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Patent Illegality in Arbitral Award - An Evolving Concept and Comparative International Jurisprudence

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This article examines the evolution of the concept of patent illegality in arbitration, particularly under the Indian Arbitration and Conciliation Act, 1996 (ACA). Section 34 of the Act allows for the granting of precedence and overriding procedural criteria. Indian courts have expanded the scope of patent infringement, resulting in a shift in jurisdiction towards increased scrutiny by local jurisdictions. Cases are being affected, and reforms are being made, particularly after 2015. This article examines ONGC v Saw Pipes and Western Geco case laws to show the implications for public policy and the interpretation of patent illegality in addition, it compares the treatment of domestic and foreign arbitration awards under the ACA and explores international arbitration law in the judiciary system in comparison with opportunities in Hong Kong, France, Italy, the United Kingdom, and the United Arab Emirates. The decision strikes a delicate balance between preserving judicial certainty and ensuring the rule of law in the Indian judiciary.

Keywords: *patent illegality, arbitration, public policy, arbitral awards.*

INTRODUCTION

The Arbitration and Conciliation Act (ACA) 1996, which went into effect in India in 1996, is primarily concerned with using arbitration to settle disputes. The nature of the 'finality' of arbitration is one of the primary reasons why it is becoming increasingly popular around the world. To avoid long procedures and then numerous appeal options common in litigation, arbitration is common as an alternative dispute resolution. Chapter VII, in particular, section 34 of the ACA Act, allows arbitral awards to be challenged in court on procedural and substantive grounds by article 34 of UNICTRAL model law[1] standards.

However, the adoption of the ground of patent illegality by Indian courts has increased the scope of setting aside domestic arbitral awards. This article will look at how this trend has taken India from a pro-enforcement attitude to a more limited approach to enforcing arbitral awards. The Law Commission's 246th Report suggestions and significant court decisions such as ONGC v Saw Pipes (2003), ONGC Ltd. v Western Geco International Ltd. (2014), and Associated Builders v DDA (2015) had an impact on the 2015 amendment to ACA Act. Significant amendments were made to Section 34 by the Arbitration and Conciliation Act (Amendment) Act, 2015, which added Section 34(2A) that permits the annulment of *domestic arbitral* verdicts due to *patent illegality*.

PATENT ILLEGALITY

The Supreme Court of India has construed this term, which is not defined in the original ACA 1996 act, to encompass flagrant disregard for the law or the provisions of the arbitration agreement. Remarkably, this basis for challenge does not include simple mistakes in the interpretation of the law or the reappraisal of the evidence. In keeping with changing court interpretations and bolstering the Act's provisions for justice and fairness in arbitration processes, the inclusion of *patent illegality* in arbitration rulings indicates a broader perspective on public policy and legal compliance.

[1] UNICTRAL Model Law on International Commercial Arbitration, art 34

Under the 2015 Amendment to the Arbitration & Conciliation Act 1996, patent illegality was added as a basis for contesting arbitral awards. It denotes a basic mistake in the award that is visible and gets to the heart of the situation. This error has to be so apparent, twisted, or unreasonable that no reasonable person could have made it. The word 'patent' implies that such illegality must be immediately evident from the award's face. Generally, unless they flagrantly breach legal principles, mere legal errors or contractual misinterpretations by arbitrators do not meet the qualifying criteria.[2]

JUDICIAL INTERPRETATION OF 'PATENT ILLEGALITY'

In the case of ***Renusagar Power Co. Ltd v General Electric Co.***[3], the Supreme Court interpreted the meaning of 'public policy of India' as one of the grounds for setting aside an award given in the ACA Act[4] about the Foreign Exchange Regulation Act and the implications for the legality of foreign awards under s.7(1)(b)(ii) of the Foreign Awards Act. The Court concluded that since the purpose of these Acts was to protect India's economic interests, breaking them would be against public policy. It divided public policy into three grounds: Fundamental policy of Indian law, the interest of India, and lastly, Justice or Morality.

