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Public Policy in Arbitration: Is the Horse Still Unruly?

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ABSTRACT

The doctrine of public policy has long occupied a controversial position in arbitration law, often serving as a gateway for judicial intervention in arbitral awards. Borrowing from the celebrated description of public policy as an “unruly horse,” Indian courts have grappled with the challenge of balancing the finality of arbitral awards against the need to preserve fundamental legal values. This paper examines the evolution of the public policy ground for setting aside arbitral awards under the Arbitration and Conciliation Act, 1996, with particular emphasis on contemporary judicial trends.

*The study traces the jurisprudential journey from the narrow interpretation adopted in *Renusagar Power Co. Ltd. v. General Electric Co.* to the expansive approach in *ONGC v. Saw Pipes Ltd.* and *ONGC v. Western Geco International Ltd.*, where courts broadened the scope of review by incorporating concepts such as patent illegality and the fundamental policy of Indian law. While these decisions enhanced judicial oversight, they also attracted criticism for undermining arbitral autonomy and encouraging excessive court interference. The paper further analyses the legislative response through the Arbitration and Conciliation (Amendment) Act, 2015, which sought to confine the public policy exception to clearly defined categories and expressly prohibited review on the merits of the dispute. Subsequent decisions, including *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*, *Reliance Infrastructure Ltd. v. State of Goa*, *Consolidated Construction Consortium Ltd. v. Software Technology Parks of India*, *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*, and *V.K. John v. S. Mukanchand Bothra*, demonstrate a discernible judicial commitment to respecting arbitral finality and limiting intervention to exceptional circumstances.*

The paper argues that although the contours of public policy have become more predictable and restrained, the doctrine continues to retain a degree of flexibility necessary to safeguard justice and legality. It concludes that the “unruly horse” has not been completely tamed, but contemporary judicial and legislative developments have substantially reduced its capacity to disrupt the arbitral process.

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I. INTRODUCTION

Judicial intervention in an arbitral proceeding is limited to the extent permitted under the Act, and the general assumption is that arbitral awards should be final and binding, and open to only a limited challenge before the Court.¹ The Courts exercise limited jurisdiction over the verdict of the arbitrator.² The Courts cannot go into the merits of the case, nor reappraise and re-examine the evidence, nor look into the insufficiency of the evidence.³ The reason for this restricted right of challenge is that the whole process of arbitration is an outcome of party autonomy and consensus among the parties. From the very inception of the arbitration agreement, it is a consensual arrangement between the parties, except in cases of statutory arbitration and, to a certain extent, in institutional arbitration.

If the outcome of such a consensual reference is not made binding and enforceable, the projected benefits of arbitration as a speedy, convenient, and less expensive mode of dispute resolution, when compared with court proceedings, will remain a mirage. This is the reason for the restricted challenge against an arbitral award under the Arbitration Act, 1940, as well as under the Arbitration and Conciliation Act, 1996. The following observation by Justice Sinha is worth mentioning here.⁴

“The 1996 Act makes provision for the supervisory role of Courts, for the review of the arbitral award only to ensure fairness. Intervention of the Court is envisaged in a few circumstances only, like in cases of fraud or bias by the arbitrators, violation of natural justice, etc. The Court cannot correct errors of the arbitrators. It can only quash the award, leaving the parties free to begin the arbitration again if it is desired. So, the scheme of the provision aims at keeping the supervisory role of the Court at a minimum level, and this can be justified as parties to the agreement make a conscious decision to exclude the Court’s jurisdiction by opting for arbitration as they prefer the expediency and finality offered by it.”

II. RECOURSE AGAINST AN ARBITRAL AWARD

Recognition and enforcement of an award passed by a duly constituted Tribunal is regulated by the various provisions of the Act. The statute gives finality to the arbitral award by virtue of

¹McDermott Int’l, Inc. v. Burn Standard Co., (2006) 11 S.C.C. 181 (India).

²Airports Auth. of India v. Protective Consultancy & Sec. Servs. Ltd., (2005) 4 Raj 258 (Del. H.C.) (India).

³M.K. Chitkara v. Union of India, (2008) 2 Arb. L.R. 271 (Mad. H.C.) (India).

⁴McDermott, *supra* note 1.

