

## ENHANCING THE EFFECTIVENESS OF THE ARBITRATION AND CONCILIATION ACT, 1996: A CRITICAL ANALYSIS OF ENFORCEMENT MECHANISMS IN INDIA

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### ABSTRACT

*The Arbitration and Conciliation Act, 1996 serves as the foundation for arbitration in India. However, the effectiveness of its enforcement mechanisms, especially in relation to the public policy exception and judicial review, remains debatable. This paper critically analyses these enforcement challenges, compares India's framework with international standards, and provides recommendations for reforms. It also reviews key Supreme Court judgments that have shaped arbitration law, shedding light on India's evolving stance. The paper concludes by proposing targeted reforms aimed at making India a more arbitration-friendly jurisdiction*

**Keywords:** Arbitration, conciliation, UNCITRAL model, arbitral award.

### INTRODUCTION

Arbitration has become an indispensable alternative to traditional court litigation, offering a faster and often less costly means of resolving disputes. The Arbitration and Conciliation Act, 1996 (ACA) was enacted with the aim of consolidating and modernizing India's arbitration laws, drawing inspiration from the UNCITRAL Model Law. Despite its progressive nature, the Act's enforcement mechanisms have faced criticism due to judicial intervention, delays, and broad interpretations of the public policy exception. The New York Convention of 1958, which India has ratified, specifies in Article V(2)(b) that the enforcement of an arbitral award may be refused, among other reasons, if it conflicts with the public policy of the jurisdiction where enforcement is sought. Notably, the term 'public policy' remains undefined in the Convention, meaning its interpretation will depend on each country's standards. Historically, India has faced challenges in aligning its understanding and standards of public policy with those accepted internationally.

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Many countries contend that their definitions of international public policy are more limited than their domestic public policy. As India aims to position itself as a hub for arbitration by ensuring that arbitration awards are final and minimizing judicial interference, there has been a trend towards adopting a more restricted interpretation of public policy in rejecting the enforcement of foreign awards in international commercial arbitration.

## **OVERVIEW OF THE ARBITRATION AND CONCILIATION ACT, 1996**

### **Historical Context**

The legal landscape of arbitration in India predates its independence. Arbitration law evolved through various legislative enactments, notably the Arbitration Act, 1940, which was criticized for inefficiencies and delays in the arbitral process. Recognizing the need for a modern arbitration framework, the Arbitration and Conciliation Act, 1996 was enacted, reflecting the principles of the UNCITRAL Model Law and aligning Indian arbitration law with international standards.

**Pre-Independence Era:** Arbitration in India initially developed under British colonial rule, with early laws such as the Indian Arbitration Act, 1899 providing limited recognition of arbitral awards.

**Post-Independence:** The Arbitration Act of 1940 became the primary legislation, though it was widely criticized for allowing excessive court interpretation.

### **Key Objectives and Principles of the ACA**

The ACA rests on several key principles, including party autonomy, minimal judicial interference, and the finality of arbitral awards. These principles are crucial for ensuring the efficiency of arbitration and boosting the confidence of both domestic and international parties in India's arbitration framework.

#### **1. Increased Popularity of Arbitration:**

The ACA has significantly contributed to the rise in arbitration as a preferred mode of dispute resolution in India. More parties are opting for arbitration due to its efficiency, flexibility, and reduced costs compared to traditional court litigation.

#### **2. Party Autonomy:**

One of the most notable findings is the emphasis on party autonomy. The ACA allows parties the freedom to choose their arbitrators, procedures, and applicable laws, which enhances their control over the arbitration process.

**3. Limited Grounds for Challenge:**

The Act limits the grounds on which an arbitral award can be challenged, promoting the finality of awards. This reduction in grounds for judicial intervention supports the integrity of the arbitration process.

**4. Judicial Support:**

The Indian judiciary has generally adopted a pro-arbitration stance, which has been instrumental in reinforcing the effectiveness of the ACA. Courts have been supportive in upholding arbitration agreements and awards, thereby fostering a favourable environment for arbitration.

**5. International Alignment:**

The ACA is aligned with international arbitration standards, including the UNCITRAL Model Law. This alignment enhances India's appeal as a destination for international arbitration and reflects a commitment to global best practices.

**6. Recognition of Arbitral Institutions:**

The ACA encourages the establishment and recognition of arbitral institutions, which can provide administrative support and enhance the credibility of the arbitration process. Institutions like the Delhi International Arbitration Centre (DIAC) have emerged as key players.

