8 RMLNLUJ (2016) 233

The Finality and the Fairness in International Commercial Arbitration: A Paradox in International Arbitral Awards

by
Prasenjit Kundu[*]

I. INTRODUCTION

Arbitration being a private mode of dispute resolution mechanism, an arbitral award receives the status which the country law, where the arbitration takes place, chooses to confer upon it. Most of the national legal systems favour international arbitration of trans-border commercial disputes and view the arbitral award as equivalent to the decision of a court and therefore considers the arbitral award as having similar authority as a judgment of a court of law[1]. An international arbitral award which is rendered in one country is easier to enforce in another country than a foreign court decision due to the widespread ratification of international convention on the recognition and enforcement of foreign arbitral awards[2]. However it becomes incredible to have no review of the content of the award as well as the conditions in which it was made at the legal system of its origin (country where the award was delivered) even though the global recognition of international enforceability of the arbitral award is unequivocal. The legal systems which advocate for no judicial intervention during the arbitral proceedings and up to the period of rendering a final arbitral award, also finds the existence of some sort of review of arbitration award as a necessary corollary to their legislative policy. The party being dissatisfied with the arbitral award and seeking to avoid the award shall have every opportunity to wait for the successful party to proceed for the enforcement of the

award where he can resist the same before the national court of the country in which the enforcement is sought. But much before that, an unsuccessful party shall have the opportunity to have recourse to challenge the award[3]. In this regard it is important to note that the party's right to adopt a challenge procedure solely depends on the relevant rules of arbitration which is made applicable to the arbitration at hand and the law of the seat of the arbitration. Even where the relevant rules of arbitration provide that the arbitral award is final and binding and the parties shall be carrying out it without any delay[4], the law of the seat of arbitration usually provides some way of challenging an arbitral award[5].

II. METHODS OF CHALLENGE

A. Internal Challenge

There are number of arbitration rules which provide 'internal challenge' to the arbitral award by way of the review of the procedure which was followed in conducting the arbitration or the review of the award itself. This internal review of the award or the procedure is common in practice in maritime and commodity arbitration and also in different forms of arbitrations by trade associations[6]. An expansive provision regarding the adoption of internal challenge to the arbitral award is seen in ICSID Convention[7]. Under this Convention a party can apply for the interpretation, revision and the annulment of the award by an application in writing addressed to the Secretary General. The various grounds on which the award is held liable to be set aside include tribunal not being properly constituted or it has exceeded its jurisdiction, corruption on the part of any member of the tribunal, departure from the fundamental procedural rules etc[8]. The rule

further talks about the appointment of an ad hoc committee for deciding such challenge and submission of the dispute to another newly constituted arbitral tribunal on the request of one of the parties in the circumstances when the ad-hoc committee has declared the award annulled. Many users of ICSID arbitration and also many commentators find such procedure as cumbersome and Redfern has termed this as "Expansive Version of Childhood game of Snake and Ladders!!!"[9] In this regard it is pertinent to note that this is the only procedure available for challenging the ICSID awards and because of the special status it enjoys under the Washington Convention, there cannot be any challenge of ICSID arbitral award before a national court[10].

B. Correction and Interpretation of Awards; Additional awards

The rules regarding correction, interpretation and additional awards are at different variants in different legal systems and in different arbitration rules and considered as an exception to the general rule that an arbitrator becomes *functus officio* after the tribunal has rendered its final award. An interpretation is "intended to resolve any uncertainty as to the precise meaning of an award and the manner in which it is to be performed"[11]. Correction of an award is generally sought in relation to the typographical or clerical errors. An additional award can be rendered by the arbitral tribunal when certain claims were presented before the tribunal but the tribunal omitted to consider those claims. The purpose of incorporation of a provision like additional award is to ensure that the arbitrator may complete its mission and if the arbitrator while rendering its final award did not consider certain issues already presented, the arbitrator shall reconsider those issues. An overview of the different jurisdictions and arbitration rules make the position clear that the power of the arbitral tribunal to render the additional awards and also the provision for correction and interpretation of the arbitral award are possible only when the Rules of the arbitration or the law of the country under the aegis of which the arbitration is being conducted does so permit. The UNCITRAL Model Law on International Commercial Arbitration talks about the interpretation, correction as well as additional award[12]. In England the power to correction and rendering of

additional awards are expressly referred in the statute[13], though there is no provision empowering the tribunal to go for interpretation/clarification of the award. The US Federal Arbitration Act does not confer any such power of additional award and restricts the arbitrator's power only to the correction or modification of arbitral awards on different grounds[14]. In India, the Arbitration and Conciliation Act, 1996 does, like UNCITRAL Model law, recognize correction, interpretation as well as additional award[15].

C. Recourse to the National Court

A party to a dispute has a right to have a fair trial which is considered as a fundamental requirement of procedural fairness. Although commercial arbitration achieves its goal of fast and expeditious resolution of commercial disputes by distancing itself (throughout the proceedings) from the parochial interventionist approach of the judiciary, still some measure of court supervision at the end of the proceedings will certainly enhance the fairness of the proceeding. The contemplation of a challenge mechanism before the national court is a guarantee to ensure a review of the arbitral award by the state court in the circumstances when a party has a good reason to be dissatisfied or aggrieved with the arbitration[16]. A challenge to the arbitral award to the national court can generally be had after exhausting the internal appeal or the correction/interpretation of the awards if the rules or the law of the country in which the arbitration has been held so requires[17]. The growing popularity of the internal appeal mechanism[18] which is basically devised to deal with the jurisdiction of the arbitral institutions

can be having some impact on the court's power to review the arbitral awards. An

applicant can be prevented from raising any challenge before the national court until the arbitration appeal mechanism is exhausted[19].