Section 35.⁵ However, this is subject to the other provisions contained in Part I of the Arbitration and Conciliation Act, 1996. Section 34⁶ provides for the recourse that a party can take against an award. That provision states that an arbitral award, though final and binding on the parties, may be set aside by a Court on certain grounds specified therein. A party requesting such relief must furnish proof of the existence of the grounds specified in clause (a) of sub-section (2) of Section 34 for the Court to set aside an award. The grounds are: (1) a party's incapacity; (2) an invalid arbitration agreement; (3) the party making the application not receiving proper notice of the arbitrator's appointment or of the proceedings, or being otherwise unable to present its case; (4) the arbitral award dealing with a dispute not falling within the terms of the submission to arbitration; and (5) the composition of the Tribunal or the arbitral procedure not being in accordance with the agreement of the parties.

Two further grounds are mentioned in clause (b) of sub-section (2) of Section 34, on which the Court may set aside the award upon a finding as to certain facts. The grounds in this clause are of such a nature that the finding as to their existence rests on the subjective satisfaction of the Court. They are: (1) that the subject matter of the dispute cannot be resolved through arbitration, that is, it is not arbitrable; and (2) that the award is in conflict with the public policy of India. The effect of Section 34 is that, where a person makes an application under it to set aside an arbitral award, the award becomes executable only after the proceeding to set it aside is rejected by a Court of competent jurisdiction. It is a mandate under Section 36⁷ that the proceedings for setting aside an arbitral award must conclude before the award can be enforced under the Code of Civil Procedure, in the same manner as if it were a decree of a Civil Court.

The most problematic feature of Sections 34 and 48 of the Act, which provide for the setting aside of an arbitral award, is that, to a considerable extent, they permit precisely what the lawmakers sought to prevent, namely excessive intrusion by an overburdened judiciary. Public policy as a ground for setting aside an award in Indian arbitration has a dual nature, presenting both significant advantages and serious concerns in the enforcement of arbitral awards. On the one hand, the doctrine functions as a safeguard to ensure fairness, legality, and justice in arbitral proceedings. On the other hand, the expansive interpretation of public policy has often resulted in prolonged litigation and judicial intervention, thereby discouraging foreign parties from selecting India as a preferred arbitral seat.

⁵The Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996, § 35 (India).

⁶*Id.* § 34(2)(b)(ii).

⁷*Id.* § 36(1).

III. PUBLIC POLICY AS A GROUND: MEANING AND CONSTITUTIONAL DIMENSION

The drafting history of Article 34 of the Model Law on International Commercial Arbitration appears to indicate that “public policy” was an inaccurate translation of the phrase “ordre public.”⁸ In fact, a proposal to replace public policy with fundamental rules of procedure was supported by England, Finland, France, Australia, the United States, Canada, Japan, India, Switzerland, Greece, and Mexico.⁹ When an award is challenged on the ground of public policy, the issues for consideration differ between domestic and international arbitration. The general assumption is that, as an adjudicator, the arbitrator is bound to apply the law of the land. If an award in international arbitration violates the proper law, it is generally presumed to contravene the public policy of India.

The Preamble to the Constitution of India functions as a foundational interpretative guide in determining whether an arbitral award is contrary to the “public policy of India.” The constitutional values of justice, namely social, economic, and political, together with liberty, equality, and fraternity, provide the normative framework within which courts assess the legitimacy and enforceability of arbitral awards. Public policy in the Indian context is therefore not confined to narrow contractual principles; rather, it derives its content from the broader constitutional vision embedded in the legal order.

The Fundamental Rights guaranteed under Part III of the Constitution reinforce this approach by safeguarding individual freedoms, equality before the law, non-discrimination, and procedural fairness. Consequently, arbitral awards that violate the principles of natural justice, promote arbitrariness, or undermine constitutional guarantees may be regarded as inconsistent with Indian public policy. The judiciary has increasingly recognised that arbitration, though rooted in party autonomy, cannot operate in isolation from constitutional morality and the rule of law.

Further, the Directive Principles of State Policy, though non-justiciable, significantly influence the interpretation of public policy by reflecting the State’s commitment to social welfare, economic equity, and distributive justice. These principles assist courts in evaluating whether private adjudicatory outcomes adversely affect broader societal interests. In this sense, public policy is a dynamic concept shaped not only by statutory provisions but also by evolving constitutional ideals and societal values.

