ISSN: 2582-6433

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed JournalMulti Disciplinary
Peer Reviewed6th Edition

VOLUME 2 ISSUE 7

www.ijlra.com

 ISSN: 2582-6433

DISCLAIMER

ISSN: 2582-6433

EDITORIAL TEAM

EDITORS

Megha Middha

Megha Middha, Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar

Megha Middha, is working as an Assistant Professor of Law in Mody University of Science and Technology, Lakshmangarh, Sikar (Rajasthan). She has an experience in the teaching of almost 3 years. She has completed her graduation in BBA LL.B (H) from Amity University, Rajasthan (Gold Medalist) and did her post-graduation (LL.M in Business Laws) from NLSIU, Bengaluru. Currently, she is enrolled in a Ph.D. course in the Department of Law at Mohanlal Sukhadia University, Udaipur (Rajasthan). She wishes to excel in academics and research and contribute as much as she can to society. Through her interactions with the students, she tries to inculcate a sense of deep thinking power in her students and enlighten and guide them to the fact how they can bring a change to the society

Dr. Samrat Datta

Dr. Samrat Datta Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Samrat Datta is currently associated with Seedling School of Law and Governance, Jaipur National University, Jaipur. Dr. Datta has completed his graduation i.e., B.A.LL.B. from Law College Dehradun, Hemvati Nandan Bahuguna Garhwal University, Srinagar, Uttarakhand. He is an alumnus of KIIT University, Bhubaneswar where he pursued his post-graduation (LL.M.) in Criminal Law and subsequently completed his Ph.D. in Police Law and Information Technology from the Pacific Academy of Higher Education and Research University, Udaipur in 2020. His area of interest and research is Criminal and Police Law. Dr. Datta has a teaching experience of 7 years in various law schools across North India and has held administrative positions like Academic Coordinator, Centre Superintendent for Examinations, Deputy Controller of Examinations, Member of the Proctorial Board

ISSN: 2582-6433

Dr. Namita Jain

Head & Associate Professor

School of Law, JECRC University, Jaipur Ph.D. (Commercial Law) LL.M., UGC -NET Post Graduation Diploma in Taxation law and Practice, Bachelor of Commerce.

Teaching Experience: 12 years, AWARDS AND RECOGNITION of Dr. Namita Jain are - ICF Global Excellence Award 2020 in the category of educationalist by I Can Foundation, India.India Women Empowerment Award in the category of "Emerging Excellence in Academics by Prime Time & Utkrisht Bharat Foundation, New Delhi.(2020). Conferred in FL Book of Top 21 Record Holders in the category of education by Fashion Lifestyle Magazine, New Delhi. (2020).Certificate of Appreciation for organizing and managing the Professional Development Training Program on IPR in Collaboration with Trade Innovations Services, Jaipur on March 14th, 2019

Mrs.S.Kalpana

Assistant professor of Law

Mrs.S.Kalpana, presently Assistant professor of Law, VelTech Rangarajan Dr. Sagunthala R & D Institute of Science and Technology, Avadi.Formerly Assistant professor of Law,Vels University in the year 2019 to 2020, Worked as Guest Faculty, Chennai Dr.Ambedkar Law College, Pudupakkam. Published one book. Published 8Articles in various reputed Law Journals. Conducted 1Moot court competition and participated in nearly 80 National and International seminars and webinars conducted on various subjects of Law. Did ML in Criminal Law and Criminal Justice Administration.10 paper presentations in various National and International seminars. Attended more than 10 FDP programs. Ph.D. in Law pursuing.

Avinash Kumar

Avinash Kumar has completed his Ph.D. in International Investment Law from the Dept. of Law & Governance, Central University of South Bihar. His research work is on "International Investment Agreement and State's right to regulate Foreign Investment." He qualified UGC-NET and has been selected for the prestigious ICSSR Doctoral Fellowship.He is an alumnus of the Faculty of Law, University of Delhi. Formerly he has been elected as Students Union President of Law Centre-1, University of Delhi.Moreover, he completed his LL.M. from the University of Delhi (2014-16), dissertation on "Cross-border Merger & Acquisition"; LL.B. from the University of Delhi (2011-14), and B.A. (Hons.) from Maharaja Agrasen College, University of Delhi. He has also obtained P.G. Diploma in IPR from the Indian Society of International Law, New Delhi.He has qualified UGC – NET examination and has been awarded ICSSR – Doctoral Fellowship. He has published six-plus articles and presented 9 plus papers in national and international seminars/conferences. He participated in several workshops on research methodology and teaching and learning.

