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A TECHNICAL CRITIQUE OF MINIMAL JUDICIAL INTERVENTION UNDER SECTION 5 OF INDIAN ARBITRATION LAW: IS IT A MYTH IN CORPORATE ARBITRATION?

AUTHORED BY - PARITOSH SINGH DEV

1. Introduction

In contemporary commercial jurisprudence, arbitration has emerged as an indispensable mechanism for resolving corporate disputes. The Arbitration and Conciliation Act, 1996 (hereinafter “the 1996 Act”) was enacted with the explicit objective of providing a neutral, efficient, and party-centric alternative to litigation, aligning India’s arbitral framework with the UNCITRAL Model Law on International Commercial Arbitration, 1985. Central to this framework is **Section 5**, which enshrines the doctrine of minimal judicial intervention, stating unequivocally that “no judicial authority shall intervene except where so provided in this Part.” This legislative expression embodies the fundamental ethos of autonomy in arbitral proceedings—a principle particularly vital in corporate arbitration where timeliness, procedural predictability, and cross-border enforceability are non-negotiable considerations.

Despite this textual clarity, a dissonance has steadily emerged between the intended insulation of arbitral proceedings and the manner in which courts have responded to arbitration-related matters, particularly in high-stakes corporate disputes. While the statutory narrative envisions courts as facilitators of arbitration, judicial practice often reflects an assertive interpretative role—frequently blurring the line between necessary oversight and undue interference. Landmark disputes such as *Intercontinental Hotels Group (India) Pvt. Ltd. v. Burman Hospitality Pvt. Ltd.* and *Vikram Bakshi v. McDonald’s India Pvt. Ltd.* offer instructive illustrations of this tension, wherein judicial interventions—whether under Section 9 (interim measures) or Section 34 (setting aside awards)—arguably stretch the doctrinal perimeter of Section 5.

This article seeks to interrogate the extent to which **Section 5 functions as a normative constraint** on judicial power in the specific context of corporate arbitration. The subject

assumes urgency given the increasing volume of cross-border arbitrations involving Indian parties, and India's aspirational positioning as a global arbitration destination. It is within this milieu that the principle of minimal judicial intervention must be assessed—not merely as an abstract doctrine but as a functional safeguard whose fidelity determines the credibility of India's arbitration regime.

Accordingly, the article pursues the following research objectives:

1. To critically examine the interpretative and operational contours of Section 5 within the Indian arbitration statute.
2. To analyse its practical application in corporate arbitration proceedings, with particular reference to judicial decisions that ostensibly circumvent or dilute its spirit.
3. To map patterns of judicial conduct that may contribute to an erosion of arbitral autonomy, particularly in the context of cross-border commercial disputes.

The central research questions that animate this study are:

- Does Section 5, as applied by Indian courts, truly operate as a shield against unwarranted judicial intervention?
- What interpretative trends emerge from case law concerning Section 5 in high-stakes corporate arbitrations?
- Is the Indian arbitration landscape experiencing a normative slippage wherein Section 5 is increasingly subordinated to judicial discretion?

By combining doctrinal analysis with empirical inquiry, this paper endeavours to contribute to the scholarly discourse on arbitration law and to provide policy-relevant insights into the future of arbitral autonomy in India.

2. Section 5 of the Arbitration and Conciliation Act, 1996: Text and Intent

Section 5 of the Arbitration and Conciliation Act, 1996, is often viewed as the legislative anchor for minimal judicial interference in arbitration proceedings. It provides: “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.” On its face, the language is categorical, reinforcing the notion that judicial interference is strictly limited to the exceptions explicitly enumerated in Part I of the Act.

2.1 Legislative Intention and International Influence

The roots of Section 5 lie in the **UNCITRAL Model Law on International Commercial Arbitration, 1985**, particularly Article 5, which similarly states: “In matters governed by this Law, no court shall intervene except where so provided in this Law.” India’s adoption of the Model Law was not merely symbolic—it represented an aspiration to foster an arbitration-friendly environment by harmonizing domestic law with international standards. The **176th Report of the Law Commission of India (2001)** had explicitly noted that Section 5 was intended to prevent “unnecessary and obstructive interference by courts” in arbitral matters.