The interpretation of section 34 of the Arbitration and Conciliation Act, 1996, underscores that awards violating statutory provisions cannot stand, as this would undermine fundamental principles of justice. Such violations, including procedural lapses that impact parties' rights, render awards patently illegal and subject to challenge under Section 34.[5] The concept of 'public policy of India' within Section 34 is broadly construed to encompass matters of public interest and welfare. Recent judicial decisions illustrate a shift towards the more comprehensive review of arbitral awards based on substantive legal violations, diverging from earlier, narrower interpretations.[6] In particular, the courts have emphasised adherence to Sections 73 and 74 of

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[2] William Rowley and Benjamin Sino, *The Guide to Challenging and Enforcing Arbitration Awards* (3rd edn, Law Business Research Ltd 2023)
[3] *Renusagar Power Co. Ltd v General Electric Co* (1994) 1 SCC Supp 644
[4] Arbitration and Conciliation Act 1996, s 34
[5] Badrinath Srinivasan, 'Public Policy and Setting Aside Patently Illegal Arbitral Awards in India' (2008) SSRN <http://ssrn.com/abstract=1958201> accessed 25 July 2024
[6] Surbhi Darad, 'Analyzing The Prospect Of Public Policy As A Defense For The Enforcement Of Arbitral Award In View Of The 2015 Amendment To The Arbitration And Conciliation Act' (*Mondaq*, 15 May 2017) <https://www.mondaq.com/india/arbitration-dispute-resolution/594098/analyzing-the-prospect-of-public-

the Indian Contract Act, which ensure fairness in awarding compensation for breach of contract. These sections permit recovery of reasonable damages, whether specified in the contract or estimated as liquidated damages, contingent upon the breach's foreseeable consequences.[7] The case involving ***Oil and Natural Gas Corporation (ONGC) v Saw Pipes***[8] exemplifies this approach, where the court upheld ONGC's right to deduct liquidated damages for delayed performance as per contractual terms despite an extension granted. The decision underscores the framework for challenging arbitral awards that deviate from the judiciary's role in upholding contractual obligations and ensuring awards align with legal provisions. In conclusion, Section 34 provides robust substantive legal requirements or contractual terms, aiming to maintain integrity and fairness in arbitration proceedings under Indian law. As a result, the court held that in addition to the limited interpretation in Renusagar's case, it should be noted that awards can be set aside if they are *'patently illegal' i*n addition to the existing three grounds.

DOMESTIC AWARDS VS FOREIGN AWARDS - JUDICIAL PERSPECTIVES

Further, section 35 of the model law talks about the enforcement of foreign awards; it states that *'an arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and article 36.'*

In Saw Pipes[9], the Supreme Court interpreted the provision under s 34(2)(b)(ii)[10] liberally. However, the decision to limit this interpretation to domestic awards and not extend it to foreign awards under s 48(2)(b)[11] is contentious due to the identical language used in both provisions. This interpretation has diluted the legislative intent of two provisions that use the same phrase.[12]

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policy-as-a-defense-for-the-enforcement-of-arbitral-award-in-view-of-the-2015-amendment-to-the-arbitration-and-conciliation-act#authors> accessed 25 July 2024

[7] Promod Nair, 'Surveying a Decade of the 'New' Law of Arbitration In India' (2007) 23(4) Arbitration International <https://academic.oup.com/arbitration/article-abstract/23/4/699/252782?redirectedFrom=fulltext> accessed 25 July 2024

[8] *ONGC v Saw Pipes* (2003) 5 SCC 705

[9] *Ibid*

[10] Arbitration and Conciliation Act 1996, s 34

[11] Arbitration and Conciliation Act 1996, s 48

[12] *Ibid*

In 2002, it was decided in ***Bhatia International v Bulk Trading SA that*** international arbitrations would fall under the scope of Part I of the ACA Act. The Arbitration and Conciliation Act's Part I will apply to foreign arbitrations conducted in India unless the parties specifically waive this provision, according to the Supreme Court's ruling. The Court further declared that unless the parties expressly waived them, domestic arbitration laws, such as those governing interim relief and appeal procedures, could be applied in foreign arbitrations. In contrast to the usual pro-arbitration stance in international commercial arbitration, this ruling allowed parties to request interim relief from courts in India under Part I of the ACA Act in international arbitrations seated in India, potentially increasing the involvement of Indian courts in these proceedings. In 2005, The Constitutional Bench of the Supreme Court reversed precedent rulings in Bhatia International and Venture Global Engineering[13] in the ***Bharat Aluminium Co. v Kaiser Aluminium Technical Service Inc.[14] case***. The Court emphasised that Part I of the 1996 Act is primarily designed for arbitrations within India's jurisdiction, rejecting the idea that it applies to international arbitrations. This ruling maintained the difference between domestic & foreign arbitration under Indian law by making it clear that Section 2(2) of the ACA Act does not apply to arbitrations being conducted outside of India.

