

Setting Aside of Arbitral Award -

Evolution of *Public Policy*

Doctrine - PART I

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Section 34: Application for setting aside arbitral award.

- (1) Recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
- (2) An arbitral award may be set aside by the Court only if—
the party making the application [establishes on the basis of the record of the arbitral tribunal that] {Substituted by the Arbitration and Conciliation (Amendment) Act, 2019, for “furnishes proof that” (w.e.f. 30-8-2019)} —
 - (i) a party was under some incapacity, or
 - (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
 - (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration:
Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
 - (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or

Section 34: Application for setting aside arbitral award (contd..)

(b) the Court finds that—

- (i) the subject-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.

[*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,—

- (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
- (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.] {Substituted by the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f 23.10.2015):

Prior to substitution, the Explanation stand as:

“Explanation.-Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.”

[(2A) 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 reappreciation of evidence.]

Section 34: Application for setting aside arbitral award (contd..)

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.

[(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.

(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.] **{Inserted by the Arbitration and Conciliation (Amendment) Act, 2015 (w.e.f 23.10.2015.)}**

Origin of the *Triple Test*

- Renusagar Power Co. Ltd. Vs. General Electric Co. – three tests to decide if an award would be contrary to ‘public policy’
 - *Fundamental policy of Indian law,*
 - *Interests of India, and*
 - *Justice or morality*
- Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (now repealed)

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ONGC cases and redefining **Public Policy**

- ONGC Vs. Saw Pipes

- Patent illegality – the fourth element was added to decide whether or not an arbitral award would be contrary to the public policy of India.

- ONGC Vs. Western Geco International Ltd

- Explained the meaning of ‘fundamental policy of India’ and in the course of explanation;
- three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law.

- Western Geco International Ltd – **three principles**
 - The Court or authority concerned is bound to adopt a ‘judicial approach’.
 - A Court or a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice.
 - Perversity or irrationality tested based on Wednesbury’s Principle of Reasonableness.
- Associate Builders Vs. Delhi Development Authority
 - Justice R.F. Nariman in his judgement, elaborated on the concepts of
 - ‘fundamental policy of Indian law’;
 - ‘interest of India’;
 - ‘justice or morality’; and
 - ‘patent illegality’

Associate Builder's Case – Justice Nariman's exposition

- “**Fundamental Policy in India**” means
 - Disregarding orders of superior courts;
 - fair, reasonable and objective, as against an arbitrary or whimsical approach;
 - principles of natural justice; and
 - perversity and irrationality by the standards of a reasonable person who would have arrived at the decision.
- “**Interest of India**” was very briefly explained to be something that is relevant to India as a member of the world community in its relations with other foreign nations.
- “**Justice and morality**” means that an award could be said to be against justice and morality if it shocks the conscience of the Courts.

- “**patent illegality**” would include three subheads:
 - contravention of a substantive law of India, the illegality of which should go to the root of the matter and cannot be trivial in nature;
 - contravention of the Arbitration and Conciliation Act, itself;
 - contravention of Section 28(3) of the Act.
- Justice Nariman noted:
 - *An Arbitral Tribunal must decide in accordance with the terms of the contract, but if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair-minded or reasonable person could do*

Arbitration and Conciliation (Amendment) Act, 2016

- changes suggested by the **246th 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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