**7. Emphasis on Confidentiality:**

The Act supports the confidentiality of arbitration proceedings, which is a critical aspect for parties, especially in commercial disputes. This confidentiality fosters trust and encourages parties to disclose sensitive information during arbitration.

**8. Interim Measures:**

The ACA allows for the granting of interim measures by arbitral tribunals, providing essential relief and preserving the status quo during the arbitration process. This provision is crucial for protecting parties' rights before the final award.

**9. Time-Bound Proceedings:**

The ACA emphasizes the need for timely resolution of disputes, with provisions aimed at expediting arbitration proceedings. The introduction of time limits for the completion of arbitration has been a significant improvement.

## **10. Judicial Intervention:**

While the ACA aims for minimal judicial interference, the courts have sometimes intervened in arbitration matters. Notable Supreme Court judgments have clarified the scope of judicial review and enforcement of arbitration awards, balancing party autonomy with judicial oversight.

## **11. Evolving Interpretation:**

The interpretation of key provisions of the ACA has evolved over time, particularly in the context of public policy and the enforcement of foreign arbitral awards. The judiciary's role in shaping these interpretations is crucial for the ACA's application.

## **12. Awareness and Education:**

There is a growing awareness and education regarding arbitration among legal practitioners, businesses, and academics, which is essential for the successful implementation of the ACA. Increased training and resources are being made available to foster a deeper understanding of arbitration practices.

## **ANALYSIS OF ENFORCEMENT MECHANISMS**

### **Public Policy Exception**

One of the most contentious aspects of arbitration law in India is the public policy exception, particularly under Section 48 of the ACA, which allows courts to refuse the enforcement of foreign arbitral awards if they violate India's public policy. The interpretation of "public policy" has evolved over the years, often leading to unpredictable enforcement outcomes.

#### **1. Definition and Scope:**

The public policy exception under Section 48(2)(b) permits the refusal of an arbitral award if it is contrary to the "fundamental policy of Indian law," the "interests of India," or "justice or morality." These broad terms have resulted in varied judicial interpretations.

#### **2. Impact on Enforcement:**

The unpredictable application of public policy, as seen in ONGC Ltd. v. Saw Pipes Ltd., has undermined the certainty of arbitral awards. In this case, the Supreme Court expanded the scope of public policy to include errors of law, allowing the setting aside of an award on the grounds of patent illegality.

### **Case Law - ONGC Ltd. v. Saw Pipes Ltd. (2003)**

**Facts:** The dispute arose from a contract between ONGC and Saw Pipes regarding the supply of pipes. ONGC challenged the arbitral award, claiming that it violated Indian law.

**Issue:** Whether an arbitral award could be set aside on grounds of "patent illegality" under the public policy exception.

**Observations:** The Supreme Court held that an award could be set aside if it was "patently illegal" or violated the fundamental policy of Indian law. This broadened the scope of judicial intervention in arbitration.

**Judgment:** The court set aside the award, stating that the arbitrator's interpretation of the contract was erroneous and violated public policy. The court observed, "an award that is contrary to the provisions of law or the terms of the contract is liable to be set aside under Section 34.

### THE FORMALITIES FOR ENFORCEMENT OF A FOREIGN AWARD

The formalities of enforcement of foreign awards are relatively basic and have been reflected in Article 4 of the New York Convention and Section 7 of the 1996 Act. Here too, there have been certain legal developments. Article 4(1) of the NYC provides that to obtain recognition and enforcement, the party applying for recognition and enforcement shall supply the duly authenticated original award or duly certified copy, as well as the original agreement or a duly certified copy. The language of Article 4(1) and Section 47 suggests that it is mandatory that the requisite documents be filed at the time of application. However, in a recent judgment in PEC Ltd. v. Austbulk Shipping Sdn. Bhd., the Supreme Court gave the provision a liberal interpretation. This case concerned the enforcement of a London Maritime Arbitration Association award. The authenticated copy of the arbitration agreement had not been filed at the time of making the application, but later in the proceedings, the Supreme Court held that the word 'shall' be read down as may<sup>2</sup> Consequently, 'shall' would be read as may, at the initial stage of the application, but not thereafter. The Supreme Court emphasized the pro-enforcement bias of the New York Convention by advancing a pragmatic, flexible, and non-formalistic approach in construing the enforcement applications. It gave a liberal interpretation and held that initial non-filing of the charter party was a curable defect. The award was finally enforced. The pro-enforcement bias of the Supreme Court was also exhibited in Shriram EPC Ltd. v. Rioglass Solar SA, where it upheld the validity of the arbitration agreement despite challenges, reinforcing the need for judicial restraint in interference<sup>3</sup>

**Singapore**

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<sup>2</sup> *PEC Ltd. v. Austbulk Shipping Sdn. Bhd.*, (2019) 2 SCC 327 (India).