Later, in 2014, in the case of ***ONGC Ltd v Western Geco International Ltd,[15],*** the court highlighted the concept of *'Fundamental Policy of Indian Law'* under public policy. While the Saw Pipes Ltd. case does not go into great detail about this idea, it does imply that fundamental policy comprises principles critical to the *'administration of justice'* and *'law enforcement'* in India. The concept of 'Fundamental Policy of Indian Law', which includes ideas essential to the legal system of the country and law enforcement, was examined in this case. It highlights the necessity of using a judicial method to ensure objectivity, justice, and conformity to legal principles in all decisions affecting rights. It requires authorities to behave by legal criteria to avoid bias or arbitrariness. Further, stresses the need for sensible judgments to prevent illogical or perverse effects. It permits challenges to arbitral verdicts in cases when the arbitrators make choices that result in injustices or fail to draw the appropriate conclusions.

[13] *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190
[14] *Bharat Aluminium Co. v Kaiser Aluminium Technical Service Inc.* (2005) 4 SCC 126
[15] *ONGC Ltd v Western Geco International Ltd* (2014) 9 SCC 263

Courts should not tamper with the substance of arbitral awards, according to widely held international arbitration principles. In Singapore, which is known for its pro-arbitration attitude while adjudicating upon the legality of arbitral awards, the High Court ruled in ***Government of the Republic of the Philippines v Philippine International Air Terminals Co., Inc.* (2007**)[16] that arbitral verdict cannot be overturned for legal errors under Section 34, which is comparable to Indian law. Courts favour minimum judicial interference in arbitration. Supreme Court in India, in the case of ***Enercon v Enercon GmbH,***[17] stressed limited court intrusion, which is reflected in s.5 of the ACA Act. However, the Western GECO ruling appears to depart from these standards, potentially injecting ambiguity into Indian-seated arbitrations by expanding court involvement, which contradicts the intended system of arbitration legislation.

The Supreme Court looks to seminal instances like Renusagar, Saw Pipes, and Western when interpreting 'public policy' under Section 34 of the ACA Act. Its definition of 'public policy' is wide enough to include core tenets of Indian law, such as obeying orders from higher courts, upholding the rule of law, and refraining from making rash choices. The Court in ***Associate Builders v DDA***[18] made it clear that factual mistakes made by arbitrators do not justify intervention unless they are indicative of arbitrariness. The decision emphasises that challenges grounded on 'patent illegality' must involve grave transgressions like fraud or serious legal mistakes at the heart of the disagreement. Crucially, the Court stressed that judicial review shouldn't serve as the initial level of appeal for factual errors. In addition to establishing clear parameters for when court involvement in arbitral verdicts is appropriate, these ruling underlines India's position in favour of arbitration.

INTERNATIONAL JURISPRUDENCE

Some countries like Hong Kong favour the internal public policy of their country as much as India does in the enforcement of the arbitral awards. Courts in Hong Kong have had similar views as India[19], *"an award that is so profoundly offensive to the enforcement jurisdiction's sense of*

[16] *Government of the Republic of the Philippines v Philippine International Air Terminals Co., Inc.* [2006] SGHC 206
[17] *Enercon (India) Ltd and Ors v Enercon Gmbh and Anr* (2014) 5 SCC 1
[18] *Associate Builders v Delhi Development Authority* (2015) 3 SCC 49
[19] *Hebei Import & Export Corp. v Polytek Engineering Co. Ltd.* [1999] 2 HKC 205

justice that, despite being a party to the Convention, it cannot fairly be expected to ignore the complaint' is what they characterise as an award that violates public policy".[20]

In many other jurisdictions, there is a clear difference between domestic and foreign public policy. According to the Court of Appeal of Paris, Foreign public policy is *"the body of rules and values that the French legal system cannot tolerate violations of, even in international situations."*[21] 'Ordre public international' was defined by the French Court of Cassation as *"principles of universal justice considered in France to have absolute international significance"* in the Lautour case[22]. Public policy is defined by Italian courts *as "a body of universal principles shared among nations of the same civilisation, aimed at protecting fundamental human rights often found in international declarations or conventions."*[23] This is a similar perspective. This viewpoint is consistent with what is often called "transnational public policy." Domestic arbitration awards in English law can be contested on public policy grounds of the Arbitration Act 1996, either actively trying to overturn the award (Sections 67 and 68)[24] or passively resisting enforcement (Section 66).[25]

English Courts, while dealing with foreign arbitral awards, are less strict about upholding the award if they are considered to be against public policy.[26] This flexibility results from the possibility of enforcing conduct that might otherwise be against English domestic public policy if they are validated by a foreign arbitration ruling. Moreover, English courts generally defer to foreign arbitrators' findings on public policy problems and abstain from re-examining independently.[27]