⁸R.S. BACHAWAT, *LAW OF ARBITRATION & CONCILIATION* (6th ed. 2019).

⁹While the specific formulation advanced by the United Kingdom did not receive unanimous endorsement, the participating States concurred that the notion of public policy should be interpreted narrowly and restricted to contraventions of fundamental procedural law.

Indian public policy has historically emphasised the preservation of social institutions such as marriage, respect for religious pluralism and tolerance, integrity in public and political life, and the protection of fair commercial practices. It also incorporates the common-law principle that agreements imposing unreasonable restraints on trade are void where they adversely affect both private parties and the public interest. The doctrine likewise promotes equality and fairness in legal and economic relations by discouraging discriminatory or unconscionable arrangements.

Thus, the concept of public policy in Indian arbitration law reflects a careful balance between contractual freedom and constitutional governance. While courts generally adopt a pro-enforcement approach towards arbitral awards, judicial intervention becomes necessary where an award violates the fundamental policy of Indian law, basic notions of justice and morality, or the constitutional ethos underlying the Indian legal system. This balance raises several questions. Does every provision of law lay down a public policy? Would all plenary legislation fall within this category? Would subordinate legislation fall within the category of laws for this purpose? Or would it be open to the courts to evaluate whether the law alleged to be infringed is directory or mandatory? These questions must be traced directly to the notifications and orders issued under the relevant statutes.

IV. JUDICIAL INTERPRETATION OF PUBLIC POLICY

While interpreting Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961,¹⁰ the Supreme Court in *Renu Sagar Power Company Ltd. v. General Electric Company*¹¹ held that Indian courts would be justified in refusing enforcement of a foreign award on the ground that it conflicts with the public policy of India if such enforcement is contrary to (a) the fundamental policy of Indian law, (b) the interests of India, or (c) morality and justice. The Court further clarified that, as the enforcement of a foreign award is governed by the principles of private international law, the doctrine of public policy as applied in that field alone would be attracted, and that a mere infraction of domestic law *per se* would not amount to a conflict with the public policy of India. That view necessarily related to the enforcement of a foreign award after it had become final.

While Section 34 undeniably establishes public policy as a ground for challenging an arbitral award, the precise contours of what constitutes a violation of public policy remain unsettled. An award obtained by fraud or corruption, by suppression of facts, by misleading or deceiving

¹⁰Foreign Awards (Recognition and Enforcement) Act, 1961, No. 45, Acts of Parliament, 1961, § 7(1)(b)(ii) (India).

¹¹*Renusagar Power Co. Ltd. v. Gen. Elec. Co.*, 1994 Supp (1) S.C.C. 644 (India).

the arbitrator, or by exerting undue pressure on the arbitrator, will be an award improperly procured.¹²

In *O.N.G.C. v. Saw Pipes*,¹³ while considering the judicial intervention envisaged in Section 5, the Supreme Court observed:

“...it is for the Parliament to provide for limited or wider jurisdiction of the Court in a case where the award is challenged.... Therefore, in our view, the phrase ‘Public Policy of India’ used in Section 34 in this context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns the public good and the public interest. What is for the public good or in the public interest, or what would be injurious or harmful to the public good or public interest, has varied from time to time. However, an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in the public interest. Such an award is likely to adversely affect the administration of justice. Hence, in our view, in addition to the narrower meaning given to the term ‘public policy’ in *Renu Sagar’s* case, it is required to be held that the award could be set aside if it is patently illegal. The result would be that the award could be set aside if it is contrary to: (a) the fundamental policy of Indian law; or (b) the interest of India; or (c) justice or morality; or (d) in addition, if it is patently illegal. Illegality must go to the root of the matter, and if the illegality is of a trivial nature it cannot be held that the award is against public policy. An award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such an award is opposed to public policy and is required to be adjudged void.”

Holding that a broader interpretation is necessary for the phrase “public policy of India” to prevent the frustration of legislation and justice, the Court held that:

“...giving limited jurisdiction to the Court for ensuring finality of the award and resolving the dispute by a speedier method would be much more frustrated by permitting a patently illegal award to operate. A patently illegal award is required to be set at naught, otherwise it would promote injustice.”

