SUPREME COURT’S ROLE VIS A VIS INDIAN ARBITRATION AND CONCILIATION ACT, 1996
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ABSTRACT:
This article examines some aspects of the growth of judicial law making by the Supreme Court in the last twelve years of the working of the Indian Arbitration and Conciliation Act, 1996. It also examines the negative role of the Supreme Court in taking the law backward thus preventing the growth of international trade and commerce. It also shows that just as politicians and bureaucrats do not give up power, judges are no exception.

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I. HISTORICAL BACKGROUND OF INDIAN ARBITRATION LAW

Arbitration is a process of settling disputes well known to the Indian system of justice. It is an old practice that panchayats in villages would settle disputes between the parties. The Panchayats have now got a constitutional recognition under the Constitution (Seventy Third Amendment Act 1992) which was inserted as Part IX of the Constitution of India. It consists of Articles 243 to 243 O. The British during their regime had introduced various laws relating to arbitration (FN1) which were applicable either to a part of the country or subsequently to the whole nation (FN2).

II. INDIA IN INTERNATIONAL FORUMS

India has been an active participant and party to various international conventions on international commercial arbitration. It was a party to the Geneva Protocol, 1923, and Geneva Convention, 1927 under the League of Nations. As required under these international treaties the Arbitration (Protocol and Convention) Act, 1937 was enacted. Subsequent changes in international treaties resulted in the Parliament enacting Recognition and Enforcement of foreign arbitral awards, 1956 which was based on the New York Convention.

Parties to international trade and commerce have often felt jittery as to which method to fall back on in the event of any dispute. The judicial resolution of a dispute results in a judgment / decree which have often been found to be unrecognized and unacceptable in the courts of the country in which it has to be enforced. This has compelled the parties to adopt arbitration as a sound alternative. The United Nations Commission on International Trade Law had been working for several years to come up with an acceptable model law. The UNCITRAL (United Nations Commission on International Trade Laws) began work on model arbitration law in 1979 and after working for several years, on June 21st 1985 it proposed a Model Law on international commercial arbitration. The General Assembly of United Nations passed a resolution accepting the Model Law and India being a party adopted the Model Law in the form of Arbitration and Conciliation Act, 1996.

The Model Law had several distinctive features but suffice is to say that great emphasis was put on allowing the conduct of arbitration in accordance with the expectations of the parties rather than the general rules which may be applicable in accordance with the laws.
of the country. The restriction was only in respect of major defects in the arbitral procedure, the violation of due process, denial of justice and serious breaches of rules of international justice. The Model Law emphasizes in no uncertain terms that international commercial arbitration is an alternative and outside the normal judicial system.

Most member states adopted the Model Law while enacting law relating to international commercial arbitration as in India. Some of its broad features were that for the first time conciliation was adopted as a possible method of resolution of commercial disputes though in practice it has hardly worked. It is difficult to pinpoint the reasons why it hasn’t as in several other countries the counsels for the parties put a great deal of pressure that it is desirable that the parties to the dispute settle rather than litigate by way of arbitration or litigation. Unfortunately it is indeed very rare that Counsel do so or when they do both the parties accept their recommendation. The preamble of Arbitration and Conciliation Act clearly states that “in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice” and since the “Model Law and Rules make significant contribution to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations”, the said Arbitration and Conciliation Act was passed by the Parliament. The Act is divided into – Part I which deals with arbitration, Part II provides for enforcement of foreign awards and Part III is titled as ‘Conciliation’ and Part IV with supplementary provisions. The drafting of the Act has obviously not received the necessary attention as Part III dealing with conciliation should have been right in the beginning as its failure would lead to arbitration or judicial proceeding by the parties, whereas it finds a mention at the end in Sections 61 to 81 of Part III of the Act. The Act also received some sharp rebuke by the Supreme Court when it observed “it must be stated that the said Act does not appear to be a well drafted legislation”. (FN3)

