

# Setting Aside of Arbitral Award -

## Evolution of *Public Policy*

### *Doctrine - PART II*

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# *Arbitration and Conciliation (Amendment) Act, 2016*

- changes suggested by the **246<sup>th</sup> Report** of the Law Commission to amend the law
- Section 18 of the Amendment Act, 2016 introduced ***Explanation 1*** to Section 34(2)(b), to explain when an award is in conflict with the public policy of India, and
- A new sub-section (2A) to statutorily include patent illegality as one of the grounds on which an arbitral award could be challenged under Section 34 of the Act

# Arbitration and Conciliation (Amendment) Act, 2016 (contd..)

- Explanation to Section 34(2)(b) reads as under:
  - *“Explanation 1. – For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--*
    - .....
    - *(ii) it is in contravention with the fundamental policy of Indian law; or*
    - *(iii) it is in conflict with the most basic notions of morality or justice.*
- Explanation 2- *For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.”*

# *Arbitration and Conciliation (Amendment) Act, 2016 (contd..)*

- newly inserted sub-section (2A) reads as under:

“An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

*Provided* that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.”

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# *Ssangyong Engineering – modifications to Doctrine of “Public Policy”*

- ***Ssangyong Engineering and Construction Co. Ltd. Vs. National Highways Authority of India*** – authored by Justice R.F. Nariman
- Changes brought about wrt certain aspects of his own judgment in the case of ***Associate Builders*** while upholding and maintaining certain other positions as mentioned in the earlier case.
  - i. Interpretation of ‘public policy of India’ would now be constricted to ‘fundamental policy of Indian law’, ‘basic notions of justice or morality’, as were interpreted in **Associated Builders**.*
  - ii. The ground of mere ‘contravention of a substantive law of India’ would no longer be a factor in testing whether or not an arbitral award would be in contravention of the public policy of India, as held in **Associate Builders**.*

## *Ssangyong Engineering – modifications to Doctrine of “Public Policy” (contd..)*

- Interpretation of ‘*public policy of India*’ would now be constricted to ‘*fundamental policy of Indian law*’, ‘*basic notions of justice or morality*’, as were interpreted in ***Associated Builders***.
- The ground of mere ‘*contravention of a substantive law of India*’ would no longer be a factor in testing whether or not an arbitral award would be in contravention of the public policy of India, as held in ***Associate Builders***.

## *Ssangyong Engineering – modifications to Doctrine of “Public Policy” (contd..)*

- ‘Patent illegality’ **would not include**:
  - a contravention of a statute not linked to public policy or public interest; or
  - Re-appreciation of evidence, which what an appellate court would do.
- ‘Patent illegality’ **would include**:
  - An arbitral award *not being reasoned* and in contravention of Section 31(3) of the Act; or
  - A *finding based on no evidence* at all or an award which ignores vital evidence; or
  - The arbitrator *commits an error of jurisdiction*.

## *BCCI vs. Kochi Cricket Pvt. Ltd – A notable verdict*

- ***BCCI v. Kochi Cricket Private Limited:***

- Section 26 of the 2015 Amendment Act provides that unless the parties agreed otherwise, the amendments would be prospective i.e. it would apply to court proceedings which commenced on or after the Commencement Date irrespective of whether the connected arbitration had commenced prior to Commencement Date.
- The court also held that there would be no automatic stay operating on the award even when the challenge application in court had been filed prior to the Commencement Date.
- During the ***BCCI Case***, the Government of India, approved the text of Arbitration & Conciliation (Amendment) Bill, 2018 (“Bill”). ***Clause 87 of the Bill*** provided that the 2015 Amendment Act shall apply only where the arbitration had commenced prior to the Commencement Date.



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# *Hindustan Construction Company Limited & anr. v. Union of India*

- At the beginning, the Arbitration Act was found to be suffering from the disease of automatic stay of award if a challenge to such award was filed under *Section 34*.
- This effectively led to all awards being challenged before the court as it automatically stayed any payment thereunder and consequently deprived the award holder of due amount
- Problem was cured by ***the Arbitration and Conciliation (Amendment) Act, 2015*** (“2015 Amendment Act”). The 2015 Amendment Act provided that *there shall be no automatic stay of the award merely upon filing of a challenge under Section 34.*

# *Hindustan Construction Company Limited & anr. v. Union of India (contd..)*

- 2015 Amendment Act created a set of problems:
  - **Uncertainty 1**: *if the amended provisions applied to court proceedings that arose from arbitrations which had commenced prior to the commencement date of the 2015 Amendment Act i.e. October 23, 2015 (“Commencement Date”).*
  - **Uncertainty 2**: *if the automatic stay on enforcement of awards would continue where proceedings under Section 34 were pending at the Commencement Date.*

# References

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