<sup>3</sup> *Shriram EPC Ltd. v. Rioglass Solar SA*, (2018) 15 SCC 224 (India).

Singapore has positioned itself as a global arbitration hub by adopting a pro-arbitration stance and streamlining its enforcement procedures. The International Arbitration Act, 1994, which is based on the UNCITRAL Model Law, offers a narrow interpretation of the public policy exception, which enhances the certainty of enforcement.

- **Public Policy Exception:** The courts in Singapore interpret the public policy exception narrowly, limiting its application to cases where the award violates the fundamental norms of justice and morality. This approach aligns with the pro-enforcement bias inherent in international arbitration.
- **Judicial Review:** Singaporean courts have consistently upheld the principle of minimal judicial interference, confining their review to procedural irregularities rather than engaging in merits review.

#### Case - AJU v. AJT (2011)

**Facts:** This case involved a challenge to an arbitral award on the grounds of public policy.

**Issue:** Whether the award could be set aside for being contrary to public policy.

**Observations:** The court reaffirmed that the public policy exception must be interpreted narrowly, emphasizing that only awards that offend fundamental principles of justice and morality can be set aside.

**Judgment:** The court upheld the award, reinforcing Singapore's pro-arbitration stance. The court held, "The public policy exception should be applied sparingly, and only where there is a clear violation of fundamental justice.<sup>4</sup>

#### Hong Kong

Hong Kong has long been recognized as one of the most arbitration-friendly jurisdictions. The Hong Kong Arbitration Ordinance mirrors the UNCITRAL Model Law and places a strong emphasis on minimizing court intervention.

- **Efficient Enforcement:** The enforcement of arbitral awards in Hong Kong is relatively straightforward, with minimal procedural hurdles. The courts place great weight on party autonomy and the finality of arbitral awards.
- **Minimal Judicial Intervention:** Hong Kong courts adopt a restrictive approach to judicial review, focusing only on procedural fairness and preventing any review on the merits.

#### Case - Hebei Import & Export Corp v. Polytek Engineering Co. Ltd. (1999):

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<sup>4</sup> *AJU v. AJT*, [2011] SGCA 20 (Sing.).

**Facts:** The dispute concerned a foreign arbitral award, which was challenged on the grounds of public policy.

**Issue:** Whether the enforcement of the award was contrary to Hong Kong's public policy.

**Observations:** The court noted that the public policy exception should be applied cautiously, and only in cases where the award would undermine justice and fairness in Hong Kong.

**Judgment:** The court enforced the award, holding that "public policy is not to be lightly invoked to resist the enforcement of an arbitral award.<sup>5</sup>"

### United Kingdom

The United Kingdom, under the Arbitration Act, 1996, is seen as a model jurisdiction for arbitration. The Act incorporates the principles of the UNCITRAL Model Law and adopts a clear and predictable framework for enforcing arbitral awards.

- **Precise Public Policy:** UK courts have consistently applied a narrow interpretation of the public policy exception, limiting its scope to fundamental breaches of justice.
- **Enforcement Framework:** The UK has an efficient enforcement framework, where the courts typically support the arbitral process and avoid interfering with the merits of the dispute.

#### Case- **Dallah Real Estate v. Pakistan (2010):**

**Facts:** The case involved the enforcement of a foreign arbitral award that was challenged by Pakistan on the grounds of public policy.

**Issue:** Whether the UK courts should refuse enforcement on public policy grounds.

**Observations:** The court emphasized that public policy should only be invoked in exceptional circumstances and should not be used to challenge the merits of an arbitral award.

**Judgment:** The court refused to enforce the award, but the decision was based on jurisdictional issues rather than public policy concerns. The court stated, "Public policy in the context of arbitration is confined to matters affecting the most basic notions of morality and justice.<sup>6</sup>"

### Switzerland

Switzerland is known for its arbitration-friendly approach and its alignment with international arbitration standards. The Swiss Private International Law Act, 1987 governs arbitration in Switzerland, offering a streamlined and efficient enforcement process.

