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Sec. 34 of Arbitration and Conciliation Act

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A B S T R A C T

Sec. 34 of the Act describes the procedure for setting aside an arbitral award rendered by an arbitral tribunal, which includes the Court's intervention in setting aside the verdict. The assistance of the courts is required for the smooth operation of the arbitration system; however, excessive intervention by the Court in cases of entertaining applications against arbitral awards must be avoided as it would cause unnecessary delay in arbitral proceedings, defeating the purpose of the Act. The Arbitration Act of 1940 failed to resolve the ambiguity of the expression "public policy of India," and the grounds for setting aside an arbitral award were also not clearly defined, allowing the judiciary to give interpretations based on their understanding and thus increasing the possibility of judicial intervention in the arbitral process. The Arbitration and Conciliation Act of 1996, as amended by the Arbitration and Conciliation (Amendment) Act of 2015, gave sec. 34 of the Act a distinct personality and settled some difficulties concerning it. This Article assesses Sec. 34 of the 1996 Act and its revisions, as well as the scope of judicial involvement. Furthermore, the revisions brought about by the Amendment Act of 2015 have been assessed, particularly the concept of "Indian public policy.

Keywords: Arbitration, Arbitral Award, Patent Illegality, Foreign Arbitral Award, Public Policy

INTRODUCTION

Arbitration is a dispute resolution technique in which the parties agree to submit their disagreement to one or more arbitrators who issue binding rulings. An Arbitration Award is a decision made by an Arbitration Tribunal in an arbitration case that is stated to be equivalent to a court of law's judgement. Arbitration is preferred in international trade because a foreign arbitral ruling is easier to enforce than a court judgement. However, if a claimant's claim fails, an Arbitral award can be of a non-pecuniary nature, as neither party is required to pay any money to the other.

Arbitration became widely acknowledged as a frequent method of resolving economic disputes at the end of the twentieth century. The primary Indian law on arbitration was the Indian Arbitration Act, 1899, which was based on the English Arbitration Act of 1889. It was later replaced by the Indian Arbitration Act, 1940, which was eventually restored by the Arbitration and Conciliation Act, 1996, which is based on the UNCITRAL Model Law on International Commercial Arbitration, 1985.

With the rapid expansion of globalisation and the dismantling of economic and political obstacles, there is a growing demand in the global economy for greater certainty, precision, and flexibility in conflict resolution, posing new problems for arbitration institutions.

Though there are various procedures for resolving commercial conflicts, such as mediation and conciliation, in which parties reach mutual agreements, one of the reasons why arbitration is valued in the commercial realm is the binding nature of the judgement. However, under Sec. 34 of the Arbitration and Conciliation Act of 1996, the aggrieved party has recourse against arbitral verdicts on specific grounds.

Setting Aside Arbitral Award

The Arbitration Act of 1940 provides three types of remedies against arbitral awards: rectification, remission, and setting aside. However, the current situation differs in that the remedies have been combined into two. Furthermore, under the 1996 Act, the Arbitral Tribunal cannot review an Award on its own; the aggrieved party who has suffered as a result of the Arbitral Award must challenge it in accordance with the Law, and if the aggrieved party fails to apply under Sec. 34 for setting aside the Award, a de novo inquiry is not bound to arise on its own. According to the Supreme Court, "an arbitrator is a judge appointed by the parties, and as such, an award given by him is not lightly interfered with."

However, because the major goal of the Award is to make a legitimate award in the interest of justice, the Court is empowered to maintain a close eye on the Arbitrator's acts. With this goal in mind, the law provides for specific remedies against Arbitral Awards.

Sec. 34 of the Arbitration and Conciliation Act of 1996 empowers the Court or the Judiciary to interfere in the Arbitration process in order to set aside the Arbitration Tribunal's Award. This section discusses the application procedure as well as the grounds for setting aside the arbitral Award. Furthermore, a limitation time has been established within which the application must be filed with the Court.

Grounds for Setting aside an Award

Sec. 34 of the 1996 Act is consistent with Art. 34 of the UNCITRAL Model Law as well as Sec. 30 of the 1940 Arbitration Act. However, in light of Sec. 30 of the Arbitration Act of 1940, the reach of Sec. 34 is limited. The grounds for challenging an award under Sec. 34 are limited, because the term "Public Policy of India" lacks a defined definition under the 1996 Act.

Sec. 34(2)(a) of the Arbitration and Conciliation Act of 1996 outlines specific reasons on which the Court may set aside the arbitral judgement if the party demonstrates that:

- A party was hindered by some incompetence,
- The arbitration agreement is invalid under the law to which the parties to the Agreement have submitted it.
- There had been no sufficient notification of the arbitrator's appointment or the proceeding.
- The arbitral award deals with a dispute that does not come within the parameters of the arbitration submission, or the award contains a conclusion that goes beyond the limits of the arbitration submission.
- The tribunal's composition was not in conformity with the parties' agreement.