An important issue in regard to the recourse to the national court against an arbitral award is the court before which the challenge can be made. The issue is relevant because in an international commercial arbitration the parties are (in every likelihood) from different nationalities and also owing to the fact that there could be simultaneous application of different laws in different parts of commercial arbitration. If the arbitration is held in Switzerland and the commercial contract between the parties are governed by the French law and the agreement to arbitrate is being governed by Swedish law[20], the question may arise regarding the competent court of the jurisdiction in which an application to vacate the arbitral award can be made !! The relevant international and national arbitration instruments as well as the approaches of different national courts in different jurisdictions indicate that this is the court of the seat of the arbitration where a challenge to the arbitral award must be addressed. This recognition of the court of the seat of arbitration as being the competent court to entertain the challenge can be traced in both UNCITRAL Model law and the New York Convention, 1958[21]. Henceforth the reference to the expression 'recourse to the national court' would always indicate recourse to the national court of the seat of the arbitration, i.e., the court of the country where the award has originated.

III. EXTENT OF RECOURSE TO NATIONAL COURT AGAINST THE ARBITRAL AWARD

The power of the national court to review the arbitral award does vary from country to country. Each state having a law governing arbitration has its own concept of what measure of control it wishes to exercise over the arbitral process and, in particular, a measure of control against an award[22].

An overview of the different provisions as envisaged in different jurisdictions contemplates three different approaches regarding this power of the national court.

A. Full Recourse to National Court against Arbitral Awards
B. No Recourse to National Court
C. Recourse to National Courts on Limited Grounds

Full Recourse to National Court against Arbitral Awards

The mechanism of fully fledged appeal of arbitral awards on issues of facts and law is now a rarity. Barring very few exceptions, the modern law of commercial arbitration does not recognize or permit appeal against arbitral awards on both facts and laws. The statutorily recognized rights to make an appeal against the arbitral awards on issues of facts and laws are available in Argentina where parties in an international arbitration can make such appeal to the Court of Appeal unless the parties provide otherwise in the arbitration agreement[23]. It is pertinent to note that even the limited right to appeal on law is disappearing[24]. This limited right to appeal is discussed in detail in the third category, i.e. recourse to national courts on limited grounds. The following quote essentially depicts the correct position in this regard:

> "*The increasing favourable climate for arbitration has led to arbitration awards being considered final and binding and to a pro-enforcement policy over the last twenty years. Challenge proceedings are generally based on an excess of jurisdiction of the tribunal or some procedural irregularity which has prevented a fair procedure. In some countries the previously existing possibilities to appeal against awards on points of law have largely been abolished.....*"[25].

No Recourse to National Court

There are certain jurisdictions which do not allow any kind of review of the arbitral awards whatsoever and thereby promote arbitration within the jurisdiction of the country. It is a matter of debate that whether the setting aside of the arbitral award should be abolished altogether or not but the fact is it is only limited number of countries which have resorted to no review of the arbitral award in their jurisdictions. A country which does not subject

the arbitral award (given in that country) to any review by its national court might have the object of distancing the arbitration from the court of law and earning the reputation of 'arbitration friendly country' in order to excel in international trade and investment but sometimes this practice proves to be counterproductive. One such example is the Belgian Legal System[26].

An example of not recognizing the competence of the national court to review the arbitral award was found in the decisions of several courts in French legal system. This approach of the French Courts exposed the losing party to the risk of grave injustice as it denied the aggrieved party the right to challenge fundamentally flawed arbitral procedure. However this was remedied by international arbitration decree at later point of time and since 2011 the legislative position is parties by an agreement can opt out for any sort of judicial review. This is done through the amendment of Art. 1522 of the NCPC which came into force on 1st May 2011. This raises another concern in relation to the party autonomy and

Another notable example of this *no recourse to the national court* against the arbitral award is traced in the reference of *delocalization* of arbitration[27]. Reference may be had to ICSID arbitration. Except the ad hoc mechanism of annulment of the ICSID arbitration award, there cannot be any challenge of the ICSID arbitral award before the national court. This is argued that ICSID arbitration does have no "country of origin". This implies that the ICSID arbitration is detached from any national legal system and therefore national courts shall have no review of the ICSID arbitral award. This can truly be called a 'floating arbitration' resulting a 'floating arbitral award'.

Recourse to National Courts on Limited Grounds

In between the aforementioned two extreme stands of the spectrum there is a middle course which is much in common and prevalent as far

the global practice of recourse to arbitral awards at the seat of the arbitration is concerned. The glaring example is the Model law itself. Article 34 of the Model Law emphatically states that application to the national court for setting aside the arbitral award is the '*only exclusive recourse*' which a party can have had and such an application can be given *only* on the grounds mentioned therein[28]. The Model Law aims to provide a sole means of recourse and also considered as opposing the various national types of recourse which different countries adopted in their respective jurisdictions[29]. This also mirrors the "clear trend towards further limiting the control function of the courts in the international context"[30]. Model Law does not permit any review of the award on merits and therefore the grounds are primarily concerned with procedural

issues[31]. A closer scrutiny of the grounds mentioned in Article 34 of the Model law discloses a great resemblance to the grounds of resistance to the enforcement of foreign arbitral awards as enumerated in Article V of the New York Convention, 1958. This resemblance is not coincidental. The success of the New York Convention in the matter of recognition and enforcement of foreign arbitral awards among its signatories made it imperative for the drafters of the Model Law to promote as well as to continue the policies and principles of the international commercial arbitration as contemplated in the NY Convention and therefore it was desirable to incorporate the identical grounds in the Model Law. Further it is to be noted that Art. 34 set forth essentially the same reasons as those on which recognition and enforcement of the arbitral award can be resisted in article 36 of the Model Law. So barring very few exceptions, the wordings of these two provisions of the Model Law, i.e. Arts 34 & 36 which deal with setting aside of the arbitral award and grounds for resisting recognition

and enforcement of arbitral award are same as being found in article V of the New York Convention which is exclusively designed to resist the enforcement of foreign arbitral award. The Commission Document of the UNCITRAL states its policy for the said resemblance as follows:

> *"Article 34's conformity with article 36(1) of the Model Law, which de facto implements article V of the New York Convention is regarded as desirable in view of the policy of the Model Law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions with their different purposes (in one case reasons for setting aside the award and in the other case grounds for refusing recognition or enforcement of the same) form part of the alternative defence system which provides a party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation. The effect of traditional concepts and rules familiar and peculiar to the legal system ruling at the place of the arbitration is not limited to the State where the arbitration takes place but extends to many other states by virtue of article 36(1)(a) (v) or article V(1)(e) of the 1958 New York Convention, in that an award which has been set aside for whatever reasons recognized by the competent court or applicable procedural law, would not be recognised and enforced abroad"*[32].

These grounds of challenging an arbitral award as contemplated in the UNCITRAL Model Law has now been adopted verbatim, substantially or at the very least Model law has inspired the national legislations around the world. Therefore the grounds to set aside an award read almost same in almost all the jurisdictions. Streamlining the various actions and remedies which were available in different jurisdictions for attacking an arbitral award had been the legislative intent in Article 34(2) Model Law. However there cannot be a uniform application and the states do have the liberty to deviate from the model law, of course. A good example on this point is Egypt which includes a ground to attack an arbitral award on the reasoning that "arbitral tribunal failed to take into consideration the agreed law of the parties as to the law governing the subject matter of the dispute"[33]. It is pertinent to note that the various grounds available to the parties may broadly be classified into three categories. These grounds may exist alone or in combination with one or more grounds, depending on the law of the seat

of the arbitration[34]. An award can be challenged on 'jurisdictional grounds' like validity or the existence of the arbitration agreement, matters which go to the adjudicability of the claim like issue of the arbitrability, capacity of the parties to enter into agreement etc. The second broad category of challenging the arbitral awards is the 'procedural grounds' which includes matters like failure to give proper notice of the appointment of the arbitrator, parties not being given proper opportunity to present the case, arbitration is not being conducted as per the agreement etc. UNCITRAL Model Law has given due cognizance to the jurisdictional grounds as well as the procedural grounds. There is another category in this spectrum which can be termed as 'substantive grounds' which too opens the door of judicial review of the arbitral awards. This is the ground when the arbitral award is challenged on the issue of the 'mistake of law' or 'mistake of facts'. The UNCITRAL Model Law does not recognize any substantive grounds for challenging the arbitral award so as the most of the jurisdictions.

In certain common law jurisdictions an appeal has been made allowed on the ground that the arbitrator failed to apply the applicable law properly or at all. Reference may be had to the English jurisdiction where section 69 of the Arbitration Act, 1996 gives a right to appeal against the arbitral award on the issue of law. But this is not an unconditional right and this can be exercised only with the due permission from the court of law. The provision further enumerates the conditions under which the court shall grant permission for such an appeal[35]. It is important to note that an appeal shall only be entertained in the matter of question of English law[36]. Difficulties might arise to decide the question of law as some issues might be interwoven with question of fact or procedure. A notable case on this point is the Queen's Bench decision in *Fence Gate Ltd.* v. *NEL Construction Ltd.*[37] In

this case Fence Gate Ltd. appealed before the Division Bench of Queen's Bench against arbitrator's cost award which stated that the cost of Fence Gate ltd's counterclaim to be borne by both the parties. While deciding, the arbitral tribunal took into consideration the unreasonable conduct of Fence Gate ltd. during the contract work and also considered that the counterclaim was exaggerated which had an adverse impact on the early settlement of the counterclaim. In appeal the Queen's Bench found that the appeal could be entertained only in the circumstances which raised question of law or which involved question of irregularity but it was not open to decide whether the arbitrator acted 'judicially.' Therefore the Bench held that finding of exaggeration was one of fact which was not appealable and the unreasonable conduct of Fence Gate ltd. during the contract work could not be considered in the determination of the counterclaim (finding on an issue of law) and the appeal was allowed thereof.

In relation to the issue of appeal on a question of law, reference can also be had at the US legal system. The US Federal Arbitration Act (FAA) does not expressly provide any ground for attacking an award on the mistake of law. Nevertheless, in US, an arbitral award can be challenged on the 'manifest disregard of law'. Like its English counterpart US Courts have also taken a restrictive view on the issue of 'error of law' and the ground is to be applied in a limited sense. Manifest disregard of law itself is not sufficient and the court needs to be satisfied that had the law been applied properly the result would have been different. Therefore the test is not that whether the law had been applied correctly or not rather whether the correct application would have had a different outcome or not!![38]

IV. INDIAN POSITION

The United Nation Commission on International Trade Law (UNCITRAL) after enacting its Model Law on International Commercial Arbitration in 1985 handed over the Model Law to its member nations and directed the member states to amend, modify the country's local arbitration law in the line of the UNCITRAL Model Law in order to have a uniformity in the practice of international commercial arbitration. With the growth of international trade and law and in order to attract foreign investment India too felt the need to revamp its arbitration law and therefore enacted the Arbitration and Conciliation Act, 1996 (the Act) by consolidating, amending

and repealing the then existing three laws which were governing the arbitration in the jurisdiction. A closer look on the Act affirms that the Act is the mirror reflection of the UNCITRAL Model law and the first thirty four provisions of the Act are the near reproduction of the Model law. In fact the provision for setting aside of the arbitral award as envisaged in section 34 of the Act is closely modelled on its Model law counterpart. A comparison of the two provisions, i.e., art. 34 of the Model Law and sec. 34 of the Act makes it evident that the grounds are identically worded with the only change occurred in 34(2)(b)(ii) which states the 'public policy' as a ground to set aside the award. The Indian legislature added an explanation in the said ground which states as follows: "Explanation - Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of doubt, that any 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". The explanation is further elaborated in the 2015 amendment of the Act which shall be referred at the later part of the discussion.