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<sup>5</sup> *Hebei Import & Export Corp. v. Polytek Eng'g Co. Ltd.*, [1999] 2 HKCFAR 111 (H.K.).

<sup>6</sup> *Dallah Real Estate & Tourism Holding Co. v. Islamic Republic of Pakistan*, [2010] UKSC 46 (U.K.).

- **Narrow Public Policy Application:** Swiss courts have consistently applied the public policy exception narrowly, focusing only on cases where the award contravenes Switzerland's most fundamental legal principles.
- **Effective Enforcement:** Switzerland has a highly efficient enforcement framework, with minimal judicial intervention and clear procedural guidelines.

**Case - X v. Y (Swiss Federal Tribunal, 2006):**

**Facts:** This case involved a challenge to a domestic arbitral award on the grounds of public policy.

**Issue:** Whether the award could be set aside for being contrary to public policy.

**Observations:** The Swiss Federal Tribunal held that public policy must be interpreted restrictively, applying only to awards that violate Switzerland's core legal principles.

**Judgment:** The court upheld the award, reaffirming Switzerland's pro-arbitration stance. The court observed, "Public policy is an exceptional ground for refusing enforcement and should be interpreted narrowly to respect the finality of arbitral awards.<sup>7</sup>

**United States**

The United States follows the Federal Arbitration Act, 1925 (FAA), which provides a solid framework for the recognition and enforcement of arbitral awards. The public policy exception is narrowly defined under U.S. law, ensuring that arbitral awards are not easily set aside.

- **Specific Grounds for Public Policy:** U.S. courts apply the public policy exception in limited cases, such as awards obtained through fraud, corruption, or where enforcement would violate fundamental principles of justice.
- **Established Framework:** The FAA provides a well-defined procedure for enforcing arbitral awards, with the courts generally taking a hands-off approach unless procedural irregularities are evident.

**Case Reference - Mitsubishi Motors Corp v. Soler Chrysler-Plymouth, Inc. (1985):**

**Facts:** The case involved the enforcement of an arbitral award in an international commercial dispute.

**Issue:** Whether the enforcement of the award violated U.S. public policy.

**Observations:** The U.S. Supreme Court held that arbitral awards should be enforced unless they violate the "most basic notions of morality and justice."

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<sup>7</sup> X v. Y, [2006] 132 I.L.R. 1 (Swiss Fed. Trib.).

**Judgment:** The court enforced the award, emphasizing that the public policy exception should be used sparingly. The court observed, "The enforcement of an arbitral award should not be denied on the basis of public policy unless it clearly offends the most fundamental norms of justice.<sup>8</sup>

### LANDMARK CASES IN INDIA

India's arbitration jurisprudence has been shaped by several landmark Supreme Court cases. These cases highlight the evolving nature of arbitration law in India, particularly in relation to the enforcement of arbitral awards and the interpretation of the public policy exception.

#### Case- ONGC Ltd. v. Saw Pipes Ltd. (2003)

**Facts:** ONGC and Saw Pipes Ltd. entered into a contract for the supply of goods. A dispute arose, and the matter was referred to arbitration. The arbitrator made an award in favour of Saw Pipes, but ONGC challenged the award on the grounds of public policy.

**Issue:** Whether the arbitral award could be set aside on the grounds of "patent illegality" under the public policy exception.

**Observations:** The Supreme Court broadened the scope of public policy by holding that an award could be set aside if it was "patently illegal." The court emphasized that an error of law could be a valid ground for setting aside an award if it violated Indian law.

**Judgment:** The court set aside the award, stating that the arbitrator's interpretation of the contract was erroneous and violated public policy. The court held, "An award that is contrary to the provisions of law or the terms of the contract is liable to be set aside under Section 34<sup>9</sup>.

#### Case- Renusagar Power Co. Ltd. v. General Electric Co. (1994)

**Facts:** This case involved the enforcement of a foreign arbitral award in favour of General Electric. Renusagar Power Co. challenged the award on the grounds of public policy, arguing that it violated Indian law.

**Issue:** Whether the enforcement of the foreign arbitral award could be refused on public policy grounds.

**Observations:** The Supreme Court adopted a narrower interpretation of public policy, limiting its application to fundamental principles of Indian law, justice, and morality.