Furthermore, under Sec. 34(2)(b) of the Act, the court may set aside the Award if any of the following conditions are met:

- Arbitration cannot be used to resolve the dispute's subject matter.
- The arbitral award is contrary to Indian public policy.

Amendments brought in Sec. 34 under The Arbitration and Conciliation (Amendment) Act, 2015

The Arbitration and Conciliation (Amendment) Ordinance, 2015 makes significant changes to the Act with the goal of speeding up the arbitration procedure and eliminating court intrusion, making India a more appealing location for foreign investors and enhancing the ease of doing business in India.

Public Policy

The term "public policy" was not defined in the Arbitration and Conciliation Act of 1996, hence it remained vague. Due to the lack of a formal definition of the term public policy, the term had a broad connotation, allowing the courts to interpret it as they saw appropriate. The phrase is understood to suggest a broader public interest or public benefit. However, this provides an abstract description of the term without providing a concrete definition.

As a result, the explanation appended to sub-clause (ii) by the amendment Act has defined the scope and meaning of the expression where the arbitration award shall be considered to be against public policy if the award was persuaded by fraud or corruption or in violation of the fundamental policy of India Law or the basic notions of policy morality and justice.

The term "public policy" has been interpreted in various ways, and the breadth and meaning of the term have been a source of contention among many practitioners and academics. In its 246th Report, the Law Commission proposed limiting the application for setting aside an arbitral award to grounds of public policy and applying only when the award was persuaded or affected by fraud or corruption, or was against the fundamental policy of Indian law or

in violation of the most basic notions of morality. The Law Commission proposed the amendment first, and it was incorporated into the Amendment Act as a result.

The modification was implemented in order to limit the judicial interference of Courts in Arbitration. This is because the major reason for using arbitration to settle disputes is to resolve them quickly, and including courts in the process will simply add to the pendency and costs of the parties to arbitration. Furthermore, the change has added explanation 2 to sub-clause (ii), which means that when an aggrieved party seeks to set aside an arbitral decision on the basis of fundamental policy of Indian law, the courts are now forbidden from delving into the merits of the case.

Patently Illegal

Sec. 2A of the 1996 Amendment to the Arbitration and Conciliation Act provides for patent illegality as an additional reason for setting aside an arbitral judgement. This premise will only apply to arbitrations held in India, not international commercial arbitrations, as the section's wording indicates. In Administrative Law, "error of Law apparent on the face of the record" has been regarded as one of the grounds for invalidating a judicial or quasi-judicial matter under the writ of certiorari. If an arbitral award is inconsistent with any of the provisions of the Arbitration and Conciliation Act, 1996, it is considered a patent error on its face. Such a judgement or award is null and void since it has no legal impact and can thus be ruled unlawful and incapable of being implemented.

The term "public policy" refers to issues that are of general benefit to the public and are in the best interests of the people. The concept of what constitutes common good for people, what is in the best interests of people, and what is harmful or injurious to the common people has been debated and differed over time. However, an award that is clearly in violation of a legislation or statutory requirement and may be deducted from the face of the award cannot be stated to be in the interest of the common people or for the good of the people. Furthermore, such an award appears to have a negative influence on the administration of justice, and so it can be set aside as clearly illegal if it is contradictory to:

- fundamental policy of India
- the interest of India
- justice or morality
- if it is patently illegal

A final decree can only be challenged on a limited number of grounds, such as lack of jurisdiction or nullity. However, when the Appellate Court exercises revisional authority and a judgement is challenged before such a court, the scope of such court's jurisdiction expands. As a result, where the credibility of an award is called into doubt on the basis of "Indian public policy," a broader interpretation has to be added so that an award made by the Tribunal that is clearly illegal can be set aside, as held in Natural Gas Corp. Ltd v. SAW Pipes Ltd.

In Associate Builders v. Delhi Development Authority, the Supreme Court clarified what constitutes patent infringement. According to the Court, patent infringement includes the following:

- fraud or corruption
- contravention of substantive law
- error of law by the arbitrator
- contravention of the arbitration and Conciliation Act, 1996 itself
- the arbitrator fails to give consideration to the terms of the contract and usages of trade under sec. 28(3) of the Act
- the arbitrator fails to give a reason for his decision.

Furthermore, a caveat is inserted to subsec. 2A stating that if the court believes that there is an incorrect interpretation of the law, this cannot be the sole reason for setting aside the award. An award can only be challenged under Sec. 34 of the Act of 1996. As stated in Shanska Cementation India Ltd v. Bajranglal Agarwal, a single erroneous finding cannot be the subject of an award.