ISSN: 2582-6433

ABOUT US

INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANLAYSIS ISSN 2582-6433 is an Online Journal is Monthly, Peer Review, Academic Journal, Published online, that seeks to provide an interactive platform for the publication of Short Articles, Long Articles, Book Review, Case Comments, Research Papers, Essay in the field of Law & Multidisciplinary issue. Our aim is to upgrade the level of interaction and discourse about contemporary issues of law. We are eager to become a highly cited academic publication, through quality contributions from students, academics, professionals from the industry, the bar and the bench. INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS ISSN 2582-6433 welcomes contributions from all legal branches, as long as the work is original, unpublished and is in consonance with the submission guidelines.

ISSN: 2582-6433

Review Of Patent Illegality In Setting Aside Arbitral Award In India

Authored By: Ankita Priya
School Of Law
Galgotias University
Greater Noida(2022)

Abstract

Arbitration law is founded on two pillars: party autonomy and award finality. If court interference distorts these two pillars, arbitration law would fail to achieve its ultimate goal and lose its identity. Indian arbitration law has progressed from indiscriminate judicial involvement, as established in the Colonial Act and subsequent 1961 legislation, to a more mature Act based on the Model Law; this demonstrates the need of limited judicial participation. It is difficult to define public policy as a generic term and as a reason to vacate an arbitral ruling. Judicial rulings about the scope of public policy that allow for nearly unlimited judicial review of arbitral awards deal a fatal blow to international commercial arbitration. This paper talks about the emergence of patent illegality through the provision of public policy as a separate ground for setting aside of the arbitral awards in the recent times. The paper uses the doctrinal method of research and studies through various precedents established by the Court in developing the doctrine of public policy vis a vis patent illegality.

Keywords: arbitration, public policy, patent illegality, arbitral award, etc.

ISSN: 2582-6433

Introduction

Some judges appear to have thought [public policy, the unruly horse] more like a tiger, and refused to mount it at all, perhaps because they feared the fate of the young lady of Riga. Others have regarded it like Balaam's ass which would carry its rider nowhere. But none, at any rate at the present day, has looked upon it as a Pegasus that might soar beyond the momentary needs of the community. - Percy H. Winfield[1]

Fali Nariman describes arbitration in India as a never-ending war between two irreconcilable principles: the high one that demands justice even if the heavens fall and the lower one which demands an end to litigation[2]. He goes on to state that 'in India, we have our Arbitration Act since 1940—it governs domestic and reaches out to foreign arbitration as well; it is based on the high principle that the losing party never lets a Court forget it[3]. The two pillars of arbitration law are party autonomy and award finality. If court interference distorts these two pillars, arbitration law would fail to achieve its ultimate goal and lose its identity. Arbitration legislation in India has progressed. The Colonial Act and the Constitution protect people against arbitrary court intrusion following legislation from 1961 to a more mature Act based on the Model Law indicates the significance of limited judicial intervention. The necessity to diminish the court's supervisory control is undeniable. The Arbitration and Conciliation Act 1996 (India) ('1996 Act') was enacted with the goal of allowing minimum judicial interference and ensuring the finality of arbitral rulings. Given these goals, it's critical to identify the areas of arbitration law that provide for comprehensive judicial review and the setting aside of decisions, such as "public policy." Judicial rulings on public policy have reaffirmed that it is a nebulous notion, with courts applying multiple interpretations based on its flexibility and adaptability.

Arbitration laws in India are being broadened by judicial interpretation, which is counter to legislative purpose. The Court restored Indian arbitration jurisprudence to the pre-modern period of the Arbitration Act 1940 (India) ('1940 Act') in the 2011 decision of Ramesh Chander Arora v Kashmeer Saree Kendra[4]. The Court's ruling, which used the provisions created by the 1940 Act rather than the 1996 Act, reignited the dispute over whether 'patent illegality' could be used to establish the 'public policy' exemption. The focus of this article is confined to determining whether 'patent illegality' is the same twin of 'public policy' and can be used to overturn arbitral judgements. In order to support arbitration and ensure compliance with the 1996 Act, Indian courts have defined the term "public policy" narrowly.