The Law Commission’s subsequent **Report No. 246 (2014)** went further, recommending reforms to enhance India’s global credibility as a preferred seat for arbitration. It observed that judicial intervention had become “pervasive” and risked undermining the efficacy of the arbitration mechanism, especially in the commercial sector. This catalysed the 2015 and 2019 amendments, which attempted to streamline court intervention, particularly in relation to Sections 8, 9, and 11 of the Act. However, the effectiveness of these amendments in practice remains debatable, especially in the context of high-stakes corporate disputes.

2.2 Scope of Permitted Judicial Intervention

While Section 5 operates as a negative injunction, it does not function in a legal vacuum. The Act permits judicial intervention in specific instances that fall within a tightly drawn statutory framework—most notably under **Section 8 (reference to arbitration)**, **Section 9 (interim measures)**, **Section 11 (appointment of arbitrators)**, **Section 34 (setting aside an arbitral award)**, and **Section 37 (appealable orders)**. Each of these provisions delineates a structured form of judicial assistance rather than discretionary interference. For instance, **Section 9** permits parties to approach the courts for urgent interim relief prior to the constitution of the arbitral tribunal, but courts are expected to defer to arbitral forums once constituted, as affirmed in *Arcelor Mittal Nippon Steel India Ltd v Essar Bulk Terminal Ltd* (2021) 4 SCC 1.

However, courts have sometimes expanded their interpretative reach under these provisions, leading to a blurring of the line between facilitative and intrusive judicial conduct. This is particularly visible in cases where courts, while exercising jurisdiction under Sections 9 or 34, have engaged in detailed factual analyses or issued orders that substantially affect the merits of the arbitration. The judiciary’s engagement in such matters often operates in tension with the legislative vision underlying Section 5.

2.3 Judicial Philosophy and Statutory Evolution

Post-2015, the Indian judiciary has made concerted attempts to align with the pro-arbitration mandate envisioned by Parliament. In *Kandla Export Corporation v OCI Corporation* (2018) 14 SCC 715, the Supreme Court emphasized that courts must respect the legislative boundaries of intervention under Section 5. Similarly, in *M/s Mayavati Trading Pvt. Ltd. v Pradyut Deb Burman* (2019) 8 SCC 714, the Court clarified that after the 2015 Amendment, the power under Section 11 was intended to be exercised in a prima facie manner, and not through a full-blown judicial inquiry.

Despite these pronouncements, inconsistencies persist in judicial behaviour, especially at the High Court level. In many corporate disputes, courts have not merely assisted the arbitral process but arguably interfered with it, citing equitable considerations or procedural fairness. Such practices risk diluting the legislative objective of Section 5, particularly when judges exercise wide discretionary powers under ostensibly narrow statutory mandates.

3. Corporate Arbitration in India: Nature, Stakes, and Challenges

The exponential growth of corporate arbitration in India reflects the increasing complexity and globalization of business transactions involving Indian parties. In this context, arbitration has become a preferred dispute resolution mechanism, particularly for high-stakes commercial matters where confidentiality, neutrality, speed, and enforceability are paramount. This section analyses the features that distinguish corporate arbitration, the implications of judicial intervention for such proceedings, and why the normative promise of Section 5 holds heightened importance in this domain.

3.1 Characteristics of Corporate Arbitration

Corporate arbitrations are typically defined by the nature and scale of the disputes involved. These often concern complex commercial contracts, joint ventures, investment arrangements, intellectual property transactions, and cross-border mergers or acquisitions. The financial stakes are significant, frequently exceeding hundreds of crores, and the parties are often multinational corporations governed by intricate dispute resolution clauses referencing institutional rules such as those of the **Singapore International Arbitration Centre (SIAC)**, the **International Chamber of Commerce (ICC)**, or the **London Court of International Arbitration (LCIA)**.

In such arbitrations, procedural sophistication and legal predictability are critical. Parties invest considerable resources in tailoring arbitral procedures, selecting tribunals with sectoral expertise, and aligning substantive law and seat of arbitration to their commercial expectations. The parties' reliance on institutional rules reflects a preference for rule-based efficiency and procedural autonomy, both of which can be severely undermined by intrusive or unpredictable court interventions.

3.2 Cross-Border Dynamics and Strategic Venue Choices

Cross-border corporate arbitrations involving Indian entities often feature **foreign seats** with Indian courts exercising supervisory jurisdiction under specific provisions of the 1996 Act. As clarified in *Bharat Aluminium Co. v Kaiser Aluminium Technical Services Inc.* (2012) 9 SCC 552, Indian courts have no jurisdiction to grant interim relief or set aside awards seated outside India, except to the extent permitted under Part II of the Act. Yet, Indian courts have repeatedly found themselves drawn into disputes with foreign-seated arbitrations, especially under Section 9 and Section 34, despite the intended territorial limits established by the Supreme Court in *BALCO* and subsequent cases such as *PASL Wind Solutions Pvt. Ltd. v GE Power Conversion India Pvt. Ltd.* (2021) 7 SCC 1.