We have already seen that the Model law does allow the recourse to the arbitral award *only* by way of setting aside of the award and *only* on the grounds enumerated in Art. 34 and does not contemplate any challenge as to the merits of the award. Likewise the closer examination of the grounds in the Indian Act clearly indicates that the Act does not comprehend any such review of the arbitral award on merits and therefore the Indian court is precluded from reviewing the merit of the awards even indirectly. But the ever expansionary outlook of the Indian court had put the Indian arbitration law under threat which made it imperative for the Indian Parliament to step in and bring the necessary modification by way of amendment to the existing 1996 Act. The interventionist approach of the Indian court in relation to the setting aside of an arbitral award is at the following. But it is beyond the scope of this article to review all the grounds on which an arbitral award can be set aside. Therefore the effort is to discern the area of "*public policy as a ground to challenge an arbitral award*" which seems to be the most controversial area in the Indian arbitration law.

The issue of 'Public Policy' as a ground to Challenge the Arbitral Award

The Supreme Court appeared to have departed significantly from the spirit of this Act while the court dealt the issue of public policy in *ONGC Ltd.* v. *Saw Pipes Ltd.*[39] *in the year 2003. The court opened up a new ground of setting aside of the arbitral award by giving the possibly*

widest interpretation of the expression 'public policy'. A brief fact of the case stated that the dispute in relation to the setting aside of an arbitral award was between ONGC and Saw Pipes. For the purpose of off shore oil exploitation, Saw Pipes agreed to supply casing pipes to the appellant ONGC. The terms of the agreement stated that any delay on the part of the respondent in the supply of the casing pipes shall entitle the appellant to claim a stipulated amount as liquidated damages. Saw pipes delayed the delivery owing to the labour problem which Saw Pipes claimed as a ground of force majeure and therefore sought an extension of time. ONGC denied such request and withheld liquidated damages for the delay in the delivery. This was contested by saw pipes and the issue was referred to the arbitral tribunal as per the arbitration agreement of the supply contract. The tribunal observed that although labour problem did not fall within the contractual definition of *force majeure* but ONGC was not entitled to withhold the liquidated damages reason being ONGC failed to establish the fact that as a result of that delay ONGC suffered adversely. ONGC applied before the Indian court for setting aside the arbitral award on the ground of public policy as enumerated in section 34(2)(b) (ii) of the Act. The court found that Arbitral Tribunal had erred while it required ONGC to prove its loss in order to be able to apply liquidated damages; ONGC was not required to do such as a matter of both contractual interpretation and applicable law. The court held — "if the award is contrary to the substantive provisions of law or the provisions of the Act or against the terms of the contract, it would be *patently illegal* which could be interfered under section 34(2)(b) (ii) of the Act"[40]. Therefore the award was liable to be set aside as the award was considered to have violated the public policy of India.

In this regard it is important to note that the term public policy had been interpreted by the Supreme Court in *Renusagar Power Co. Ltd.* v. *General Electric Co.*[41] In *Renusagar*, the Court adopted a narrower interpretation of the term public policy and held that an award could be held to be in contravention of the public policy only in the following three circumstances- "The award is against - (i) the fundamental policy of India (Ii) the interest of India; or (iii) justice or morality". The court categorically stated — "the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merit[42]. Though *Renusagar* was decided in the year 1994 when the Act of 1996 had not come into picture and the court dealt the issue of public policy under the then applicable Foreign Awards Act, 1961, but the provision of public policy in s 7(1)(b) (ii) of the 1961 Act was identical to s 34(2)(b)(ii) of the 1996

Act[43]. Therefore it was legitimately expected that the court should adopt the narrower interpretation of *Renusagar* in order to keep the public policy threshold high. This is evident from the language used in the explanatory note to s 34(2)(b)(ii) which categorically states that the award must rise to the level of fraud or corruption or must have been the one obtained in breach of the confidentiality provisions of section 75 of the Act or the one where the evidence obtained in the conciliation proceedings have been adduced in the arbitration proceedings in violation of section 81 of the 1996 Act. Undoubtedly the legislature, by the explanatory note, intended that only a serious violation of due process would give rise to the level of violation of Indian public policy. Nonetheless the Supreme Court in Saw Pipes had advanced the following observations - "in a case where the judgment… is challenged before the …. Court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of the award is challenged there is no necessity of giving a narrower meaning to the term 'public policy of India'. On the contrary, wider meaning is required to be given so that the 'patent illegality award' passed by the arbitral tribunal could be set aside"[44]. This introduction of new ground 'patently illegal award' in Saw Pipes in addition to the other three conditions of contravention of public policy as laid down in *Renusagar*, certainly lowered the threshold of public policy of India as a ground of setting aside the arbitral award.