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<sup>8</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

<sup>9</sup> *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705 (India).

**Judgment:** The court enforced the award, stating that public policy should be narrowly construed in the context of enforcing foreign arbitral awards. The court held, "Enforcement of a foreign award may be refused only if it is contrary to the fundamental policy of Indian law, justice, or morality."<sup>10</sup>

**Case- Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India (2019)**

**Facts:** The dispute arose over a construction contract between Ssangyong Engineering and the National Highways Authority of India (NHAI). The arbitral tribunal ruled in favour of Ssangyong, but NHAI challenged the award on the grounds of public policy.

**Issue:** Whether the arbitral award could be set aside on the grounds of public policy under Section 34 of the ACA.

**Observations:** The Supreme Court took a more restrictive approach, ruling that the public policy exception must be interpreted narrowly in line with international standards.

**Judgment:** The court upheld the award, stating that the public policy exception should not be used to re-examine the merits of the case. The court observed, "Public policy must be given a narrow interpretation, and courts should refrain from interfering with arbitral awards unless there is a clear violation of fundamental legal principles."<sup>11</sup>

### **PUBLIC POLICY AND THE 2015 AND 2021 AMENDMENTS**

The 2015 Amendment to the ACA introduced significant changes aimed at reducing delays in arbitration and limiting judicial interference. One of the key amendments was the clarification of the public policy exception, ensuring that it is applied in a narrow and precise manner.

#### **Key Changes Introduced by the 2015 Amendment**

- **Public Policy Clarification:** The Amendment restricted the scope of the public policy exception, limiting it to awards that are in conflict with the "fundamental policy of Indian law," "interest of India," or "justice and morality."<sup>12</sup>
- **Expedited Proceedings:** The Amendment introduced timelines for the completion of arbitration proceedings, aimed at expediting the process and reducing delays.<sup>13</sup>

<sup>10</sup> *Renusagar Power Co. Ltd. v. General Electric Co.*, (1994) 2 SCC 644 (India).

<sup>11</sup> *Ssangyong Eng'g & Constr. Co. Ltd. v. Nat'l Highways Auth. of India*, (2019) 15 SCC 131 (India).

<sup>12</sup> *Arbitration and Conciliation Act*, No. 26 of 1996, § 34(2)(b)(ii), India Code.

<sup>13</sup> A.K. Mishra, *Arbitration in India: A Comparative Analysis of the 2015 Amendment*, 3 *Indian J. Arb. L.* 1 (2016).

- **Judicial Intervention:** The Amendment reinforced the principle of minimal judicial interference by narrowing the grounds for setting aside awards.

### The 2021 Amendment

The 2021 Amendment further streamlined the arbitration process, particularly in relation to the enforcement of arbitral awards.

**Unconditional Stay on Awards:** One of the key changes introduced by the 2021 Amendment was the provision for an automatic stay on the enforcement of arbitral awards in cases where the underlying arbitration agreement or contract is induced by fraud or corruption.<sup>14</sup>

**Impact on Public Policy:** The 2021 Amendment reinforced the narrow interpretation of public policy, limiting its application to cases where there is a clear violation of Indian legal principles.<sup>15</sup>

### CONCLUSION

India's arbitration framework, particularly the Arbitration and Conciliation Act, 1996, has evolved significantly since its enactment. The enforcement of arbitral awards remains a critical issue, with the public policy exception often serving as a ground for judicial intervention. However, recent amendments to the ACA, coupled with landmark judgments from the Supreme Court, have sought to narrow the scope of public policy and reduce delays in the arbitral process<sup>16</sup>.

To further enhance the effectiveness of India's arbitration framework, it is crucial to continue promoting a pro-arbitration stance, limiting judicial interference, and streamlining enforcement procedures. By adopting best practices from arbitration-friendly jurisdictions, India can position itself as a global arbitration hub and attract more international commercial disputes.

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<sup>14</sup> *Arbitration and Conciliation (Amendment) Act*, No. 3 of 2021, § 36, India Code.

<sup>15</sup> A. Bhattacharya, Recent Developments in Indian Arbitration Law: A Review of the 2021 Amendment, 10 *Indian Arb. J.* 45 (2022).

<sup>16</sup> M. Singh, India's Evolution as a Global Arbitration Hub: Challenges and Prospects, 5 *Indian Arb. L. Rev.* 67 (2023).