[1] Percy H. Winfield, Public Policy in the English Common Law 42 Harv. L. Rev. 76 (1928- 29)
[2] Fali S Nariman, 'Finality in India: The Impossible Dream' (1994) 10(4) Arbitration International 373, 381
[3] Ibid.
[4] (2011) 1 ARBLR (Delhi) 232

ISSN: 2582-6433

Renusagar Power Co Ltd v General Electric Co[5] and Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd[6] are the two important decisions at the heart of the debate.

However, Saw Pipes Overturned the Court's effort to limit the scope of public policy in Renusagar. This reversal calls into question the cornerstones of arbitration law, such as minimum court interference and award finality. Saw Pipes has opened the floodgates for parties to dispute an award on minor grounds, demonstrating that a segment of the judiciary accepts a broad interpretation of public policy. In Saw Pipes, the Court re-interpreted section 34(2)(b)(ii), resulting in a broad meaning of 'public policy.'[7] This article condemns judicial excess to some extent.

Setting Aside Of Arbitral Award And Public Policy

While participating in the globalizing world, India adhered to the necessary criteria for the process. The New York Convention of 1958 (NY Convention) and the UNCITRAL Model Law ("Model Law") have already sparked a global need for standardization in arbitration frameworks. In accordance with this, the Arbitration and Conciliation Act of 1996 was enacted. It roughly resembled the Model Law's provisions. The provision for reserving an award is also influenced by this. Article 34 of the Model Law is replicated in Section 34 of the Arbitration Act. It establishes certain limited grounds for award denial. Not everyone takes defeat in their stride. Henceforth when arbitral award dis favor one of the parties in the dispute, the basic human nature drives him towards setting aside of the award. An award in India can be set aside only on the grounds mentioned in Section 34 of the Act. The purpose of setting aside is to modify in some way the award in part or wholly[8].

Public policy denotes an issue pertaining to the public benefit and interest. The notion of what is for the public good or in the public interest, as opposed to what is hurtful or damaging to the public good or public interest, has evolved over time[9]. It must be demonstrated that there is some element of illegality or that the award's enforcement would be clearly detrimental to the public good, or that enforcement would be wholly offensive to the ordinary reasonable and fully

[5] (1994) Supp 1 SCC 644
[6] (2003) 5 SCC 705
[7] 1996 Act s 34: Application for setting aside arbitral award: (2)An arbitral award may be set aside by the Court only if : (b) the Court finds that: (ii) the arbitral award is in conflict with the public policy of India.
[8] A.Redfern & M. Hunter , Law & Practice of International Commercial Arbitration (London : Sweet & Maxwell, 2004) at 404.
[9] Central Inland Water Transport Corpn. Ltd. *v.* Brojo Nath Ganguly, (1986) 3 SCC 156 : (1986) 2 LLJ 171

ISSN: 2582-6433

informed member of the public on whose behalf the State's powers are exercised[10].

Clause (ii) of sub-section (2)(b) of Section 34, which specifies, among other things, that the Court may set aside an arbitral award if it is contrary to "Indian public policy." The word "Indian public policy" is not defined in the Act. As a result, the aforementioned word must be defined in context, taking into account the objective of the section and the scheme of the Act. Various experts have often asserted that the term "public policy" does not lend itself to clear definition and may alter from generation to generation and from time to time. As a result, the term "public policy" is seen as ambiguous, capable of taking on a restricted or broad meaning depending on the circumstances. Lacking precedent, the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act, 1872 and constitutional provisions[11].