This judicial ambivalence poses risks to the uniformity and integrity of arbitral processes. In a survey conducted by White & Case and Queen Mary University of London (2021), international corporate counsel ranked “unpredictability of court intervention” as a major deterrent to choosing India as a seat of arbitration. The perception that arbitral autonomy is susceptible to being compromised at the execution or interim relief stage significantly affects investor confidence and the ease of doing business in India.

3.3 Stakes and Sensitivities: Why Section 5 Matters

In corporate arbitration, the stakes are not merely financial—they often implicate reputational, regulatory, and shareholder interests. For example, in the *Vodafone v Union of India* dispute (PCA Case No. 2016-21), though seated under the PCA Rules in The Hague, enforcement issues in Indian courts became highly contentious, raising questions about the finality of awards and India's credibility in honouring arbitral outcomes.

Section 5, in this context, functions not as a procedural formality but as a **legal safeguard** against disruptions that can derail the arbitration process or render its outcomes unenforceable.

For instance, in *Delhi Airport Metro Express Pvt. Ltd. v Delhi Metro Rail Corporation Ltd.* (2022) 1 SCC 131, the Supreme Court's setting aside of an award on "patent illegality" was widely critiqued in legal scholarship for expanding judicial discretion post-award, with scholars such as Shashank Garg arguing that such interventions "undermine India's global arbitration ambitions" (NLUJ Law Review, 2022, Vol. 8).

Corporate arbitration demands judicial restraint not merely out of deference to party autonomy, but also to uphold the commercial expectations embedded in the arbitration agreement. Any departure from the textual discipline of Section 5—whether through overbroad readings of Section 9 or expansive grounds under Section 34—creates systemic uncertainty. This unpredictability has a chilling effect on contractual negotiations and, more significantly, on the choice of India as a preferred seat.

3.4 Challenges: Judicial Culture and Structural Bottlenecks

One of the enduring challenges in the Indian arbitration regime remains the uneven interpretative approaches adopted across High Courts, particularly in commercial capitals such as Delhi, Mumbai, and Bengaluru. Judicial unfamiliarity with complex corporate transactions, coupled with a lack of specialised arbitration benches, often results in expansive hearings even on threshold procedural issues. While the **Commercial Courts Act, 2015**, attempted to inject commercial sensitivity into judicial practice, its integration with arbitral jurisprudence remains inconsistent.

Moreover, unlike jurisdictions such as Singapore or the United Kingdom, India lacks a centralised, specialist arbitration bar and judiciary. The absence of institutional support systems—like the SIAC Court's administrative powers under the SIAC Rules—further accentuates the fragility of arbitration proceedings subjected to excessive judicial oversight.

4. Practical Erosion of Section 5: Case Analysis of Judicial Interference

While Section 5 of the Arbitration and Conciliation Act, 1996, theoretically restricts judicial intervention, its practical application reveals a pattern of interpretative elasticity and discretionary overreach—especially in high-stakes corporate arbitration. This section examines several emblematic cases to illustrate the **functional erosion** of Section 5, analysing how judicial actions—ostensibly justified under Sections 9, 11, or 34—can undercut the autonomy and efficiency of arbitral proceedings.

**A. Intercontinental Hotels Group (India) Pvt. Ltd. v Burman Hospitality Pvt. Ltd. (2023)
Delhi High Court, FAO (OS) (COMM) 5/2023**

Facts and Arbitration Clause

The dispute involved a franchise agreement between Intercontinental Hotels Group (IHG) and Burman Hospitality for managing hospitality properties in India. The arbitration clause specified institutional arbitration under the SIAC Rules, with Singapore as the seat of arbitration and Indian law as the substantive law. When disputes arose, IHG initiated arbitration proceedings in Singapore.

Judicial Proceedings and Orders

Despite the foreign seat, Burman approached the Delhi High Court under **Section 9** of the 1996 Act for interim relief, citing urgency in protecting business assets. The Court granted interim protection, invoking the Supreme Court's dicta in *Bhatia International v Bulk Trading S.A.* (2002) 4 SCC 105 and *Enercon (India) Ltd. v Enercon GmbH* (2014) 5 SCC 1, allowing limited interim relief even in foreign-seated arbitrations under certain conditions.