Connotation of the phrase "Patently Illegal Order" in the context of Commercial Arbitration

The illegality in arbitration generally includes issues like "facilitation or promotion of drug trafficking, terrorism, child abuse, subversion, prostitution and other forms of human rights violation"[45] So if there is an arbitral award of damage for breach of contractual obligation of carrying out a terrorist act, such an award would certainly be held contrary to public policy of India since the subject matter of the contract would be illegal. The same rationale would apply for breach of fundamental principles of law of the jurisdiction in which the award is challenged or set to be enforced. In this sense illegality could be held as a ground for setting aside the award on the violation of the public policy. The illegality must relate to the illegal nature of the contract or its subject matter, its formation or in the circumstances in which the contract has been entered. Now the use of the term 'Patent illegality' definitely raises concern regarding the level of the public

policy violation in pursuant to s. 34(2)(b) (ii) of the Act. The explicit reference by the Supreme Court in Saw Pipes to the effect that an award shall be considered to be patently illegal in the circumstances like the award 'was contrary to the substantive provisions of law ……. against the terms of the contract' made the position abundantly clear that the Supreme Court essentially equated the concept of "*patent illegality*"

with "*error of law*". This can be substantiated by referring to the observation of the court in this regard which is as follows: "If the award is erroneous on the basis of record with regard to proposition of law (sic) or its application, the Court will have jurisdiction to interfere with the same"[46]. This interpretation of the Court in Saw Pipes certainly exceeded the scope of the 1996 Act and essentially empowered the Court to review the arbitral award on the merit of the case. The Court's approach in the determination of the fact that whether it was lawfully correct for the arbitral tribunal to ask ONGC to prove its loss in order to be entitled for compensation was an essential review of the awards on the merit of the case. This broad interpretation of the term public policy opened the floodgates to more and more challenges of arbitral awards before the Indian courts and the disappointing picture was addressed by eminent lawyer Fali S. Nariman who remarked the judgment as having "*virtually set at naught the entire 1996 Act": "…… to have introduced…. by judicial innovation……a fresh ground of challenge that an award would be contrary to Indian public policy if it was 'patently illegal' and placed it under the head of public policy was first contrary to the established doctrine of precedent… the decision of the three judges being binding on a bench of two judges. It was also contrary to the plain intent of the 1996 Act, namely the need of finality in alternative method of dispute resolution without court interference…….. The Division Bench of two judges of the Court has altered the entire road map of arbitration law and put the clock back where we started under the old 1940 Act*"[47].

The situation got worse when the Supreme Court delivered its judgment in *Venture Global Engg.* v. *Satyam Computer Services Ltd.*[48], a decision which gave a severe blow and had put Indian arbitration law under threat. The much criticized broadened definition of the term 'public policy' as laid down by the Court in saw Pipes was extended to a foreign arbitral award which was sought to be set aside before the Indian court. The Court, by applying the ratio of *Bhatia International* v. *Bulk Trading SA*[49] where the Court held that Part I of the Act extends to a foreign seated arbitration until

and unless the parties exclude the application of the Act by express terms or by the necessary implications, extended the jurisdiction of the Indian Courts to entertain a challenge to an award which originated in a country other than India. The fact of the case arose out of an arbitral award rendered by the London Court of International Arbitration. While the respondent initiated enforcement proceedings of the award before the Court of Michigan (US Court), the appellant filed a setting aside application before a City Civil Court in India. The respondent filed an appeal before the High Court against the order of the City Civil Court when there was an ad-interim ex parte order of the civil court. The court restrained the respondent from seeking or effecting the transfer of shares under the award. The High Court dismissed the order of the City Civil Court holding that the foreign award could not be challenged (u/s 34 of the Act) before the Indian Court even if it contravened Indian public policy. Against the order of the High Court, the appellant filed a special leave petition before the Supreme Court of India. The Court accepted the contention of the appellant and observed that the respondent by not choosing India for the enforcement of the arbitral award, was trying to avoid the jurisdiction of the Indian Courts as well as the extended definition of the term 'public policy' (as per Saw Pipes Ruling) which would have given the benefit to the appellant otherwise. So even if the respondent was not willing to enforce the award in India but the appellant cannot be deprived of the right to challenge the award before the Indian courts[50]. The decision of the court was essentially flawed at two scales. Firstly the Court ignored the well recognized international practices that the court of the seat of the arbitration is the competent court to set aside the arbitral award and secondly it wrongly applied the extended definition of the public policy in a foreign arbitral award. The Supreme Court in Saw Pipes observed that the said definition was meant for a domestic arbitral award, i.e. an award rendered in India only.

Phulchand Exports Ltd. v. *O.O.O. Patriot* (2011)[51] is another example of the Indian Courts' continuing hindrance to the development of arbitration law in India. The widened scope of the public policy in Saw Pipes which was to be made applicable under section 34(2)(b)(ii) of the Act was extended to section 48(2)(b) of the Act which concerns the refusal to enforce foreign arbitral award if it is contrary to Indian public policy.

This interventionist approach of the Indian Courts — "first addition of a new ground 'patent illegality' in section 34 of the Act and thereby exposing a domestic award to the possibility of being challenged on the merit of the case-second allowing the court to entertain a challenge of a foreign arbitral award under section 34 (which is exclusively designed for domestic award)

and thereby opening up the possibility of setting aside an off-shore award on its merit and finally the application of the extended definition of public policy in the provision to the enforcement of foreign arbitral awards under section 48(2)(b) of the Act"— undermined the confidence of the international business community in opting India as a preferred seat of arbitration. The further development of the law in this field had witnessed some of the welcoming approaches of the Court which attempted to dilute the ONGC doctrine but still ONGC stood as the Locus Classicus on the interpretation of the public policy.