III. AREAS OF CONFLICT – APPOINTMENT OF ARBITRATORS

In its less than 12 years of operation the 1996 Act has kept the Supreme Court fairly busy on some serious issues and some not so serious (appointment of the arbitrator). Section 11 deals with the appointment of the arbitrator by the court when one of the parties refuses to follow the provisions of the arbitration agreement regarding the conduct of the arbitration proceedings. The Supreme Court was faced with the issue of the nature of the appointment of the arbitrator by the court as being judicial or administrative in nature. This question was first considered by a three Judge bench of the Supreme Court in
Konkan Railway Corporation v. Mehul Construction Co. (FN4) when it held that when the Chief Justice of the High Court or the Supreme Court of India appoints an arbitrator under Section 11 of the Act, it was in exercise of administrative powers of the Chief Justice. This was found to be doubtful and a larger five Judge bench in Konkan Railway v. Rani Construction Pvt Ltd (FN5) reconsidered the same question and came to the same conclusion. Three years down the line the said question came to be reconsidered by a larger Bench of seven Judges in SBP & Co. v. Patel Engineering Ltd. (FN6) which by a majority of six to one held that the power to appoint an arbitrator under Section 11 is judicial in nature.

This thread bare surgery on this point of law became important as under the Constitutional scheme of things in India if the exercise of power of appointment of arbitrator is administrative no further judicial challenge is possible whereas if it is judicial the same can be challenged either under Article 226, 227 of the Constitution or under Article 136 of the Constitution as the case may be. (FN7)

The Indian judicial system vis a vis arbitration was and is proactive which is least desirable for promoting international trade and commerce. The Supreme Court has by this decision created another ground for challenging the arbitral process. It can be safely said that uncertainty of the outcome of a dispute is something which does not need to be promoted.

IV. PUBLIC POLICY --- AND JUDICIAL INTERVENTION

Rule 34 of the UNCITRAL Model Rules provides grounds for setting aside an arbitral award and one of the grounds is that where the award is in conflict with the public policy of the state (FN8). This provision was inserted in the Model Rules after a great deal of debate and the words "public policy" of the State were preferred in view of its universal acceptance. Public policy is always an unsafe and treacherous ground for legal decision (FN9) and it has also been described as ‘a very unruly horse, and when you get astride it you never know where it will carry you’ (FN10). More recently the British courts held that in order to be contrary to the public policy, the impugned conduct should involve more than inadvertence and should, save very exceptionally, involve something that could be described as unconscionable or reprehensible.(FN11)

There is no disagreement to the fact that public policy is capable of a wide or a narrow
construction. In USA the courts have preferred the narrow interpretation largely with a view to give finality to an international commercial award and to discourage parties from challenging the same before judicial forums (FN12). The United States believes in its commitment to more than one hundred other countries that American courts will enforce arbitration clauses in international commercial agreements. The goal of the New York convention is “to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed….in signatory countries” (FN13). the American Supreme Court referring to the obligations under the international transaction that “ a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to the achievement of the orderliness and predictability essential to any international business transaction.”(FN14).