The breach of public policy must unquestionably be so unjust and outrageous as to shock the Court's conscience. However, when the arbitrator has gone contrary to or beyond the stated law of the contract or given relief in a non-disputed subject, Section 34 of the Act would apply[12]. The Public Policy Doctrine has judicially been pigeon-holed into the broad view and the narrow view[13]. The narrow view espouses a restricted interpretation of the Public Policy doctrine calling for Courts to exercise caution in creating new heads of Public Policy whereas the broad view undertakes a contextual approach to the Public Policy doctrine, leaving it open to be amended and modified on a case-to-case basis. In the Gherulal case[14], the Supreme Court observed that "though the heads are not closed and though theoretically it might be permissible to evolve a new head under exceptional circumstances of a changing world it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days." In Kedar Nath Motwani vs. Prahlad Rai[15], the Court however clarified that the enforcement of a contract would be deemed to be against the Public Policy of India only if the illegality went to the root of the contract.

The broad view of the Public Policy doctrine, however, gained currency with the Supreme Court's ruling in the Muralidhar case[16], wherein the Court observed that "what constituted public policy earlier might not constitute public policy now, hence the development of new fields of

[10] Deutsche Schachtbau-Und Tiefbohrgesellschaft mbH *v.* R'as Al-Khaimah National Oil Co., *(1990) 1 AC 295 : (1987) 3 WLR 1023 : (1987) 2 All ER 769, 779*
[11] ONGC Ltd. *v.* Saw Pipes Ltd., (2003) 5 SCC 705, 719, para 16
[12] McDermott International Inc. *v.* Burn Standard Co. Ltd., *(2006) 11 SCC 181;* Centrotrade Minerals & Metals Inc. *v.* Hindustan Copper Ltd., (2006) 11 SCC 245
[13] Alabh Anant Lal & Soham Banerjee, The Public Policy Doctrine In Arbitration: A Primer On Its Effect On Challenges And Enforcement Of Awards, Indian Arbitration Law Review , Vol I, Pg 60
[14] Gherulal Parakh v. Mahadeodas Maiya & Ors, AIR 1959 SC 781, 21, 23 & 30.
[15] Kedar Nath Motwani v. Prahlad Rai, AIR 1960 SC 213
[16] Muralidhar Aggarwal & Anr v. State of Uttar Pradesh & Ors, (1974) 2 SCC 472, 28 – 32

ISSN: 2582-6433

public policy was imperative. Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time." In Central Inland Water Transport[17], observing that adopting a narrow view of the Public Policy doctrine would countenance judicial law making, the Court held that "public policy connotes some matter which concerns the public good and the public interest. The concept of what is good for the public or in public interest or what would be harmful or injurious to the public good or interest has varied from time to time." This view was further strengthened in Rattan Chand Hira Chand[18],where the Supreme Court decided that an injury to public interest would depend upon the context in which it is made and any contract which had a tendency to injure public interest was one against public policy.

In Renusagar Power Company Ltd. vs. General Electric Company[19], the Supreme Court adopted the narrow view of the Public Policy and held that "public policy" would mean the doctrine of public policy as applied by the Court in India and not international public policy. Supreme Court defined the contours of public policy to be domestic (as applied by courts in India) and not international public policy[20]. Further, the Supreme Court advocated a narrow view saying the purpose of Foreign Awards Act was to further international trade and commerce, and a narrow interpretation would facilitate this objective[21]. The court pocketed the contours of public policy into the following heads: a) "fundamental policy of Indian law; or b) the interest of India; or c) justice or morality."[22] Public policy bar thus, can be attracted only if something bigger than a mere violation of Indian law is shown[23].Court also noted that no review of an award on merit is allowed under the public policy examination, reiterating the position across various jurisdictions.

The first attitude of Indian courts following Renusagar (supra) was to take a restricted approach to domestic awards. The Supreme Court highlighted India's liberalisation strategy and the goals of the Arbitration Act, which were to limit judicial interference in the arbitral process by limiting the grounds for challenging an award[24]. A merely incorrect interpretation of substantive law would

[17] Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156, 92
[18] Rattan Chand Hira Chand v. Askar Nawaz Jung (Dead) by LRS and Ors., (1991) 3 SCC 67, 19 & 23
[19] (1994) SCC Supl (1) 644
[20] Id.
[21] Mayavati Trading Pvt. Ltd. v Pradyut Deb Burman, (2019) 8 SCC 714
[22] THE ARBITRATION AND CONCILIATION (AMENDMENT) ACT, 2019, Section 43C
[23] SubhikshVasudev, The 2019 amendment to the Indian Arbitration Act: A classic case of one step forward two steps backward? KLUWERARBITRATIONBLOG (August 25, 2019) ,
[24] Konkan Railway Co. Ltd. v. Mehul Construction Co. (2000) 7 SCC 201

ISSN: 2582-6433

not constitute the award contrary to Indian national policy was the prevailing view[25].