Patent Illegality in Public Policy

In SAW Pipes, the Supreme Court found that public policy was concerned with the public good and public interest. According to the court, an award that appears to be clearly in violation of statutory provisions cannot be argued to be in the public interest since it interferes with the administration of justice and is thus liable to be set aside as violative of public policy.

Intimation of A Notice to the Other Party

The Amendment has added a new subsec. 5 requiring that an application be submitted only after informing the other party of the duty to send a notice, accompanied with an oath by the applicant certifying his compliance with the requirement to send a notice. The principal purpose of including sub-sec. 5 is to notify the party in whose favour the award was passed of the action being taken by the party bringing an application to set aside the decision. Furthermore, this is consistent with the notion that a party to a suit has the right to obtain notice of any action taken by the opposing party in order to prepare for such action.

Foreign Arbitral Awards

The 1940 Act was intended to be a comprehensive code controlling all aspects of arbitration law, but enforcement of international arbitration agreements and awards was handled by the Arbitration (Protocol and Convention) Act 1937 and the Foreign Awards (Recognition and Enforcement) Act 1961. (hereinafter, FARE Act 1961, for brevity). India signed the Geneva Protocol in 1923 and the Geneva Convention in 1927, as well as the New York Convention in 1958. The Parliament passed the Arbitration (Protocol and Convention) Act in 1937 and the FARE Act in 1961 to give effect to its responsibilities under the Geneva and New York Conventions. Though the 1940 Act did not provide a public policy cause for excluding arbitration, the FARE Act 1961, which was based on the New York Convention, did include a specific ground on which a foreign award might be rejected enforcement for being adverse to public policy.

The 1996 Act

Meanwhile, it was thought that the 1940 Act was out of date in the age of globalisation, and that a new system was required to meet the needs of trade and business. As a result, the Arbitration and Conciliation Act of 1996 was enacted based on the 1985 UNCITRAL Model Law on International Commercial Arbitration. The 1996 Act aims, among other things, to consolidate and modernise the law on arbitration such that the Act encompasses all aspects of domestic and international business arbitration and conciliation. The 1996 Act is founded on the policies of party autonomy, little court intervention, and quick and efficient dispute resolution. The provision of law in Sec. 34 allowing for the challenge of arbitral awards is also founded on the same objective goals. It has been argued that the 1940 Act's extensive use of the power to set aside arbitral judgements contributed to the loss of the Act's intended aims. This was the time when UNCITRAL issued the Model Law on International Commercial Arbitration, which simplified the procedure and limited the grounds for setting aside arbitral verdicts. India embraced the Model Law provisions as well as the Model Law's doctrine of limited grounds for challenging arbitral judgements. In Sec. 34 of the 1996 Act, different types of challenges to awards are grouped together under a single heading: "putting aside." Except for Sec. 13(5) and 16(6), the grounds for challenge in Sec. 34 are exhaustive, and an award cannot be contested on any other grounds than those mentioned in the Act. Furthermore, the justifications in Sec. 34 are to be read narrowly in accordance with the Model Law's approach. In accordance with this approach, the courts interpreted Sec. 34(2)(b)(ii) in a limited manner and followed Renusagar, despite the fact that Renusagar was only relevant to foreign awards.

Conclusion

The legislature's principal goal in enacting the Arbitration and Conciliation Act of 1996 was to limit judicial intrusion and establish an alternate way for resolving commercial disputes that provides a quick justice delivery system. The amendments made to Sec. 34 of the Act by the Arbitration and Conciliation (Amendment) Act, 2015, have resolved many issues to a large extent while minimising judicial intervention, and have also clarified to some extent the term “public policy of India,” which was not precise prior to the amendment, as well as adding patent illegality as another ground. Another instrument for limiting judicial action under sec. 34 following the change is the addition of subsec. 6, which imposes a time limit for courts to resolve disputes within a year.

However, it is important to remember that, while the Arbitration and Conciliation Act provides an alternative to the litigation system, it is not a complete departure from the judicial apparatus; rather, it coexists with it.

Considering the current condition of arbitrator appointment, where the majority of them are government officials selected by the Central Government and are usually retired judges, they are mostly acclimated to the habit of conducting the hearing strictly according to procedures and law.

When the opposite side of the coin is examined, it is clear that the primary reason for the parties to choose Arbitration is to resolve their mutual legal rights and duties through an arbitral tribunal rather than a court of law.

As a result, it proposes little or no action by the courts. However, because the major goal of the Award is to assure the delivery of a lawful award in the interest of justice, the law allows the Courts to participate in the arbitral procedures to keep an eye on the Arbitrator. As a result, a balanced approach is essential to reveal the underlying purpose of the Act.

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