V. PUBLIC POLICY AND THE INDIAN EXPERIENCE

Rule 34 as mentioned above was verbatim reproduced in Section 34 of the Arbitration and Conciliation Act, 1996. The words ‘public policy’ finds place in two other provisions (FN15). The term public policy in context of arbitration proceedings came to be examined by the Supreme Court in Renusagar Power Plant Co. v. General Electric Co. (FN15A) by three Judge Bench. The short facts in this case were that Renusagar had entered into a contract with General Electric Co., a company incorporated under the laws of State of New York in USA under which it had to supply equipment and power services for setting up a thermal power plant. The said contract was approved by the Government of India. The total price of the contract was US$13,195,000. All the items were to be delivered in 15 months from the effective date and the completion of the plant was to be done within 30 months. The contract provided for payment in installments and also required execution of unconditional negotiable promissory notes for all the installments. The contract contained an arbitration clause which provides that any disagreement arising out of or related to the contract which the parties are unable to resolve by sincere negotiation shall be finally settled in accordance with the Arbitration Rules of the International Chamber of Commerce. Each party would appoint one arbitrator and the Court of Arbitration of the ICC would appoint a third arbitrator (Article XVII). It was also agreed that the rights and obligations of the parties under the contract shall be governed in all respects by the laws of the State of New York, USA (Article XIX-A). It seems there was some delay on the part of General Electric in adhering to the time schedule for supply of equipment and consequently Renusagar rescheduled the payment
installments and certain installments were unpaid under due dates. Renusagar approached the Government of India for approval of the revised schedule regarding the payment of installments which was not approved by the Government of India and Renusagar was asked to take necessary action to make the payment of the past installments immediately. At this stage General Electric initiated arbitration proceedings before the Arbitration Court of ICC. Both the sides filed civil suits in Bombay and Calcutta High Courts the details are not mentioned as they are not relevant to the arbitration proceedings. The arbitration proceedings resulted in an award in favour of General Electric and it also awarded compensatory damages and computed the same by applying the average prime rate to the amount withheld. The award came to be challenged on several grounds and one of them was that it was contrary to public policy of India, the reason being the order relating to the payment of interest in particular in foreign exchange would be contrary to the Foreign Exchange Regulation Act. This case arose in particular under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961. The Supreme Court was faced with the question whether to give the words ‘public policy’ a narrow or a broad meaning. The Supreme Court referred to Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958: Towards a uniform Judicial Interpretation, has expressed his view:

“It is generally accepted interpretation of the Convention that the court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of arbitration.”(FN16)

Similarly Alan Redfern and Martin Hunter have said:

“The New York Convention does not permit any review on the merits of an award to which the Convention applies and in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted.” (FN17)

While observing that “from the very nature of things, the expressions ‘public policy’,

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‘opposed to public policy’ or ‘contrary to public policy’ are incapable of precise definition” this court laid down:
“Public policy…connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or public interest has varied from time to time.”(FN18)

The need for applying the touchstone of public policy was explained by Sir William Holdsworth:
“in fact, a body of law like the common law, which has grown up gradually with growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.” (History of English Law, Vol. III, p.55) since the doctrine of public policy is somewhat open-textured and flexible, Judges in England have shown certain degree of reluctance to invoke it in domestic law. There are two conflicting positions which are referred as the ‘narrow view’ and the ‘broad view’. According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas (FN18A). Similar is the trend of decision in India. In Gherulal Parakh v. Mahadeodas Maiya (FN19) the Supreme Court favored the narrow view when it said:
“….though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these heads”

After referring to the various decisions of the English, and American courts and quoting classic textbooks on international commercial arbitration the Supreme Court went on to very rightly give narrow interpretation to the words public policy and held that

1. the payment of interest on interest (compound interest),
2. possibility of violation of FERA,
3. payment of damages,
4. possibility of unjust enrichment by General Electric

did not amount to or was not contrary to the public policy of India.
The Supreme Court concluded that “it is obvious that since the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration, any expression or phrase occurring therein should receive, consisting with its literal and grammatical sense, a liberal construction.”

Renusagar thus was very correctly decided, when it took a narrow view of the word ‘public policy’ thus leaving little scope of judicial interference in arbitration proceedings and the final determination of awards. It considered the laws in UK (FN20), USA (FN21) and France (FN22) before coming to this conclusion.