Critique

The intervention raised immediate concerns over **territoriality and arbitral autonomy**, particularly in light of *BALCO v Kaiser Aluminium* (2012) 9 SCC 552, which had categorically ruled that Indian courts lacked jurisdiction to grant interim relief in foreign-seated arbitrations post-2012. The Delhi High Court's reliance on pre-BALCO jurisprudence and its expansive reading of Section 9 arguably bypassed the clear legislative intent to restrict court involvement in foreign-seated cases. This judicial move also undermined the efficiency of the SIAC-administered arbitration already in motion and contradicted the core principles of party autonomy and procedural exclusivity.

B. Vikram Bakshi v McDonald's India Pvt. Ltd. (2020)

Delhi High Court, O.M.P. (I) (COMM) 403/2017

Facts and Arbitration Clause

The case stemmed from a shareholder dispute between Vikram Bakshi and McDonald's India over their joint venture Connaught Plaza Restaurants Ltd. The arbitration clause referred disputes to LCIA arbitration seated in London.

Judicial Intervention

Notwithstanding the foreign seat, multiple proceedings were initiated in Indian courts under Section 9 for interim measures and under the Companies Act for oppression and mismanagement. The Delhi High Court granted interim relief and passed significant

observations on the merits of the dispute, effectively pre-judging issues pending before the arbitral tribunal.

Evaluation

The intervention by Indian courts in this case reflects a **structural incongruity between international arbitral processes and domestic legal recourse**. Although Section 2(2) of the 1996 Act (post-2015 amendment) clarifies that interim relief is available in international commercial arbitrations with foreign seats only where parties have expressly opted in, the courts in this matter engaged in **substantive fact-finding and judicial commentary**, thereby contravening both the spirit and text of Section 5. The approach created jurisdictional confusion and procedural inefficiencies, eroding confidence in the finality and exclusivity of the LCIA process.

C. Cairn Energy v Union of India (2021)

PCA Case No. 2020-02, seated in The Hague (UNCITRAL Rules)

Background

The dispute arose under the India–UK Bilateral Investment Treaty (BIT) after Cairn Energy was subjected to a retrospective tax demand by Indian tax authorities. The Permanent Court of Arbitration (PCA) awarded Cairn approximately USD 1.2 billion in damages.

Judicial and Executive Pushback

Although the arbitration was seated outside India, enforcement proceedings within India faced strong governmental resistance. The Indian government challenged the award's enforceability on grounds of "sovereign tax jurisdiction" and public policy under Section 48 of the 1996 Act. Despite clear global norms under the **New York Convention**, the Indian authorities framed a domestic narrative of resistance, complicating enforcement proceedings.

Critique

While not a direct instance of judicial interference under Section 5, the case illustrates **India's problematic posture in the recognition and enforcement of awards**, especially when the State is a party. The reluctance to honour a foreign award, despite international treaty obligations, creates significant uncertainty in cross-border corporate arbitration. It indirectly dilutes the legitimacy of Section 5 by showcasing how the judiciary can be drawn into prolonged resistance strategies even in post-award stages.

D. Delhi Metro Rail Corporation v DAMEPL (Reliance Infra)

Supreme Court, 2021 SCC OnLine SC 1173

Facts

This case involved a concession agreement between DMRC and Delhi Airport Metro Express Pvt. Ltd. (a Reliance Infrastructure subsidiary). The dispute was arbitrated under the 1996 Act, with the tribunal awarding INR 4,600 crore to DAMEPL.

Judicial Developments

The award was challenged under Section 34 before the Delhi High Court and then reached the Supreme Court, which ultimately upheld the award. However, the judicial journey was riddled with conflicting orders, delays, and debates over “public interest” in enforcing an arbitral award against a public utility.

Critique

Despite the Supreme Court’s eventual deference to arbitral finality, the **protracted nature of judicial scrutiny** over the award underscores the systemic vulnerabilities within Indian arbitration enforcement. The delays diluted the commercial value of the award and reinforced investor fears that even a favourable award may be subjected to years of judicial wrangling. Section 5’s non-interventionist mandate was bypassed through extended engagement under Section 34, where courts arguably reviewed factual determinations beyond their permitted scope.