Patent Illegality As A Separate Ground In Domestic Awards

In Oil & Natural Gas Corp v Saw Pipes[26], the Supreme Court adopted a more expansive view of public policy in contrast to its stance in Renusagar.[27] The Supreme Court included "patent illegality" as a fourth ground of attack when hearing the section 34 application, and it looked carefully at the judgement and the contract's language regarding the damages provision. As a result of the court's proactive stance, justices have begun to probe the legality of rulings via the back door of public policy and monitor the improper use of laws.[28]. Numerous scholars have harshly criticized this stance.[29]

It was decided that the legislative intent could not be that the award may be overturned if it breaches the requirements of the Act, as suggested by section 34 when read in connection with other parts of the Act. As of right now, the court has made no judgment.[30]. In contrast to how it acted in Renusagar, the Supreme Court in Oil & Natural Gas Corp v Saw Pipes accepted a wider view of public policy.[31].To actually vacate the 'patently unlawful' arbitration judgement, the Court found that a wider definition was necessary (and some provisions of the 1996 Act do not become redundant)[32]. The Supreme Court's Division Bench, led by Justice Sinha, adopted the Saw Pipes finding in McDermott International despite widespread dissatisfaction.[33]

The 'patent illegality' argument has significantly undermined the spirit of the 1996 Act. It's the same as if Section 30 of the 1940 Act had never been repealed, since the same challenges may be brought under the new law.[34]. A thorough examination of the 1996 Act also reveals that, although being in direct conflict with the plain terms of the contract or substantive law, the two conditions for setting aside the award are already conceivably achievable under sections 34(2)(a)(iv) and

[25] Vijaya Bank v. Maker Development Services Pvt. Ltd. (2001) 3 Bom. CR 652
[26] 2003] 5 SCC 705
[27] Ibid.
[28] ONGC Ltd v Garware Shipping Corporation Ltd [2007] (13) SCC 434; Delhi Development Authority v RS Sharma,[2008] (13) SCC 80
[29] S. Kachwaha, Enforcement of Arbitration Awards in India, (2008) 4 ASIAN INTERNATIONAL ARBITRATION JOURNAL 65
[30] Saw Pipes (2003) 5 SCC 705, 708
[31] Ibid.
[32] Ibid.
[33] McDermott International (2006) 11 SCC 211
[34] Arbitration and Conciliation act, 1996,Section 30

ISSN: 2582-6433

34(2)(a)(v), respectively.[35]. This resulted in the court conducting a merit-based evaluation of rewards, which runs counter to the aim of minimal judicial involvement.As a new basis of intervention, some High Courts adopted the 'patent mistake of law.'[36] The courts embraced a full-fledged merit-based assessment, compromising the integrity of arbitration as an alternative conflict settlement method. It resulted in countless awards being thrown aside, with courts conducting a merit-based review[37]. Due to the Supreme Court's ruling that public policy depends on criteria including the nature of the transaction and the legislation, the courts will now be able to get to the heart of cases. To render an award against the public policy and to deem it to be injurious to public interest the merits of the award was necessary to be scrutinised.

Further in SAIL vs Gupta Brother Steel Tubes Ltd.[38] The Supreme Court reiterated the principles on which the Courts could intervene. The reiteration of the principles is[39]:

(i) *"If the arbitrator goes beyond what is required under the contract, the award is without jurisdiction, constitutes misconduct, and may be challenged in court.*

(ii) *If the arbitrator errs in his reading of the contract, it's his call, and it's not a mistake that jumps out at you from the face of the award, therefore the courts can't fix it.*

(iii) *An incorrect conclusion in point of law made by the arbitrator in response to a question of law presented to him does not render the award itself invalid.*

(iv) *Any award that goes against a material provision of law or the conditions of a contract is obviously void.*