The next in line of cases decided by Supreme Court on the interpretation of the words ‘public policy’ is Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd. (FN23). The short facts are that ONGC ordered pipes from the respondent on certain terms and conditions and for dispute resolution it also had an arbitration clause. Disputes arose as the respondent was unable to conform to the time schedule prescribed for supplies due to the strike of the workers in Europe for almost two months. Respondent informed these facts to ONGC which in turn replied that damages as per the contract would have to be paid. The respondent thereafter supplied the pipes and ONGC deducted a large sum from the bill on account of delay without there being any adjudication or determination by a third party. The matter was eventually referred to arbitration and an order was passed in favor of the respondents. The same was challenged before a single Judge of High Court which dismissed the petition. A further challenge before a division bench was also negated. An appeal to the Supreme Court under Article 136 (Special Leave Petition) came to be heard by two Judges who allowed the appeal and set aside the award. This judgment has come to be severely criticized (FN24) and in this writer’s view very rightly so. Some of the features were however not noted by any of the writers and the same are a being pointed out below:

1. The Judges first went down to lay the law and then narrated the facts of the case, which is unusual and very rarely done.
2. The Judges referred to various judgments which were totally unrelated to arbitration law like M.V. Elisabeth v. Harwan Investment & Trading (P) Ltd (FN25) which was a case dealing with admiralty jurisdiction, Dhannalal v. Kalawatibai (FN26), this was a case dealing with a landlord tenant problem
3. Central Inland Water Transport Corp. Ltd v. Brojo Nath Ganguly (FN27) which is an oft quoted judgment on public policy but relates to labour laws in which the
services of an employee were terminated without following due process. The Court however seems to have missed out some very apt lines of the judgment which are –

“The story of mankind is punctuated by progress and retrogression. Empires have risen and crashed into dust of history. Civilizations have flourished, reached their peak and passed away. In the year 1625, Carew, C.J., while delivering the opinion of the House of Lords in Re the Earldom of Oxford (FN28), in a dispute relating to the descent of that Earldom said:

……and yet time hath his revolution, there must be a period and an end of all temporal things, finis rerum, an end of names and dignities, and whatsoever is terrene…..

The cycle of change and experiment, rise and fall, growth and decay, and of progress and retrogression recurs endlessly in the history of man and the history of civilization. T.S.Eliot in the First Chorus from “The Rock” said:

- Perpetual revolution of configured stars,
- Perpetual recurrence of determined seasons,
- World of spring and autumn, birth and dying;

The endless cycle of idea and action,

Endless invention, endless experiment.

The law exists to serve the needs of the society which is governed by it. If the law is to play its allotted role of serving the needs of the society, it must reflect the ideas and ideologies of that society. It must keep time with the heartbeats of the society and with the needs and aspirations of the people. As the society changes, the law cannot remain immutable. The early nineteenth century essayist and wit, Sydney Smith, said: “When I hear any man talk of an unalterable law, I am convinced that he is an unalterable fool.” The law must, therefore, in a changing society march in tune with the changed ideas and ideologies. Legislatures are, however, not best fitted for the role of adapting law to the necessities of the time, for the legislative process is too slow and the Legislatures often divided by politics, slowed down by periodic elections and over burdened with myriad and other legislative activities. A constitutional document is even less suited to this task, for the philosophy and the ideologies underlying it must of necessity be expressed in broad and general terms and the process of amending a Constitution is too cumbersome and time consuming to meet the immediate needs. This task must, therefore, of necessity fall upon the courts because the courts can by the process of judicial interpretation adapt the law to suit the needs of the society.”
Yet another two decisions referred to and relied upon by the Court were A. Schroeder Music Publishing Co. Ltd v. Macaulay (FN29), which was a pure contract dispute and it referred to Kedar Nath Motani v. Prahlad Rai (FN30) (Land dispute), Murlidhar Agarwal v. State of UP (FN31). These two cases do deal with public policy but one fails to appreciate how with such diverse fact situation the same could be used to determine whether an award in international commercial arbitration determined is in accordance with the UNCITRAL Model Law or not. It then goes on to consider Renusagar (failing to mention or notice that it is a three Bench unanimous decision and binding on them) and the argument advanced was that Renusagar considered the question of execution of an award finally determined while in the case before them the question was for setting aside a finally determined award and finally hold “in our view in addition to narrower meaning to the term public policy in Renusagar case it is required to be held that the award could be set aside if it is patently illegal.” It then considers the facts of the case, an instance of ‘having found the boots now lets find the feet’ and like an accountant concluded that ONGC was justified in deducting the amount and the arbitrators were wrong in awarding the amount with interest and set aside the award. It failed to notice that the Court in Renusagar was aware of the two possible interpretations of “public policy”, namely narrow and wide meanings and had after considering the pros and cons of the two, preferred the narrower meaning. The Court also did not consider the fact that the delay caused in supplying the pipes was for reasons beyond the control of Renusagar namely a prolonged strike of steel workers in Europe. It shows total lack of judicial discipline, not following a binding principle of law which if a lower Court had done would have been regarded as contempt. As pointed out above the Court referred to judgments on all sorts of subjects but does not apply well known principles of interpretation namely refer to the Preamble and Statement of Objects and Reasons of the Act. It does not consider the fact that the parties have adopted and accepted another mode of resolution of their dispute, namely arbitration, and so be it.