However this adventure-misadventure of the Indian judiciary was overshadowed when the five members Constitutional Bench of the Supreme Court in its landmark decision in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services, Inc.* (2012)[52] overturned the highly criticized *Bhatia International*. As a result of this, the regressive approach of the Indian judiciary in entertaining a challenge of an off-shore arbitral award u/s 34 of the Act and the possible exposition of the said award to be reviewed on merits by the Indian courts have got watered down. This progressive trend was witnessed in the decision of the Court in *Shri Lal Mahal Ltd.* v. *Progetto Grano SpA* (2013)[53]. The three judge Bench of the Supreme Court overruled *Phulchand*[54] and unequivocally stated: "*the application of Doctrine of Public Policy of India for the purpose of enforcement of foreign award under section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award and refusal of enforcement of a foreign award can be made if the award is against the fundamental policy of Indian law; interest of India or justice or morality*". Essentially the judgment marked a welcome trend by upholding the application of the doctrine of public policy in a restrictive sense (as it was interpreted in *Renusagar* Case) and thereby raising the threshold for intervention in international arbitration higher than its purely domestic counterpart. It is needless to say that the domestic award continued to be reviewed by applying the ratio in ONGC because no bench faced with a similar question had ever recommended the Chief Justice to constitute a review bench. This regime not only made arbitration an unreliable system but also eroded the faith of the international and domestic business communities to commit any business in India.

Feeling the need to revive the law in this regard, the Law Commission in its 246th Report recommended a narrow interpretation of the term 'public policy' both under section 34 & 48 in order to bring conformity with

the decision of the Supreme Court in *Renusagar* and *Shri Lal Mahal*[55]. It recommended that an award shall be considered to be in conflict with 'public policy' only if it was induced by fraud and corruption or was opposed to the "fundamental policy of India" or "most basic notions of morality or justice". It recommended removing "interests of India" as well as "patent illegality" both of which permitted judicial overreach. However, the Commission recommended the insertion of section 34(2A) for the setting aside of the purely domestic award on the ground of "Patent illegality appearing on the face of the award"[56]. Therefore a distinction was drawn between an international arbitration award

rendered in India and a pure domestic award delivered in India. The recommendation was made owing to the fact that the judicial intervention in a purely domestic award is far greater than in examining a foreign award or an award of an international arbitration in India. To avoid excessive intervention in the premise of the "patent illegality" the Commission added a proviso to the proposed section 34(2A) to the effect the award would not be considered defective under patent illegality ground merely "due to the erroneous application of law or by re-appreciation of evidence". The Commission, thus, prescribed an exhaustive definition of public policy and also prohibited review on merits by the insertion of proviso to the proposed section 34(2A).

A decision of the Supreme Court in *ONGC Ltd.* v. *Western Geco International Ltd.* (2014)[57] deserves special mention in this regard. The judgment was delivered on 4th September, 2014, just a month later of the law Commission's Report. While interpreting the term "fundamental policy of Indian law, "the Court included the following attributes: "(i) 'judicial approach' which involves reasonable and non-arbitrary decision (ii) adhering to the principle of natural justice and (iii) a decision of high threshold of reasonableness". To determine whether the decision was reasonable or not, the Court would necessarily be required involving itself in the facts of the matter and the evidence available. The court, therefore, involved itself to adjudicate whether the reasoning and the conclusion of the tribunal is satisfactory-opening up, once again, review on merits. This time the attempt was not through the door of "patently illegal" but through the door of "fundamental policy of Indian law". Tired with this judicial vindication, the Law Commission published a Supplementary to its 246th Report in February 2015[58] which stated — "*Western Geco had expanded the Court's power to*

review an award on merits. Such a review was contrary to the object of the Act and International Practice……. Fundamental Policy of Indian law shall not entail a review on the merits of the dispute". This was a second attempt of the Law Commission of India to shut the gate of routine challenges to arbitral awards. Fortunately the recommendations have been considered in the Arbitration and Conciliation (Amendment) Act, 2015. The welcoming changes in relation to the public policy ground in section 34(2)(b)(ii) are—

(i) The Amendment Act has added Explanation 2 which is worded as follows:

"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"

(ii) An addition of a new sub-clause 2A which is worded as follows:

(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 re-appreciation of evidence".*

It is understood that the reason for changing the public policy provision in the Act is to make Indian law consistent with the international law and practice of commercial arbitration.

V. CONCLUDING REMARKS

The importance of speed and finality in large, complex international arbitrations is debatable but parties always have been preferring expedite resolution of the disputes. It has been profoundly found that the arbitration users value "fairness and justice of the process" over the other competing features of the arbitration such as speed, cost and finality. In order to protect the parties from the arbitrariness and misconduct by the arbitrators, the parties cannot be left in a legal vacuum without any recourse against the award. The finality of an arbitral award in order to speed up the dispute resolution mechanism cannot weigh over the fundamental right to a fair trial *vis-à-vis* at least a minimum set of protection. As long as arbitration has existed as an alternative to litigation in court, the award has been subject to some form of judicial review. Many scholars have raised concerns in relation to the present existing double review of the arbitral award — review by the courts of the seat of the arbitration and the ultimate review by the courts of

the country where the enforcement is sought. The grounds for refusing to recognize/enforce the foreign awards and the grounds for setting aside an award by the court of the seat of the arbitration are almost identical under the New York Convention and the UNCITRAL Model Law respectively. As a result of this the recourse to local courts both at the seat of the arbitration as well as the enforcement country is often duplicative. Many scholars have argued for the abolition of this dual control. Whether the idea is plausible or not is beyond the scope of the article. However what is strongly argued is that absence of any court scrutiny at the arbitral situs would adversely affect the victims of the defective arbitration and in some cases the interest of the reviewing state itself. At the same the safeguards must be exercised with all cautions so that the reviewing courts do not become court of appeal. The finality of the arbitration must ensure that the parties are not allowed to be engaged in a prolonged and costly series of appeals and thereby minimize the disruption to the ordinary business of the parties involved in the arbitration proceedings.