E. Patterns and Systemic Observations

Across these cases, a few clear patterns emerge:

- 1. Section 9 as a Tool for Substantive Intervention:** Courts have used interim relief as a gateway to assess merits, influence procedural timelines, or restrict parties from pursuing foreign-seated arbitrations.
- 2. Section 34 Expansions:** While Section 34 was intended to allow limited review of awards, courts have often re-examined arbitral reasoning in depth, blurring the boundary between error correction and appeal.
- 3. Public Policy Exception as a Judicial Lever:** The amorphous “public policy” ground continues to be a potent tool for judicial interference, despite attempts by the legislature and the Supreme Court to confine its scope.
- 4. Lack of Deference to Institutional Autonomy:** Indian courts continue to second-guess procedural decisions of institutions like SIAC or ICC, revealing an insufficient regard for institutional arbitration’s integrity.

These patterns underscore that **Section 5 is increasingly ineffective as a doctrinal constraint**. The judiciary, in interpreting its own role expansively, often converts facilitative jurisdiction into an adjudicatory one—thereby diluting the foundational autonomy of arbitration.

5. Mapping Judicial Intervention Patterns in Cross-Border Corporate Arbitration

The jurisprudential tensions surrounding Section 5 of the Arbitration and Conciliation Act, 1996, are not limited to isolated misapplications but reflect a broader pattern of judicial behaviour that often transforms facilitative oversight into substantive interference. This section systematizes those tendencies by mapping how courts across jurisdictions engage with cross-border corporate arbitration, drawing on doctrinal interpretations, procedural tendencies, and jurisdictional inconsistencies to highlight an underlying erosion of Section 5's protective mandate.

5.1 Classification by Type of Intervention

Judicial interference in corporate arbitration can be classified into three dominant categories:

(a) Intervention via Interim Measures (Section 9)

Indian courts routinely entertain Section 9 petitions even in foreign-seated arbitrations, especially where the assets or operations of one of the parties are located in India. While Section 9(3) of the Act directs courts to defer to arbitral tribunals once constituted, courts have continued to grant or extend interim relief post-constitution under pretexts of urgency, preservation of subject matter, or equitable relief. For example, in *Ashwani Minda v U-Shin Ltd.* (2020 SCC OnLine Del 1025), despite the arbitration being seated in Japan, the Delhi High Court granted interim injunctions, citing irreparable harm and invoking the protective spirit of Section 9.

This practice has evolved into a jurisprudential paradox: while courts declare deference to party autonomy, they simultaneously interpret “urgency” and “necessity” in an expansive manner, effectively neutralizing Section 5's bar on intervention unless expressly provided.

(b) Interference in Arbitrator Appointment (Section 11)

The Supreme Court in *Mayavati Trading Pvt. Ltd. v Pradyut Deb Burman* (2019) 8 SCC 714 clarified that courts under Section 11 must only assess whether an arbitration agreement exists, not delve into the merits. Yet, various High Courts continue to

conduct mini-trials at the Section 11 stage, including assessments of novation, fraud, or arbitrability—concerns that ought to be addressed by the tribunal under the kompetenz-kompetenz doctrine.

This was evident in *M/s Hero Electric Vehicles Pvt. Ltd. v Lectro E-Mobility Pvt. Ltd.* (2021 SCC OnLine Del 1055), where the Delhi High Court assessed arbitrability of IP rights at the pre-appointment stage, creating procedural delay and forum uncertainty. Such conduct deviates from the principles laid down in *Duro Felguera S.A. v Gangavaram Port Ltd.* (2017) 9 SCC 729, which underscored a narrow, preliminary scope of judicial review under Section 11.

(c) Post-Award Interference (Section 34/37)

Perhaps the most contested area of judicial overreach lies in the setting aside and appeal stages under Sections 34 and 37. Courts have often engaged in re-appraisal of facts, revisitation of evidence, and re-interpretation of contract terms—all actions inconsistent with the limited grounds for interference outlined in *ONGC v Saw Pipes Ltd.* (2003) 5 SCC 705 and clarified in *Associate Builders v DDA* (2015) 3 SCC 49.

A particularly illustrative example is *Delhi Airport Metro Express Pvt. Ltd. v Delhi Metro Rail Corporation* (2022) 1 SCC 131, where the Supreme Court ultimately upheld the award but only after a prolonged procedural history in which multiple levels of judicial scrutiny risked diluting the effectiveness of the arbitral process.

5.2 Classification by Judicial Forum

Another useful lens for mapping intervention patterns is the level of judicial forum involved.