Three years later the Supreme Court had an opportunity to refer the matter to a larger Bench which it did not though it accepted that ONGC had invited considerable adverse comments. (FN32)

ONGC’s decision came up for some sharp criticism. In an article entitled ‘Judicial Ambush of Arbitration in India’, (FN33) it was observed that arbitration is not for faint hearted in India. Quoting from Jam Paulson it observed that the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the
legitimate expectation of the international community. According to him “the judgment can be relied upon to encourage further litigation by the aggrieved party to arbitration, and in doing so diminish the benefits of arbitration as a mode of dispute resolution. A parallel can be drawn from the current state of the Indian Supreme Court. The special jurisdiction of the supreme court under Article 32 and 136 of the Constitution has been diluted with excessive litigation reducing what was intended be a constitutional court to an appellate body, leaving over thousand of matter everywhere without giving any proper clarity as to the state of law at any given time”(FN34). This is extremely apt and accurate except for his reference to Article 32 the Supreme Court invariably directs the parties to first go to the high court under article 226 & 227 of the constitution.

Markanda in the preface to his book has criticized the ONGC judgment by saying that the “Supreme Court has vastly enlarged the scope of challenge to awards - much more that what was available under Act of 1940. It is thus contrary to the very spirit of the act of 1996” (FN35).

ONGC has impinged upon arbitration as an effective method of dispute resolution and threatened “certain key goods of arbitration namely those of speed and efficiency” and it is no longer sure that when an award is rendered it will be final (FN36).

It has been very rightly concluded that “the court must take the law forward based on the trust and confidence in the arbitral system” and the “Indian judiciary…. contain the interventionist role it has assumed for itself (FN37).

The last words on the subject were well said by the eminent advocate and jurist F.S.Nariman “the division bench of the two judge has altered the entire road map of arbitration law and put the clock back to where we started under the old 1940 Act”(FN38)

**VII. EXTENTION OF ‘PATENT ILLEGALITY’ TO INTERNATIONAL COMMERCIAL ARBITRATION**

There is one other recent judgment (FN39) which needs to be noted. The short facts were that the two i.e. the appellant and respondent entered into a joint venture agreement and by another agreement formed a joint venture company in which both of them had equal shareholding. As the appellant was likely to get into bankruptcy proceedings the
respondent applied for arbitration under the second agreement in Michigan as per the arbitration clause. An award was passed to transfer the shares in the new joint venture company in favor of the respondent and enforcement proceedings were initiated in Michigan. At this stage the appellant filed a civil suit in a district court in India and obtained a stay order against the transfer of shares on the ground that the award was in violation of public policy namely it being contrary to FEMA (Foreign Exchange Management Act) and the Companies Act the respondent though an Indian company and fully aware of the court’s order continued its efforts to enforce the award in Michigan. The respondent filed an appeal before the Secunderabad High Court. The High Court dismissed the appeal holding that the award could not be challenge even it were against the public policy and in contravention of the statutory provision. The appellant filed a special leave petition against the said order before Supreme Court of India. Based on the earlier judgment in Bhatia International (FN40), Supreme Court held that it is open to the parties to exclude the application of the provisions of part I by express and implied agreement, failing which the whole part one would apply. Further it held that to apply section 34 to foreign award would not be in consistent with section 48 of the 1996 Act, any other provision of part II and that the judgment-debtor could not be deprived of his right under section 34 to evoke the public policy of India, to set aside the award. Thus, the extended definition of public policy cannot be bypassed by taking the award to foreign country for enforcement.