———

* Assistant Professor (Law), Dr. Ram Manohar Lohiya National Law University, Lucknow.

[1] Emmanuel Gaillard and John savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration Kluwer Law International* 883-886 (Kluwer Law International, 1999) available at http://www.kluwerarbitration.com/CommonUI/book-toc.aspx?book=TOC_Gaillard_1999_V07 (Last Visit on 3/10/2016).

[2] *Ibid*

[3] Challenging an arbitral award is a common practice in international commercial arbitration but there are different terminologies which are used to mean such challenge. In common law jurisdictions, the customary language used is 'appeal against an award' which includes an appeal to a different tribunal provided it is permitted under the relevant applicable rules of the arbitration and also an appeal to the national court which is empowered to vary the award or to send it back to the tribunal for reconsiderations or to set aside the award whole or in part. In civil law jurisdiction the challenge is identified with the use of the expression 'recourse' to a court of law against an award. 'Recourse against the arbitral award' is also used in Article 34 of the UNCITRAL Model law which represents the grounds on which an arbitral award can be set aside by the relevant court.

[4] See for instance The UNCITRAL Arbitration Rules (As revised in 2010), art. 34(2), ICC Rules on Arbitration, 2012, art. 34(6), LCIA Rules on Arbitration, 2014, art. 26(8).

[5] Award includes interim award, partial award and a final award as to the issue/issues with which it deals.

[6] See, for example, Rule 12 of the Arbitration Rules (No-125) of the Grain and Feed Trade association(GAFTA) effective from 1st of April, 2012.

[7] The Convention on the Settlement of Investment Disputes between States and Nationals of other States, 2006 available at https://icsid.worldbank.org/apps/ICSIDWEB/icsiddocs/Documents/ICSID%20Convention%20English.pdf)

[8] The ICSID Convention, 2006, art. 52.

[9] Nigel Blackaby, Constantine Partasides, et. al., *Redfern and Hunter on International Commercial Arbitration* (Oxford University Press, 6th edn., 2009).

[10] *Supra* note 8 art. 54(2).

[11] *Supra* note 9 at 590.

[12] The Model law provision does permit an interpretation of the award *only* when both the parties make a request so (art. 33(1)(b)). A request for correction of the award can be given by a party or it can be done by the arbitral tribunal on its own initiative arts. 33(1)(a) & 33(2); Within 30 days from the receipt of the award, a party can give an application for an additional award art. 33(3).

[13] The English Arbitration Act, 1996 : Section 57(3) of the Act reads as follows : "The tribunal may on is own initiative or on the application of a party—

(a) Correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission or clarify or remove any ambiguity in the award, or

(b) Make an additional award in respect of any claim (including a claim for interest or costs) which was presented to the tribunal but was not dealt with in the award.

[14] For example, 'evident material miscalculation', 'evident material mistake', etc. For details, see US Federal Arbitration Act, 1925, s. 11(as amended in 2002).

[15] See, the Arbitration and Conciliation Act, 1996, s. 33.

[16] Julian D.M. Lew, Loukas A Mistelis, et.al. (eds.), *Comparative International Commercial Arbitration* 664 (Kluwer Law International 2003) available at http://www.kluwerarbitration.com/CommonUI/book-toc.aspx?book=TOC_Lew_2003_V05_V06IBA (Last visited on 5/10/2016).

[17] For example see Section 70 of the English Arbitration Act, 1996. Section 70(2) reads as follows:

"70(2) An application or appeal may not be brought if the applicant or the appellant has not first exhausted- (a) any available arbitral process of appeal or review, and (b) any available recourse under section 57 (correction of award or additional award)".

[18] Arbitral appellate review mechanism can be found in the rules of AAA, ICSID, GAFTA, FOSFA etc.

[19] Roman Khodykin, "National Court Review of the Arbitration Award: Where do We Go from Here?" in Stavros L. Brekoulakis, Julian D.M. Lew et al. (eds), *The Evolution and Future of International Arbitration* 276 (Kluwer Law International 2016).

[20] An effect of 'separarbility presumption' whereby we consider the arbitration agreement as an independent clause from the other terms of the underlying contract is the possibility of the application of different laws to the arbitration agreement and the underlying contract though the arbitration agreement is a part of the whole contract.

[21] Art. 34 of the Model law say that the competent court to entertain an application for setting aside an arbitral award is the court as described in art. 6 of the Model Law. Art. 6 envisages the contracting state to designate the court/courts or the competent authority to perform the functions inter alia setting aside of arbitral award. Also the New York Convention in Art. V (1) (e) sets out one of the grounds for resisting the enforcement of a foreign arbitral award to the effect that the award has been set aside by the competent courts of seat of arbitration.

[22] *Supra* note 9 at 594.

[23] *Supra* note 9 at 268.

[24] *Ibid.*

[25] *Supra* note 16 at 15-57.

[26] For example Belgium abolished all forms of setting aside of arbitral award in Belgium if there was no Belgium party to that arbitration. The attempt was to make Belgium an arbitration friendly country. But it had an opposite effect. Parties turned away from Belgium as a seat of arbitration and the arbitral institutions blacklisted Belgium as a potential venue. As a result Belgium reintroduced the possibility of setting aside of arbitral awards in 1998. See Belgium Judicial Code (CJB) 1985, Article 1717 (4) as amended in 1998 which reads as follows: "The parties may, through an express declaration in the arbitration agreement or through a letter of agreement, exclude any action for the annulment of an arbitrator's award when neither of them is either a natural person with a Belgian citizenship or a residence in Belgium, or a legal person having its main establishment or having a branch there". For details see, Caroline Verbruggen, "Commentary on Part VI of the Belgian Judicial Code, Chapter VII: Article 1717" in Niuscha Bassiri and Maarten Drayes (eds.), *Arbitration in Belgium* 455-288 (Kluwer Law International 2016).

