 2015 Amendment which repealed the automatic stay of award provision on filing of setting aside application.[126] A separate application is now required to be filed in order to trigger stay of operation of an award along with the setting aside application.

However, the Legislature through introduction of the proviso to section 36(3) by the 2021 Amendment has created an anathema of confusion amongst all stakeholders. It reads as

"Provided further that where the Court is satisfied that a Prima facie case is made out that,—

(a) the arbitration agreement or contract which is the basis of the award; or

[121] The same was done in Jaiprakash Associates Limited v. Tehri Hydro Development Corporation India Limited (2019) 17 SCC 786.
[122] Project Director, National Highways vs. M. Hakeem, (2021) SCC OnLine SC 473.
[123]*Id* at ¶ 46.
[124]*See also*, Srikrishna Committee Report, p. 43.
[125] Arbitration Act, §36(2); *See also* Dushyant Dave, *Chapter 11: Recognition and Enforcement of Foreign and Domestic Arbitral Awards: Role of National Courts*, in DUSHYANTDAVE , MARTIN HUNTER , ET AL. (EDS), ARBITRATION IN INDIA, Kluwer Law International 2021) pp. 237.
[126]The court recognized this problem in 2004 only but it took around 11 years for the legislature to rectify it. *See* National Aluminum Company Ltd. (NALCO) v. Pressteel& Fabrications (P) Ltd. and Anr., (2004) 1 SCC 540.

(b) the making of the award, was induced or effected by fraud or corruption, it shall stay the award unconditionally pending disposal of the challenge under section 34 to the award."

The proviso is applicable even for proceedings initiated prior to 2015, thereby effectively resurrecting the powers of the courts to grant unconditional stay. The amendment provides statutory backing to a recourse with parties which already existed in the regime as an allegation of fraud can be raised before the arbitral tribunal itself or even at the setting aside stage or even at the appellate stage under section 34 and 37(1) respectively.[127]Because even earlier a stay could have been obtained from the on conditions it may have deemed fit. The ordinance now enables the parties to seek unconditional stay on enforcement of awards on alleging fraud.

The proviso also uses the words *"prima facie"* as a standard for alleging fraud, which can only mean (in absence of any clarification in the amendment) that merely on alleging fraud parties would get unconditional stay. Since the scope of enquiry available under section 34 is limited, as discussed above. And proving of fraud or corruption would require a wider enquiry.[128]

What does the amendment seeks to achieve through specially carving out a statutory backing to fraud or corruption enquiry, since due to absence of any clarification it would be susceptible to misuse and would come up as a delay tactic. Further, the retrospective application might lead to flooding of courts with applications for stay on enforcement of awards from earlier.

The author believes that the amendment defeats the objectives of the Arbitration Act, i.e. to facilitate quick enforcement of contracts through a robust arbitration regime, because the unconditional stay would leave the award debtor with another recourse to avoid enforcement of awards in due time that too as a statutory recourse. Further, it highlights the poor drafting of provisions dealing with the automatic stay provision, as the problem with the pre-2015 provision was highlighted in year 2004 itself in *NALCO* (supra), however, it took 11 (circa) years for rectifying the problem through its deletion in 2015, but in a span of 6 years only in

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[127]Shubham Joshi, *Implications Of The Arbitration And Conciliation (Amendment) Act, 2021: Ensuring (Un)Ease Of Doing Business In India?, RSRR* (April 21, 2021), <http://rsrr.in/2021/04/20/implications-of-the-2021-arbitration-amendment-act/>

[128]PoojaChakrabarti, KunalDey, *The Story Of Arbitral Meddling - Analyzing The Arbitration And Conciliation Act (Amendment) Ordinance 2020*, ARGUS PARTNERS (Nov 10, 2020), <https://www.argus-p.com/papers-publications/thought-paper/the-story-of-arbitral-meddling-analyzing-the-arbitration-and-conciliation-act-amendment-ordinance-2020/>

2021, the legislature has re-introduced this provision in different shape and thereby re-incarnating the previous defect.[129]

[129]Also *see*, Ashish Dholakia, Ketan Gaur and Kaustub Narendran, *India's Arbitration And Conciliation (Amendment) Act, 2021: A Wolf In Sheep's Clothing?*, KLUWER ARBITRATION BLOG (May 23, 2021), <http://arbitrationblog.kluwerarbitration.com/2021/05/23/indias-arbitration-and-conciliation-amendment-act-2021-a-wolf-in-sheeps-clothing/>

V. CONCLUSION AND SUGGESTIONS

The whole journey of pre and post arbitration provisions vis-à-vis judicial intervention has been an impediment in sickening the arbitration regime in India. The poor drafting and a wide & inconsistent judicial interpretation of these provisions have done the damage.

Resultantly, parties in India prefer foreign arbitral institutions. India topped the foreign users ranking at the SIAC as a total of 690 arbitration matters were referred to it where Indians were parties to the agreement.[130] The more evident reason looks to be long delay of proceedings due to an excessive judicial intervention.

Even though, the scheme of the Act under section 5 although provides for minimal judicial intervention in arbitration proceedings, though, has not been able to achieve its objectives. Due to an uncertain and interventionist tendency arbitration has become more of an *'Additional Dispute Mechanism'* instead of an Alternative Dispute Resolution for dispute resolution in India.