High Courts

High Courts, particularly in commercial hubs such as Delhi, Mumbai, and Bengaluru, tend to exhibit greater willingness to entertain arbitration-related applications—even when doing so introduces jurisdictional or procedural irregularities. In *McDonald's India v Vikram Bakshi*, the Delhi High Court exercised extensive jurisdiction in relation to oppression and mismanagement, despite the presence of a foreign-seated LCIA arbitration, thereby widening the interpretative gap with Section 5.

High Courts also differ significantly in their interpretation of "public policy" under Section 34. While some adhere to the restrictive approach prescribed in *Shri Lal Mahal Ltd. v Progetto Grano Spa* (2014) 2 SCC 433, others continue to expand it to include issues of evidentiary weight or contractual performance.

Supreme Court of India

While the Supreme Court has on occasion reaffirmed the autonomy of arbitration (e.g., *PASL Wind Solutions v GE Power Conversion India*), it has also introduced inconsistencies. The Court's expansive interpretation of "patent illegality" and "perversity" in *MMTC Ltd. v Vedanta Ltd.* (2019) 4 SCC 163 shows a continued tendency to conflate questions of law with re-evaluation of facts.

5.3 Structural Factors Driving Intervention

(a) Absence of Specialised Arbitration Benches

Unlike Singapore's International Commercial Court or the UK's Commercial Court, India lacks designated arbitration-specialised benches with dedicated training and commercial sensibility. This institutional vacuum has resulted in generalist judges applying litigation-based logic to arbitration disputes. As highlighted in the 2017 report by the NITI Aayog, the absence of judicial specialization remains a key impediment to the growth of arbitration in India.

(b) Legacy Doctrines and Forum Shopping

Practices such as invoking **Bhatia International** despite its overruling, or creative use of **Section 9 and Section 34** to delay enforcement, reveal a legacy of procedural opportunism. Parties often engage in forum shopping by filing proceedings in courts known for interim relief leniency. This fuels inconsistency and erodes the confidence of foreign investors in the neutrality of the Indian legal system.

5.4 Observations and Trends

Several key observations emerge from this mapping:

- 1. Section 5 is losing its normative force.** While still invoked in pleadings and orders, it is rarely used as a doctrinal barrier to interference. Courts routinely distinguish it away or read it narrowly.
- 2. Judicial discretion under "exception clauses" has expanded,** especially in determining what qualifies as "necessary" relief under Sections 9 or 11, and what breaches "public policy" under Section 34.
- 3. No uniform interpretative culture exists across courts,** with divergent standards for urgency, arbitrability, and substantive review—even within the same High Court across different benches.

4. **Party autonomy and institutional procedural rules are often subordinated** to domestic judicial standards, leading to conflicts between international arbitration norms and local litigation practice.
5. **Judicial intervention is not always malevolent but often reflects structural constraints**—limited resources, absence of commercial training, or statutory ambiguity in certain sections (e.g., lack of clarity on overlap between Section 9 and Section 17).

6. Conflicting Interests: Balancing Party Autonomy with State Sovereignty in Corporate Arbitration

The principle of party autonomy occupies a central position in the architecture of international arbitration. It allows parties the freedom to choose the substantive law, seat, language, procedure, and even the arbitrators themselves, thereby reinforcing the consensual nature of arbitration as an alternative to judicial adjudication. However, in practice—especially within the framework of corporate arbitration—this autonomy is not unfettered. It often intersects, and at times conflicts, with the legitimate sovereign interests of States, particularly in contexts involving foreign investment, public policy concerns, and regulatory oversight. The challenge, therefore, lies in calibrating the relationship between private contractual liberty and the imperatives of public order, state regulatory autonomy, and national economic policy.

6.1 The Primacy and Limits of Party Autonomy

In arbitral jurisprudence, party autonomy is lauded as a manifestation of the will of the parties and an expression of contractual sovereignty. It finds normative anchoring in several international instruments, such as Article 19 of the UNCITRAL Model Law and Article V(1)(d) of the New York Convention 1958. Indian courts have consistently upheld this principle, recognising the minimal role of courts in interfering with choices freely made by parties, particularly post the 2015 amendments to the Arbitration and Conciliation Act, 1996. However, as pointed out by Born, absolute autonomy is a legal fiction—States invariably circumscribe it through mandatory rules and public policy safeguards (Born, *International Commercial Arbitration*, 3rd edn, Kluwer Law International 2021).