[27] The concept of delocalization is basically meant to have an arbitration not being subject to the law of the seat of the arbitration as well as the court of the seat of the arbitration. For details see *Redfern Hunter on International Arbitration* (*Supra* note 9 at 188-193).

[28] Article 34 does not take away the right of the parties to initiate for correction, interpretation of arbitral awards as contemplated in art. 33 of the Model Law. Such requested would be advanced before the tribunal and not before the court and therefore application for setting aside of the arbitral award is the only recourse to the national court available under the UNCITRAL Model law.

[29] See the Commission Document of the UNCITRAL Model Law: A/CN. 9/264, art. 34, para. 1 available at http://www.uncitral.org/uncitral/en/commission/sessions/18th.html (9/9/2016).

[30] Dr Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd edn., 2010).

[31] The various grounds enumerated in Article 34 of the Model Law are as follows:

"(1) lack of capacity to conclude an arbitration agreement or lack of a valid arbitration agreement; (2) where the aggrieved party was not given proper notice of the appointment of the arbitral tribunal or the arbitral proceedings or was otherwise unable to present his case; (3) Where the award deals with the matters not contemplated by, or falling within, the arbitration clause or submission agreement, or goes beyond the scope of what was submitted; (4) Where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or with the mandatory provisions of the Model Law itself; (5) Where the subject matter of the dispute is not capable of settlement by arbitration under the law of the State where the arbitration takes place; (6) where the award is in conflict with the public policy of the State where the arbitration takes place.

The Model Law list is exhaustive, as expressed by the word '***only***'.

[32] *Supra* note 29 at para 8.

[33] Albert Jan Van Den Berg, "Should the Setting Aside of the Arbitral Award be abolished?" *ICSID Review* 1-26 (2014).

[34] *Supra* note 9 at 594.

[35] Section 69(3) of the English Arbitration Act, 1996 enumerates the grounds. The provision reads as follows: "69(3) Leave to appeal shall be given only if the court is satisfied (a) that the determination of the question will substantially affect the rights of one or more of the parties, (b) that the question is one which the tribunal was asked to determine (c) that, on the basis of the findings of fact in the award- (i) the decision of the tribunal on the question is obviously wrong, or (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt and (d) that despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the issue".

[36] For example in *Reliance Industries Ltd.* v. *Enron Oil & Gas India Ltd.*, (2002) 1 All ER (Comm.) 59 (QBD), the appeal was not granted as the question was related to the Indian law and not the English law. Also in *AEK* v. *National Basket Assn.*, (2002) 1 All ER (Comm) 70, permission to appeal on law was rejected as the arbitrator in the case applied Greek law.

[37] (2001) 82 Con LR 41 accessed through https://login.westlawindia.com/maf/wlin/app/document?&srguid=i0ad82d0800000157e1d630151258afef&docguid=IA60E1850E42711DA8FC2A0F0355337E9&hitguid=IA60E1850E42711DA8FC2A0F0355337E9&rank=8&spos=8&epos=8&td=9&crumb-action=append&context=54&resolvein=true (last visited 9/9/2016).

[38] See, *Hall Street Associates LLC* v. *Mattel, Inc.*, 170 L Ed 2d 254 : 128 S Ct 1396 : 552 US 576 (2008). The Supreme Court held that the grounds set out in FAA for challenging arbitral awards were exclusive and rejected the option that the parties could contractually expand the scope of judicial review to make an arbitral award amenable to judicial review on error of law. Also see *Prime Therapeutics LLC* v. *Omnicare, Inc.*, 555 F Supp 2d 993 (D Minn 2008).

[39] (2003) 5 SCC 705.

[40] *Supra* note 39 at para 15.

[41] 1994 Supp (1) SCC 644.

[42] *Ibid.* at para 37.

[43] The Foreign Awards (Recognition and Enforcement) Act, 1961, s. 7(1)(b) (ii): "The enforcement of the award will be contrary to public policy".

[44] *Supra* note 39 at para 22.

[45] Kreindler, "Aspects of Illegality in the Formation and Performance of Contracts" in International Commercial Arbitration: Important Contemporary Questions (ICCA Congress Series, No. 11) (2003), p. 212.

[46] *Supra* note 39 at para 55.

[47] Extract from the transcript of the speech delivered by Mr. F.S. Nariman at the inaugural session of "Legal Reforms in Infrastructure", New Delhi (2nd May 2003) quoted in S. Kachwaha, "The Indian Arbitration Law : Towards a New Jurisprudence" (2007) 10 (1) Int. A.L.R. 13-17.

[48] (2008) 4 SCC 190.

[49] (2002) 4 SCC 105.

[50] *Supra* note 48 at para 35.

[51] (2011) 10 SCC 300.

[52] (2012) 9 SCC 552.

[53] (2014) 2 SCC 433.

[54] *Supra* note 51.

[55] Law Commission of India, 246th Report on Amendment to the Arbitration and Conciliation Act, 1996 (August, 2014) available at http://lawcommissionofindia.nic.in/reports/Report246.pdf (last visited on 12/10/2016).

[56] *Ibid.* at page 56.

[57] (2014) 9 SCC 263.

[58] Law Commission of India, Supplementary to Report No 246 available at http://lawcommissionofindia.nic.in/reports/SupplementarytoReportNo246AmendmentstoArbitration(Hindi).pdf (last visited on 12/10/2016).