The poor drafting of the Act by the legislature, with law makers often doing a patchy work as evident from all the amendments in quick succession clearly demonstrating non-application of mind[131]allied with inconsistent judicial rulings has made drawing of the line a tough job.

At pre-arbitration stage the old regime was undone to an extent by the introduction of section 11(6-A), but surprisingly the same was deleted by the 2019 Amendment for an institutional appointment scheme without providing any clarity on long haunting questions of scope and recourse[132]. Functioning of this new regime (which is yet to come in action) cannot fructify until there are well functioning arbitral institutions in India. The question remains how the new system would work in such circumstances.

Then in post-arbitration scheme, after a long debate on *public policy* the position seems established to an extent but the re-introduction of unconditional stay of awards through the 2021 Amendment has further create an avenue for judicial intervention, and in result might further take back the arbitration to a pre-2015 position of stay.

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[130]http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf

[131]deletion of subsection (6-A) to section 11 in 2019 in only 4 years from its inception in 2015 along with the whole debate on its application and cut-off date. Also, the legislature has re-introduced the unconditional stay of awards under section 36 post the 2021 amendment that too with a retrospective application from 2015.

[132]*See* discussion in chapter III.

The effect of this lack of coordination ignites doubt even for the decided questions like that of public policy, modification of awards etc., because looking at the trend until now it cannot be said with confidence that the courts would not deviate from the narrow approach it has adopted to a wider one, as was the case before.

All this uncertainty thus, necessitates for a clearer role for courts pertaining to arbitral proceedings. Court's duty should be of a facilitator here instead of acting as an institution sitting on top of the arbitral tribunal. Any transgression of it defeats the whole purpose of arbitration as parties often find themselves before the courts instead of the arbitrator chosen by them. The courts in India need to uphold the agreement between the parties instead of peeping into its intricacies (if not provided under the Act) as parties tend to resort to arbitration in order to prevent themselves from the shackles of traditional litigation which is time consuming and costly, by submitting their matter to a privately appointed arbitrator. It impliedly ousts the role of courts except when statutorily it is permissible.

Only with a clear division of role of the courts w.r.t. arbitration and certainty in the position of law, the Act would be able to achieve its objectives towards making India a pro-arbitration jurisdiction.

On the basis of the observations made above, the researcher recommends that following steps are to be taken in order to make the arbitration regime robust:

1. The legislature shall as early as possible enforce the recommendations made in the Srikrishna Committee pertaining to strengthening of institutional arbitration in India.Attempts shall be made to strengthen the current arbitral institutions in order to bring them at par with internationally acclaimed arbitral institutions. Setting up of the Arbitration Council of India (**ACI**)[133]for grading and accreditation of arbitral institutions and arbitrators can be a step closer to strengthen the arbitration framework in India.[134]Because whenever, the 2019 Amendment to section 11 will be notified,

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[133]Part IA, section [43A-43M], THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019 NO. 33 OF 2019.

[134] Its establishment shall be done post addressing its infirmities, for more discussion on ACI please see, George Burn, Supra 69; Pranav Rai, *'Proposed 2018 Amendments to Indian Arbitration Law: A Historic Moment or Legislative Blunder?'*, Kluwer Arbitration Blog, November 24, 2018, <http://arbitrationblog.kluwerarbitration.com/2018/11/24/proposed-2018-amendments-to-indian-arbitration-law-a-historic-moment-or-legislative-blunder-2/>; *Emperor's New Clothes? Arbitration And Conciliation (Amendment) Bill, 2019,* NISHITH DESAI, LEXIS PSL (August 2, 2019), <https://www.lexisnexis.com/uk/lexispsl/arbitration/document/412012/8W3W-X112-8T41-D506-00000-00/>

courts would require well functioning arbitral institutions for referring the appointment applications.

2. Detailed rules are to be formed pertaining to the scope of examination available with the arbitral institutions under section 11 while the appointment is being done by an arbitral institution. Also, what would be the recourse against such appointment?
3. The author suggests that an amendment shall be made providing for a statutory time limit within section 11 for filing of application for appointment of an arbitrator. It could be shaped to provide a 60 days limitation period for filing of an application for such appointment from the date of refusal by the other party after receiving a notice for the same under section 21.[135]
4. The inconsistency between appealabilty of orders under section 11 must be brought at par with orders under section 8, by introducing an appeal provision for section 11 applications also, so as to fix the conundrum between the two provisions[136]. Thereby discouraging unethical use of section 11 application for delaying or avoiding arbitration as no appeal can be made against an order passed hereunder.
5. An introduction of *indemnity cost rule*[137] (as followed in jurisdictions like Hong Kong) can be introduced in Indian scenario in order to deter wrongful use of section 34 route by the parties seeking to delay the enforcement of award. It will reduce the burden on courts and would filter out the genuine cases that would be reaching before the courts.
6. The 2021 amendment to section 36, implanting unconditional stay be repealed as it would deter the pro-arbitration objective of the Act. Giving stay a statutory color would flood the courts with stay litigation and thereby hampering timely enforcement of awards.

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[135]Vaibhav Niti Supra n. 71.
[136]Pravin Electricals (P) Ltd. v. Galaxy Infra and Engg. (P) Ltd 2021 SCC OnLine SC 190.
[137] As under this rule a party unsuccessfully resisting enforcement or challenges an awards, or seeks to reopen an issue dealt with in arbitration, before a court, shall pay a the cost to the other party on indemnity basis.

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