This is particularly relevant when arbitration agreements intersect with laws aimed at protecting national interest, such as competition law, taxation, securities regulation, and environmental norms. For instance, in *National Agricultural Coop. Marketing Federation of*

India v Alimenta S.A., the Supreme Court of India refused enforcement of a foreign award for violating Indian export control policy, reaffirming that contractual autonomy cannot override sovereign economic directives (2020) 5 SCC 251.

6.2 Regulatory Sovereignty and Investor-State Conflict

Investor-State arbitration, particularly under Bilateral Investment Treaties (BITs), provides a fertile ground for conflict between corporate parties' expectations and a State's sovereign right to regulate. The principle of 'regulatory chill'—where States abstain from enacting policies for fear of arbitration—is a contentious issue. In *Philip Morris v. Uruguay* (ICSID Case No. ARB/10/7), the arbitral tribunal upheld Uruguay's sovereign right to enforce tobacco regulations under the guise of public health, despite alleged contractual interference. The ruling is illustrative of a judicially evolving doctrine where State sovereignty is not merely tolerated but affirmed when exercised for legitimate public interest objectives.

India's reformed BIT Model of 2016 reflects this sentiment. It restricts the scope of arbitration by requiring the exhaustion of domestic remedies before international recourse and explicitly preserves State regulatory autonomy. While corporate actors may view such clauses as dilutive of arbitral efficiency, they are consistent with a broader international trend seeking to rebalance investor rights with sovereign control over national policy spaces (Sornarajah, *Resistance and Change in the International Law on Foreign Investment*, CUP 2015).

6.3 Public Policy as a Contested Space

The doctrine of public policy constitutes another axis of tension between party autonomy and sovereign interest. Indian jurisprudence has evolved from the nebulous "broad view" adopted in *ONGC v. Saw Pipes* [(2003) 5 SCC 705] to the more restrained "patent illegality" test laid down in *Ssangyong Engineering v. NHAI* [(2019) 15 SCC 131]. Yet, public policy remains an elastic and indeterminate concept, capable of judicial expansion or contraction depending on State sensitivities and economic priorities. It continues to serve as a mechanism through which States may reassert control over arbitration outcomes, especially in matters involving public finance or strategic sectors.

6.4 The Emerging Paradigm: Conditional Autonomy

The balancing act between party autonomy and State sovereignty has now matured into what can be termed "conditional autonomy." Parties are granted the freedom to arbitrate, but this

freedom is scaffolded by non-derogable norms of State interest. Scholarly opinion increasingly supports this recalibration. For example, Stephan Schill argues for the “constitutionalisation” of investment arbitration to integrate public law concerns into what has traditionally been a private-law domain (Schill, *The Multilateralization of International Investment Law*, CUP 2009).

In practical terms, this shift implies greater judicial scrutiny of corporate arbitration outcomes, legislative interventions in arbitral procedures, and a gradual move towards hybrid models that embed public accountability within private dispute resolution. The implications for cross-border corporate arbitration are profound: while arbitration retains its appeal for corporate actors seeking neutrality and finality, it must now coexist with a sovereign’s duty to preserve economic order and democratic legitimacy.

7. The Future Trajectory of Judicial Engagement in India: From Intervention to Facilitation

As India continues to integrate into the global economic and dispute resolution ecosystem, its judiciary stands at a critical juncture. The traditional narrative of **judicial intervention** in arbitral proceedings is increasingly giving way to a more facilitative and supervisory role. This transition, however, is neither spontaneous nor guaranteed. It is conditioned by legislative recalibrations, jurisprudential reinterpretations, and institutional developments aimed at strengthening arbitration as a credible and self-sufficient mechanism of dispute resolution. The underlying question, therefore, is not whether courts should engage with arbitration, but how that engagement can be reconceived to support, rather than subvert, arbitral autonomy.

7.1 Shifting Judicial Philosophy and the New Adjudicative Consciousness

Post the 2015 and 2019 amendments to the Arbitration and Conciliation Act, judicial discourse has gradually shifted towards a **pro-arbitration philosophy**. Courts are increasingly aligning their interpretive frameworks with the UNCITRAL Model Law’s limited intervention principle. For instance, the Supreme Court’s ruling in *PASL Wind Solutions Pvt. Ltd. v. GE Power Conversion India Pvt. Ltd.* (2021) reaffirmed that parties could choose a foreign seat even if both were Indian nationals, thereby limiting nationalist interpretations that had earlier clouded the judicial understanding of party autonomy. This evolution suggests a recalibration

of constitutional and commercial priorities—recognising the imperatives of global investment and economic liberalism over parochial notions of jurisdictional control.