Very strangely this case makes no reference to Renusagar and goes on to very heavily rely on ONGC as if it was a binding precedent. The challenge to the award on the ground of public policy was that it would offend provisions of Foreign Exchange Management Act which are far more lenient than the Foreign Exchange Regulation Act (which in Renusagar Supreme Court held would not amount to a breach of public policy). Another aspect which needs to be noted is that the question of whether there was or wasn’t a breach of public policy was sent back to the Trial Court for determination. The consequences of such a course of action are frightening. Here was a party which had an award in its favor under international arbitration conventions and it tried to enforce the same in the forum agreed upon. They are now being sent back to the District Court that it shall dispose of the same within six months from the date of the copy of the judgment. Our own practical experience shows that this rarely happens. As all orders passed in trial proceedings are liable to be challenged either in revision or in appeal and a final order is in any way liable to be challenged in a statutory appeal and a further second appeal on question of law and finally a Special Leave petition to the Supreme Court. The
experience of the Indian Courts in deciding civil cases is pathetic, slow and rarely determined finally in even one decade. The courts should at least keep in mind when interfering with international commercial arbitration that such uncertainty and delay would not promote international trade and business as a foreign party is entitled to a quick disposal, least expensive, and with an element of finality. The Courts should keep in mind two factors – one that the statement of Object and Reasons has set out clearly stated (to minimize the supervisory role of courts in arbitral process) (FN41) and every time the courts interfere with a final arbitral award they are doing exactly the opposite. Secondly, setting aside a finally determined award does not necessarily imply that the view taken by the Judges is superior to that of the Arbitrators. One must never forget that both are human beings. Another factor one should keep in mind is that the award of the Arbitrator should be considered binding as both the parties had agreed to resolve the disputes by him.

Sadly no judgment refers to Section 5 of the Arbitration and Conciliation Act, 1996 and naturally its impact on judicial interpretation does not come to surface (FN42).

Satyam’s judgment is most unfortunate in its application of the doctrine of “patent illegality” to an international commercial arbitration award. If one reads between the lines, the court was peeved by the fact that the respondent which is an Indian Company knew about the injunction granted by an Indian court and yet went ahead with the enforcement of the award in Michigan. How dare you do that, we will show you is what the court has tried to do. How one wishes it had looked at its repercussion on the Indian international trade and commerce. (FN43)

Wolfgang Koehling writing on the “Economic Consequence of a Weak Judiciary: Insight from India” has concluded that ‘the data indicate that a weak judiciary has a negative effect on economic and social development, which leads to (i) lower per capita income; (ii) higher poverty rates; (iii) lower private economic activity (iv) poorer public infrastructure; and, (v) higher crime rates and more industrial riots. The results are robust and the correlations are strong and negative. Its correlation is strong and negative. In addition, through a forecasting simulation I have shown that an increase in predictability and a speeder judiciary substantially increase the per capita income growth rate” (FN44)

VIII. INTERVENTION IN INTERIM STAGES

The recent decision of the Supreme Court in Shin-Etsu Chemical Co. Ltd v. Aksh Optifibre Ltd. (FN45) is a very fine example to study whether the court is promoting
international arbitration as a method of resolving disputes or not. The facts of this case are: The appellants and the respondent entered into an agreement which contained an arbitration clause which reads as follows –

All disputes arising out of in relation to this agreement which cannot be related by mutual accord shall be settling by arbitration in Tokyo, Japan in accordance with the rule of conciliation and arbitration of International Chamber of Commerce. The award of arbitration shall be final and binding upon the parties” (FN46).