This broadened interpretation of the expression “Public Policy of India,” particularly through the introduction of the doctrine of “patent illegality,” led to a substantial increase in challenges

¹²Bhawarlal Bhandari v. Universal Heavy Mech. Lifting Enters., A.I.R. 1999 S.C. 246 (India).

¹³Oil & Nat. Gas Corp. Ltd. v. Saw Pipes Ltd., (2003) 5 S.C.C. 705 (India).

against arbitral awards. The wider scope enabled greater judicial intervention in arbitral proceedings and contributed to uncertainty in the enforcement of awards, leaving awards vulnerable to challenge on broad and ambiguous grounds and undermining the finality traditionally associated with arbitration. So also, in *Associate Builders v. DDA*,¹⁴ the Court held that an award can be set aside if it is:

“contrary to the fundamental policy of Indian law, i.e. it is arbitrary or whimsical as opposed to being fair, reasonable and objective, or it contains a decision so irrational that no reasonable person would have arrived at it; contrary to the interest of India, i.e. it affects India’s relations with other countries; contrary to justice and/or morality, i.e. it shocks the conscience of the court, or it relates to an immoral contract; or patently illegal, i.e. it contains a ruling which contravenes the law of India, or it contravenes the provisions of the Act, or it is based on an interpretation of the terms of a contract that no fair-minded or reasonable person would adopt.”

This broader approach rules the field even today, and has been confirmed in subsequent decisions of the Supreme Court. In *ONGC v. Western Geco*,¹⁵ the Supreme Court restated the view taken in *ONGC Ltd. v. Saw Pipes Ltd.*¹⁶ and held that the term public policy includes:

“...all such fundamental principles as provide a basis for the administration of justice and the enforcement of law in this country.” In particular, a court could assess whether a Tribunal (i) had applied a judicial approach, that is, had not acted in an arbitrary manner; (ii) had acted in accordance with the principles of natural justice, including applying its mind to the relevant facts; and (iii) had avoided reaching a decision so perverse or irrational that no reasonable person would have arrived at it.

The broad interpretation adopted in that case heightened concerns over excessive judicial intervention in arbitration. By introducing the doctrine of the “fundamental policy of Indian law,” the Supreme Court permitted courts to undertake a wider review of arbitral awards under the framework of public policy. This approach raised apprehensions among international commercial parties, many of whom increasingly favoured foreign arbitral seats to avoid the

¹⁴Associate Builders v. Delhi Dev. Auth., (2015) 3 S.C.C. 49 (India).

¹⁵Oil & Nat. Gas Corp. Ltd. v. W. Geco Int’l Ltd., (2014) 9 S.C.C. 263 (India).

¹⁶Saw Pipes, *supra* note 13.

delays and uncertainty arising from judicial scrutiny in India. Despite these challenges, the doctrine of public policy also serves important objectives.

V. THE 246TH LAW COMMISSION REPORT AND THE 2015 AMENDMENT

The Law Commission of India, in its 246th Report (2014), recommended restricting the scope of public policy to issues involving fraud, corruption, justice, and morality.¹⁷ The Commission criticised the broad interpretations adopted in *Western Geco* and *Associate Builders v. Delhi Development Authority* for expanding judicial review beyond permissible limits. These recommendations subsequently influenced the 2015 amendments to the Arbitration and Conciliation Act, which aimed at minimising court intervention and promoting efficiency in arbitral proceedings. After the 2015 amendment, it was made clear that an award can be considered contrary to public policy only if it was made or induced by fraud or corruption, if it conflicts with the fundamental policy of Indian law, or if it conflicts with the most basic notions of morality or justice.¹⁸ Depending on whether the arbitral award is found to violate Section 34 or Section 48 of the Act, it may be set aside if it is contrary to the fundamental policy of Indian law, the interests of India, or justice or morality, or if it is patently illegal.¹⁹

A. Constitutional Amendments

A more arbitration-friendly approach emerged in *SsangYong Engineering & Construction Co. Ltd. v. NHAI*,²⁰ where the Supreme Court significantly narrowed the scope of judicial interference under Section 34 of the Arbitration and Conciliation Act, 1996. The Court aligned Indian arbitration jurisprudence with international standards by limiting public-policy review primarily to fundamental legal principles and to patent illegality appearing on the face of the award. This pro-enforcement stance has strengthened India's reputation as an arbitration-friendly jurisdiction. The broad application of public-policy exceptions may also disproportionately benefit financially stronger parties who possess greater resources to prolong litigation. Excessive judicial scrutiny discourages parties from opting for arbitration and may compel weaker parties to resort to conventional litigation, which is often more expensive and time-consuming. Consequently, maintaining a balanced and narrowly tailored interpretation of public policy is essential for preserving arbitral autonomy while ensuring justice and legality.