(v) *The party that has incurred losses as a consequence of the breach is only allowed to claim compensation in the amount specified by the parties if the parties have expressly agreed on the amount of compensation to be paid in the case of a breach.To rephrase, any damages for breach of contract cannot exceed the amount indicated or defined in the contract.*

(vi) *The arbitrator's award should be upheld even if the arbitrator reached his or her judgment based on a hypothetical scenario.*

[35] Viplav Sharma, 'Enforceability of Arbitral Awards in India: Public Policy as Ground for Setting Aside the Award' (2008) 1(1) Gujarat Law Review 22
[36] Jagmohan Singh Gujral v. Satish Ashok Sabnis (2004) 1 Bom CR 307; Bharat M.N. v. Satish Ashok Sabni (2003) 6 Bom CR 257
[37] ONGC Ltd. v. Western Geco International (2014) 9 SCC 263; McDermott Supra86 ; Hindustan Zinc Ltd. v. Friends Coal Carbonisation (2006) 4 SCC 445
[38] (2009) 10 SCC 63
[39]

ISSN: 2582-6433

(vii) A court may not conduct an independent review of the validity of the arbitrator's decision as if it were hearing an appeal of that decision."

This was followed by Supreme Court's judgement in Phulchand[40] thereby making Part II i.e. international arbitration also a part of the doctrine of public policy, henceforth rejecting the execution of foreign award. However, in 2013 the judgement in Phulchand was overruled by Shri Lal Mahal by majority decision of the Apex Court.[41] This ceased the wide interpretation of the ONGC judgement and the same was adhered only to the domestic awards. According to the Court's interpretation, Renusagar's stance on the international award was restored, which is that non-enforcement of foreign judgments requires more than just a violation of law.

As a result of Saw Pipes, courts have overturned arbitration awards when arbitrators' rulings were at odds with the terms of the agreement.[42].In Western Geco, the Supreme Court determined that the "fundamental principle of law in India," the first pillar of public policy outlined in Renusagar, was unclear in light of the precedent made by Saw Pipes. The Court in Western Geco characterised the "fundamental policy of law in India" as:

- a commitment on the part of the Courts to take a fair, honest, logical, and judicial approach to the topic at hand;
- The ruling of the court conforms to the norms of natural justice.; and
- Whether or if the choice is reasonable according to the Wednesbury test[43]

[44] The Law Commission of India believed that in order to guarantee that the phrase "basic principle of Indian law" was strictly defined, a clarification was required in the modifications it provided after the Supreme Court's judgements in Western Geco and Associate Contractors (which would be contrary to international practise).[45]. It seems from the Supreme Court's dicta in the Western Geco case that administrative law jurisdiction is invoked when redacting a motion to vacate an arbitral verdict. However Associate Builders clarifies this misunderstanding by

40

41

[42] Konkan Railway Corporation Limited v. M/s. Oriental Construction Company Limited (2013) 3 Bom CR 140
[43] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation, (1947) 2 All ER 680 (CA)
[44] Associate Builders v Delhi Development Authority (2015) 3 SCC 49
[45] "Public Policy" – Developments post – Report No. 246, Supplementary to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996, Law Commission of India, Government of India, February, 2015

ISSN: 2582-6433

explaining that an arbitral award would be considered as "perverse to law" if[46]:

(i) The finding is not based on any evidence

(ii) The arbitral panel considers evidence that has no bearing on the outcome of the case.

(iii) It ignores important decision in arriving at its decision.

This judgement further laid the test to realise perversity/irrationality by attracting the Wednesbury principle limiting to the cases where relevant materials as to facts and other material on record is not taken into consideration. The order would be perverse if on realisation it lays down that even a layman would not depend on the evidence so recorded. The restriction as to the principles of justice, morality and patent illegality would depend whether its shocks the conscience of the court.[47]

As the Wednesbury criterion of reasonableness allows a review of an arbitral judgement on merits, the Law Commission thought that without such clarity, all of their advances regarding the definition of "public policy" and the fundamental policy of Indian law would be deemed null and invalid. Arbitral rulings might have been challenged on the basis that they went against fundamental Indian legal principles.[48].