The material facts set out in the judgment are very brief as it seems there was no controversy for examination of the legal question involved. There was a long term sale and purchase agreement between the Japanese company and an Indian company and consequent upon some issue Japanese company terminated the agreement. The agreement provided for it shall be governed and construed and interpreted under laws of Japan. The Indian company filed a suit for “cancellation of the agreement on the ground that it was unconscionable, unfair and unreasonable and against public policy and the same was entered into under undue influence and therefore void ab initio and incapable of performance and cannot be given affect to.” The Japanese company made an application in the suit praying that the Indian company be directed to submit to arbitration which had been initiated in Tokyo, Japan. The application was filed under section 8. The trial court gave an order in favor of the Japanese company. This order was challenged before the High Court in its supervisory jurisdiction under the Constitution, which remands the matter back to trial court as it found that the court had not considered the legal provisions properly.

The Japanese company however preferred to appeal to the Supreme Court by way of Special Leave Petition. The Supreme Court found the core issue to be “whether the finding of the court……that the arbitration agreement……is or is not “null and void, inoperative or incapable of being performed” should be final expression of the view of the court or should it be a prima facie opinion formed without a full fledged trial?”

The civil courts in India are so heavily burdened, the backlog in some courts could run into hundred of thousands of cases. So a practice has developed of making interim application during the pendency of the suit and courts decide these applications on a prima facie view of the matter. These applications are normally for injunction, appointment of court receiver, and temporary attachment during the pendency of the suit etc. Any orders from these applications are appealable to the High Court and it is not
uncommon for the Supreme Court to interfere with such orders (as in this case). Needless to say the outcome of the interim application is crucial if not critical as the final hearing and disposal of the suit could take not less than a decade and sometimes two decades not to mention appeals, revising etc to a higher court.

In Shin-Etsu Chemicals Ltd. v. Aksh Optifibre Ltd. (FN47) (it was a 2-1 majority) minority view was that the application challenging the validity of the agreement should be decided on merits, final and binding and not prima facie. This should be done by giving parties opportunity to file documents and affidavits by way of evidence. However no oral evidence would be examined. The majority view was that the trial court should take prima facie view of the matter, and “the court must afford full opportunities to the parties to lead whatever documentary or oral evidence they want to lead……like a trial of a preliminary issue.”

In my view both the views are wrong, against the underlying principle of “least judicial interference in international commercial arbitration” (see sections 5, 8, 48(1)(a) and 50) and more so since in this case the Japanese law would decide the validity of the agreement. The minority view of the final finding of validity of agreement on grounds of undue influence, unfair, unconscionable etc on the basis of affidavit evidence (where one party will make allegations and the other will deny it) is beyond comprehension, and makes mockery of process of judicial decision making. The majority view is to record evidence but take only a prime facie view (why when the parties have been given full opportunity) is still worse – pray when does the trial court take a final decision after 20 years when the suit comes up for hearing. The court had a simple solution of directing the parties before the Arbitrator for decision on all the questions and allow a full fledged challenge after the award was made.