¹⁷LAW COMM'N OF INDIA, REP. NO. 246, AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996 (2014).

¹⁸The Arbitration and Conciliation Act, 1996, § 34(2)(b)(ii) expls. 1-2 (India) (as amended 2015).

¹⁹Haryana Tourism Ltd. v. Kandhari Beverages Ltd., (2022) 3 S.C.C. 237 (India).

²⁰Ssangyong Eng'g & Constr. Co. v. Nat'l Highways Auth. of India, (2019) 15 S.C.C. 131 (India).

VI. THE CONTEMPORARY JUDICIAL TREND

Recent judgments of the Supreme Court of India reveal a clear judicial inclination towards restricting court interference in arbitral awards and confining the scope of “public policy” under Section 34 of the Arbitration and Conciliation Act, 1996. The Court has consistently maintained that proceedings for setting aside an award are supervisory in nature and cannot be converted into appellate proceedings for the reconsideration of facts or contractual interpretation. In *Reliance Infrastructure Ltd. v. State of Goa*,²¹ the Supreme Court reaffirmed that an arbitral award cannot be annulled merely because a court prefers an alternative interpretation of the contract or the evidence. The Court emphasised that interference is permissible only where the illegality strikes at the very foundation of the award, and clarified that the concepts of “patent illegality” and “public policy” are not intended to authorise a re-evaluation of the merits of the dispute.

Constitutional Amendments

A similar approach was adopted in *Consolidated Construction Consortium Ltd. v. Software Technology Parks of India*,²² where the Court observed that Section 34 does not empower courts to reassess the correctness of the findings reached by the arbitral tribunal. Judicial intervention, according to the Court, is justified only in exceptional situations where the award violates fundamental legal principles or suffers from manifest perversity. The judgment reinforced the principle that arbitral tribunals remain the final adjudicators of factual and contractual disputes. Further clarity emerged from the Constitution Bench decision in *Gayatri Balasamy v. ISG Novasoft Technologies Ltd.*,²³ in which the Supreme Court recognised a limited authority of courts to modify arbitral awards in narrowly defined circumstances, such as the correction of clerical errors or the severance of invalid portions. At the same time, the Court reiterated that the legislative objective of the Arbitration Act is to preserve arbitral autonomy and minimise judicial interference. The majority stressed that the public-policy exception must be interpreted narrowly and invoked only where an award contravenes the fundamental policy of Indian law, basic notions of justice, or morality.

In *V.K. John v. S. Mukanchand Bothra*,²⁴ the Court again underlined that the Arbitration and Conciliation Act is a self-contained legislation providing exhaustive remedies for challenging awards. It held that parties cannot bypass the restricted grounds under Section 34 by resorting

²¹*Reliance Infrastructure Ltd. v. State of Goa*, (2024) 1 S.C.C. 479 (India).

²²*Consol. Constr. Consortium Ltd. v. Software Tech. Parks of India*, 2025 INSC 574 (India).

²³*Gayatri Balasamy v. ISG Novasoft Techs. Ltd.*, 2025 INSC 605 (India).

²⁴*V.K. John v. S. Mukanchand Bothra*, 2026 INSC 393 (India).

to broader constitutional remedies. This observation further strengthens the contemporary judicial approach favouring the finality and enforceability of arbitral awards.

These decisions collectively indicate a marked departure from the expansive interpretation of public policy adopted in earlier cases such as *ONGC Ltd. v. Western Geco International Ltd.*. The present judicial trend reflects greater alignment with international arbitration standards by recognising arbitral finality, respecting party autonomy, and limiting court intervention to exceptional cases involving serious violations of law or justice.