'That principle of the law which holds that no subject can lawfully do that which tends to be injurious to the public, or against the public good,' is how England and Wales's Supreme Court formerly defined 'public policy.'[28] Similarly, courts in the US defined public policy as including

[20] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
[21] *Ibid*
[22] Penny Madden and Ceyda Knoebel, 'Arbitrability and Public Policy Challenges' (Global Arbitration Review, 17 May 2023) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/arbitrability-and-public-policy-challenges> accessed 25 July 2024
[23] *Ibid*
[24] Arbitration and Conciliation Act 1996, s 67
[25] Arbitration and Conciliation Act 1996, s 66
[26] *Westacre Investment Inc v Jugoimport SDRP Holding Co Ltd* [1999] 3 All ER 864
[27] *Ibid*
[28] *Egerton v Brownlow* [1853] 4 HLC 1

the 'fundamental ideas of morality and justice of the forum state' in the landmark Parsons case.[29] As to the International Law Association, the public policy exemption encompasses actions that are against morality, national interests, international relations, mandatory regulations (Lois de police), and basic legal principles. This list is hardly all-inclusive, though, which emphasises how challenging it is to define 'public policy' in a way that is consistent and widely acknowledged.[30]

In the UAE, there are a lot of obstacles when setting aside arbitral rulings following judicial review. If decisions are overturned during enforcement challenges for procedural errors or lack of jurisdiction, winning parties might have to reopen arbitration procedures. This procedure takes a long time and is expensive. Concern regarding awards being revoked for insignificant procedural violations that have no bearing on results is growing, as the UAE is perceived as being unfriendly to arbitration. This ambiguity affects both the parties and the arbitrators, highlighting the necessity of carefully crafting the award language to guarantee enforceability.[31]

Losing parties in the UAE frequently challenge arbitral verdicts on procedural grounds that were not mentioned earlier and are only loosely related to the Civil Procedure Code. This strategy can seem unjust and illegitimate as parties try to stretch CPC rules beyond their intended reach to discover procedural flaws. Regardless of this manipulation, UAE courts often hear these arguments. According to reported case law, courts interpret CPC rules inconsistently, frequently annulling verdicts based on small technicalities. Parties engaging in UAE arbitration proceedings must be aware of these issues.[32]

EU member states have also started to set aside the arbitral awards that are against EU law to maintain consistency and respect for EU legal norms across the member states.[33] The Court of

[29] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
[30] *Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v Shell International Petroleum Co. Ltd* [1990] 1 AC 295
[31] Nayiri Boghossian, Enforcement of Foreign Awards in the UAE: Significant Progress Achieved (*Kluwer Arbitration Blog*, 21 February 2024) <https://arbitrationblog.kluwerarbitration.com/2024/02/21/enforcement-of-foreign-awards-in-the-uae-significant-progress-achieved> accessed 26 July 2024
[32] *Ibid*
[33] *Micula v Romania* [2019] Arb/05/20

Justice of the EU, in the Achmea case, denied arbitrability of intra-EU arbitration for issues which may concern the interpretation of EU law, as it will hurt the autonomy of EU law.

An arbitral award may only be considered against public policy if it blatantly deviates from fundamental moral and just standards, according to a U.S. decision. A foreign arbitral award would only be reversed on grounds of public policy issues in very special cases.[34]

CONCLUSION

In conclusion, Indian arbitration legislation, particularly the Arbitration and Conciliation Act (ACA) 1996, has evolved significantly as a result of judicial interpretations and legislative revisions. The insertion of 'patent illegality' as a ground for appealing arbitral decisions under Section 34 indicates a departure from the traditional predilection for enforcement and allows courts to intervene when there are apparent and flagrant legal errors that influence the substance of the dispute. Although the objective was to make arbitration more equitable and lawful, the inclusion has sparked debate over how far courts should go in their assessments. Significant court rulings like Renusagar, Saw Pipes, and Western Geco have given expression to what constitutes public policy under section 34, which emphasises respect for essential concepts of Indian law and justice. This led to a discussion sparked by language that was similar to Section 48(2)(b). The ruling in Bhatia International (2002) indicated that Indian courts would be more involved in arbitration cases by extending Part I of the Arbitration Act to foreign arbitrations unless waived. However, this action was undone by Bharat Aluminium (2012), which limited part I to domestic cases only. When it comes to arbitration, public policy differs throughout international jurisdictions. For example, Hong Kong's position on the subject bears resemblance to some of India's, while other nations—like France, Italy, the UK, etc. Distinguish between their domestic and international public policies.

[34] Julian D. M. Lew et. al., *Comparative International Commercial Arbitration* (Kluwer Law 2003)