On October 23, 2015, the Act was updated to include recommendations from the Law Commission of India's Supplementary Report.[49]. Section 34 of the aforementioned Act was amended in 2015 to include Subsection 2A and a new Explanation in clause (b) of the subsection (2). Particularly, the updated language of paragraph (b) (ii) of subsection (2) of Section 34 is as follows: "Secondly, the arbitral ruling conflicts with Indian law. It is now made clear that an award is only against Indian public policy if one of the following three criteria is met: I I the award is against the fundamental policy of Indian law; (ii) the award is against the most fundamental principles of morality or justice; or (iii) the award was made with the intent to commit fraud, corruption, or in violation of sections 75 or 81. A second rationale To be clear, determining whether or not there has been a violation of the basic policy of Indian law does not need a full consideration of the case's merits. The following text has recently been added to Section 2A: "(2A) The Court may also invalidate an arbitral judgement if it determines that the award was not the result of an international commercial arbitration and that it was tainted by patent illegality that was evident on the face of the award. The mere fact that the law was applied

46

47

48 Ibid

49 Explanation 2 of Section 34 of the Act

ISSN: 2582-6433

wrongly or the evidence was reassessed, however, does not allow for the simple reversal of an award.. The term "patent illegality" is not defined, but the 2015 amendment introduces a new ground, Section 34(2A), for throwing aside domestic arbitral verdicts on the basis of patent illegality. This section's phrasing, "other than international commercial arbitration," indicates that this premise will only apply to arbitrations conducted in India and not to international commercial arbitrations.

In addition, Section 34 was changed in 2019 to help prevent unrestricted review under this provision. It has restricted its inquiry to just "the arbitral tribunal's record." With this modification in place, the court can only look into evidence that has been presented to it. [50] The Supreme Court's decision in M/s Emkay Global Financial Services Ltd. v. Girdhar Sondhi, which forbids courts from utilising evidence that wasn't provided to the arbitral tribunal during the proceedings, is better and more in line with this solution.[51].

The case of Ssangyong Engineering & Construction Co. Ltd., in which the Supreme Court strictly defined "Public Policy of India" in light of the 2015 Amendment, exemplifies the present legal approach.[52] The Supreme Court articulated the process to be followed while reviewing public policy:

a. Merit-based awards must be made without judicial interference. Nevertheless, it may if it violates the norms of natural justice.[53]

b. The Wednesbury challenge has been eliminated.[54]

c. Justice and morality are understood to refer to the purest forms of both.[55]

d. Any patent ineligibility must be clearly stated on the face of the award; basic policy or any other holes may not be used to sneak it in later.[56]

However, the patent illegality on the face of the award standard has been used by the Supreme Court to defend the perversity assumption, so it is likely to be abandoned any time soon.[57]

The post-Ssangyong approach may be seen as advantageous since the Supreme Court has also

[50] 2018 SCC OnLine SC 1019
[51] Amrit Singh, Pro-Arbitration Policy In M/S Emkay Global Financial Services Ltd. V. GirdharSondhi, RFMLR (Jan 21, 2019)
[52] (2019) 15 SCC 131
[53] Rahul Dhonde, Supra n.23, at 81
[54] Ibid
[55] Konkan Railway Corp Ltd v. Rani Construction Co, AIR 2002 SC 778
[56] Ranjit Shetty and Vatsala Pant, Limited Enquiry Scope By Courts While Appointing An Arbitrator Under Section 11 Of The Arbitration And Conciliation Act, 1996, ARGUS PARTNERS, p.3,
[57] Nakul Dewan, Arbitration in India: An Unenjoyable Litigation Jamboree, 3 ASIAN INT'L ARB. J.111 (2007)

ISSN: 2582-6433

supported a narrow reading of public policy or a section 34 application widely. It is uncertain, nevertheless, whether these legislative and judicial protections will prevent the courts from reverting to the Saw Pipes posture. More and more parties (even domestic ones) are avoiding institutions in India owing to the extensive judicial involvement described above, contributing to the ongoing uncertainty facing parties selecting the seat of arbitration in India. Interestingly, courts have been assessing judgments through a broader lens of merit analysis until recently, while perversity and irrationality remain popular in judicial corridors. [58]