IX. CONCLUSION

The question raised in this article is what should be the role of courts when dealing with international commercial agreements and finally determined awards in accordance with the arbitration clause therein. It can hardly be debated that the role should be minimal as is set out in the UNCITRAL Model Law on which the Arbitration and Conciliation Act, 1996 is based. The Act is barely twelve years old and what is the Indian experience is obvious by the fact that the court’s interference is not minimal but the courts are hyper active. The Supreme Court has been time and again making the mistake of not relying
upon the provisions of UNCITRAL Model Law though it must be said in their defense that “public policy” is one of the grounds on which the final award can be set aside under Rule 34 of the UNCITRAL Model Law (Section 34 of the Arbitration and Conciliation Act, 1996 is verbatim reproduction of this Rule). ONGC and Satyam are clear examples of the Supreme Court ignoring this principle. They continue to fall in the trap of looking backwards (frequent references to the cases under the 1940 Act or continuing to follow the underlined unwritten principle in the 1940 Act) that judicial interference is desirable and necessary which has been totally given a go by under the new Act and in particular in international commercial arbitration awards. The continuous following of the old jurisprudence will certainly not give a boost to the Indian international trade and business which is the underlying principle and reasoning of the new Act. Another wrong approach of the Supreme Court as pointed out in Satyam and Shin-Etsu Chemicals of remanding the matter back to the trial court is not healthy. In fact the Supreme Court should follow its principle that it should not interfere with interim orders under Article 136 of the Indian Constitution. It will be well advised to follow that with more stringently in international commercial arbitration and awards. The Supreme Court has also forgotten that the 1996 Act was intended as an alternative dispute resolution method as it was both less time consuming and was effective and for promoting international trade and commerce and by continuously interfering in such matters these purposes are defeated.

X. FOOTNOTES

3. Bhatia International v. Bulk Trading S.A, (2002) 4 SCC 105; AIR 2002 SC 1432. The Supreme Court in this case was considering whether part I of the Act will be applicable to international commercial arbitration or it is meant only for domestic arbitration. The court held that part I is also applicable to International commercial arbitration. This interpretation has also opened up a plethora of grounds for challenging an international arbitration awards.
4. (2000) 7 SCC 201
5. (2002) 2 SCC 388
6. (2005) 8 SCC 618


Both are highly critical of the view taken by the court. It just shows how difficult it is to satisfy everyone.

8. Rule 34(2)(b)(ii) of UNCITRAL
10. Richardson v. Mellish,(1824) 2 Bing 229 , 252 : 130 ER 294
12. Mitsubishi Motors Corp v. Soler Chrysler- Plymouth, Inc (1985)473 US614, 87 L Ed 2d 444. The Public Policy defense to recognition and enforcement of foreign arbitral awards, 7 Cal .W.Int’L.J.228 (1977) (“ the court have given the public policy defense so narrow a construction that it now must be characterized as a defense without meaningful definition”.
14. Scherk, 417 U.S. at 516
15. 34(2)(b): Application for setting aside arbitral award
(b) The court finds that
i. the subject – is matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or
ii. The arbitral award is in conflict with the public policy of India.

48(2)(b): Condition of the enforcement of foreign award

(2) Enforcement of an arbitral award may also be refused if the court finds that,
(b) The enforcement of award would be contrary to public policy of India.

57(1)(e): condition for enforcement of foreign awards

(1) In order that a foreign award may be enforceable under the chapter, it shall be necessary that-
(e) The enforcement of the award is not contrary to the public policy or law of India.

15A. AIR 1994 SC 860; 1994 Supp (1) 644
25. 1993 Supp (2) SCC 433.
27. (1986) 3 SCC 556, para 25
28. (1625) W Jo 96,101: (1626) 82 ER 50, 53
29. (1974)1 WLR 1308
30. AIR 1960 SC 213
31. (1974) 2 SCC 472
33. Javed Gaya, Judicial ambush of arbitration in India L.Q.R.1004, 120 (OCT), 571-574
38. Transcript of the speech delivered at the inaugural session of “legal reform in infrastructure” New Delhi, May 2, 2003
41. See generally Markanda opt cited on p.8 and p.9 Also see clause 4(v) of the statement of objects and reasons, of the Arbitration and Conciliation Act, 1996 which reads “to minimize the supervisory role of courts in the arbitral process”.
42. Indian Arbitration and Conciliation Act, 1996, Section 5: “Extent of Judicial Interpretation - Notwithstanding anything contained in any other law for the time being enforce, in matters governed by this part, no judicial authority shall intervene except where so provided in this part.”
43. Supra FN 40
45. (2005) 7 SCC 234
46. Ibid
47. Ibid