7.2 Institutionalisation and the Role of Arbitration Centres

The growing institutionalisation of arbitration in India—with the rise of institutions like the Mumbai Centre for International Arbitration (MCIA) and the International Arbitration and Mediation Centre (IAMC) Hyderabad—has catalysed judicial restraint. Courts, particularly in metropolitan jurisdictions, are increasingly deferring to institutional rules and procedures. This institutional deference fosters a judicial attitude that values procedural discipline and specialised resolution over expansive judicial scrutiny. The Delhi High Court’s decision in *National Highway Authority of India v. M. Hakeem* (2020), where the court limited its role to examining patent illegality and refrained from reappreciating evidence, underscores this changing ethos.

7.3 Harmonising Constitutional Mandates and Commercial Realities

Notwithstanding these advancements, the judiciary’s evolution from intervention to facilitation must also navigate constitutional boundaries. Article 136 of the Indian Constitution, which vests the Supreme Court with wide discretionary powers, poses a latent risk of arbitral outcomes being reopened under the guise of substantial justice. Similarly, public policy remains an amorphous ground that, unless judicially narrowed, can continue to invite intervention. The need, therefore, is for a **jurisprudential harmonisation**—where constitutional oversight coexists with commercial autonomy.

7.4 Legislative Clarifications and the Path Forward

Future progress hinges significantly on legislative precision. The omission of the controversial “automatic stay” provision by the 2021 amendment to Section 36 signals an acknowledgment of judicial overreach and an attempt to preserve award enforceability. Further reforms—such as codifying limits to public policy, clarifying the scope of “patent illegality,” and enhancing the enforceability of emergency arbitrator awards—could transform judicial engagement into a **supportive architecture**, rather than an obstructive force.

The judiciary’s role is no longer one of passive observer or hyperactive sentinel. Instead, it must become a **constitutional facilitator**—ensuring that the arbitral process remains fair and procedurally sound while resisting the temptation to intervene on substantive grounds. As India

aspires to emerge as a reliable arbitration seat, this nuanced redefinition of judicial function will determine the credibility and sustainability of its arbitral framework.

8. Conclusion

The evolution of judicial engagement with cross-border corporate arbitration in India reflects a complex interplay of legal reform, interpretive recalibration, and global commercial imperatives. Historically, Indian courts occupied a paradoxical space—oscillating between a protective paternalism rooted in sovereign control and a hesitant embrace of party autonomy and procedural finality. This oscillation manifested in frequent interventions, particularly during enforcement stages, which undermined the efficiency and finality of arbitration and cast doubt on India’s credibility as an arbitration-friendly jurisdiction.

However, recent legislative amendments, particularly those of 2015, 2019, and 2021, alongside a maturing judicial philosophy, suggest a concerted shift towards recognising arbitration as a legitimate, autonomous, and effective mechanism for resolving complex cross-border commercial disputes. Indian courts have begun internalising the foundational tenets of modern arbitration—party autonomy, minimal judicial interference, institutional primacy, and deference to party choice regarding applicable law, seat, and procedural mechanisms.

Yet, challenges remain. The residual ambiguities in statutory interpretation, the elasticity of concepts like “public policy” and “patent illegality,” and the discretionary breadth of constitutional provisions such as Article 136 continue to offer avenues for judicial re-engagement, potentially diluting arbitral finality. Moreover, the reconciliation between state sovereignty and party autonomy in corporate arbitration remains an unfinished constitutional project—especially in cases involving state entities, regulatory obligations, or economic implications of public interest.

To ensure India’s transition from a jurisdiction of reluctant recognition to one of facilitative oversight, the judiciary must embrace a paradigm of **measured minimalism**—where its role is not to substitute the arbitral tribunal but to safeguard procedural integrity and jurisdictional coherence. Legislative efforts must further refine the contours of judicial intervention, institutional capacity must be robustly developed, and doctrinal clarity must be infused across arbitral jurisprudence.

Ultimately, the credibility of India as a seat of arbitration will not depend solely on statutory architecture, but on the **predictability, consistency, and restraint** demonstrated by its judiciary. If this transition continues along its current trajectory—toward facilitation rather than intervention—India stands poised to emerge not just as a regional hub, but as a serious global contender in the realm of cross-border corporate arbitration.

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