In South East Asia Marine Engineering and Constructions Ltd v. Oil India Limited, the Supreme Court recently overturned an award based on a review of the contract as a whole. This Court reviewed the merits of the case before the 2015 change, notwithstanding the limited power of Section 34.[59]A three-judge bench of the Supreme Court elaborated on the history of patent illegality to overturn a domestic ruling in Patel Engineering v. North Eastern Electric Power Corporation Limited..[60]. The Supreme Court recently ruled in cases like Ssangyong and Associate Builders that if the arbitrator's decision is found to be perverse or so irrational that no reasonable person would have reached the same decision, if the arbitrator's construction of the contract has been that no fair or reasonable person would make the same construction, or if the arbitrator's construction of the contract results in any of the following: Because of this, Patel Engineering has implicitly agreed with the argument that an arbitral decision can be overturned if it is demonstrably illegal or perverse, as per Section 34 of the 1996 act.

[58] SIAC data for that matter, India topped the foreign users list with 690 matters referred, available at http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2020.pdf; last accessed on 17.05.2022
[59] Civil Appeal 673/2012
[60] Special Leave Petition (C) 3584-85 of 2020 (Patel Engineering Limited v North Eastern Power Corporation Limited) Paragraph 22

ISSN: 2582-6433

Conclusion

Arbitration in India has come a long way since 1940, with its goals greatly amended and enhanced by the 1996 Act; yet, recent judicial interpretations of public policy have moved Indian law backwards. The availability of concurrent grounds for throwing aside an arbitral judgement is a blunder perpetrated first by draughtsmen in 1940 and secondly by draughtsmen in 1996. The award might be set aside under Section 30(a) or Section 30(b) of the 1940 Act (c). Similarly, even though the 1996 Act made significant policy changes the award can still be contested on concurrent grounds. For example, if the arbitral award is challenged for prejudice, the challenge might be launched under Section 13(5) or Section 34(2)(a) (iii). 101 The Saw Pipes decision confirmed the 1996 Act's inclusion of concurrent grounds. The Saw Pipes decision can be construed as 'error of law' that can be contested under Section 34(2)(a)(v) or Section 34(2)(b) (ii). The scope of public policy is so broad that other grounds for appeal are included, broadening the scope for challenging the judgement. The judiciary's liberal interpretation of the grounds for challenging a judgement is damaging to the parties and renders India arbitration hostile.

Recently, there have been requests to submit Saw Pipes ruling to a bigger bench in order to correct the Supreme Court's original decision[61]. In arbitration cases, the Supreme Court has frequently decided that the award is final on both facts and law, and that its merits cannot be reviewed by a court of law[62]. In addition, organising arbitration specialised benches is a possible approach to preventing Saw Pipes. Such benches would be made up of a panel of judges who would solely hear arbitration-related petitions. This would aid in the expeditious resolution of cases and the establishment of clear jurisprudence about the interpretation of public policy under the 1996 Act. This can also aid in sifting through the uncertainty caused by past rulings.

Because 'public policy' is a fluid notion, it will always be accessible to different judicial interpretations. In relation to arbitration, the idea must be harmonised with the accompanying norms of minimum judicial participation and court monitoring. The balance between moral standards, norms of justice, and equity, which are at the heart of public policy, should be struck carefully so that the effectiveness of arbitration as a conflict resolution process is not jeopardised. The judge should constantly try to exhibit restraint in order to prevent the negative repercussions for Indian law and business outlined in this essay.

[61] Udita Kanwar, ONGC v. Saw Pipes, (10 March 2011) Legal Services India
[62] Maharashtra State Electricity Board v Sterlite Industries (India) (2001) 8 SCC 482

ISSN: 2582-6433

One silver lining to already frustrated procedure is that the Courts under the petition to set aside the arbitral award cannot re-open or re-examine the evidences even if the arbitrator has committed any error as to the process of recording the evidences.[63] No further decisions on the dispute will be made by the courts unless and until "Section 34(2) of the Act's" requirements for setting aside an arbitral decision are satisfied. The Court lacks the power to modify its own legal or factual conclusion. It cannot review evidence that the arbitrator has previously seen or hear appeals against the arbitrator's rulings. To investigate misconduct, the Court may simply view but not scrutinise the record before the arbitrator.

[63]Eastern and North East Frontier Railway Cooperative Bank Ltd vs B. guha and Co., AIR 1986 Cal 146.