EUROPEAN LAW REVIEW
ISSN: 0307-5400
www.sweetmaxwell.org
Volume 4; Issue 4;Jun-Aug2012; Page No. 01-04

Recourse against arbitral award U/S 34 of the arbitration and conciliation act, 1996: An analytical appraisal

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Abstract
It is an incontrovertible that the process of arbitration is governed by the law of seat of the arbitration. Therefore, in case of international commercial arbitration having the seat of arbitration in India, and in case of domestic arbitration (both parties are Indian), section 34 under Part I of the Arbitration and Conciliation Act of 1996 (hereinafter referred as 1996 Act) lays down the provisions under which applications could be filed to set aside arbitral awards.
This article is an attempt to critically analyse section 34 of the Arbitration and Conciliation Act, 1996 in the light of recent amendment of 2015 to the Act and judicial pronouncements.

Keywords: Arbitration, Award, Judicial pronouncement, amendment

1. Introduction

Application for setting aside the arbitral award: section 34

It is an incontrovertible that the process of arbitration is governed by the law of seat of the arbitration. Therefore, in case of international commercial arbitration having the seat of arbitration in India, and in case of domestic arbitration (both parties are Indian), section 34 under Part I of the Arbitration and Conciliation Act of 1996 (hereinafter referred as 1996 Act) lays down the provisions under which applications could be filed to set aside arbitral awards.
It is to be noted that the underlying philosophy of section 34 of the 1996 Act strives to bring a balance between the party autonomy and judicial interference into an arbitral process. Thus the section envisages a position whereby an arbitral award can be challenged for the purpose of setting aside the same at the first instance without much delay [1].
Commenting on the nature of Sec. 34, Supreme Court (SC) in *Indu Engg & Textiles Ltd v. D.D.A.* [2] has observed that, an arbitrator is a judge appointed by the parties and as such an award passed by him is not to be lightly interfered with. The conclusion of an arbitrator on facts, even if erroneous in the opinion of the court cannot be interfered with. Where the view of the arbitrator is a plausible view and cannot be ruled as one which it is impossible to accept, the court should not substitute its own view in place of that of the arbitrator. But this does not mean there is no check on the arbitrators conduct. In order, therefore, to assure proper conduct of proceedings, the law allows certain remedies against an award. These remedies can be obtained through a court of law having jurisdiction over the matter.

(i) Incapacity Of Party: **[S. 34 (2)(a)(i)]**

The present section enunciates that an arbitral award may be set aside by the court only when the party making application furnishes the proof that the other party suffers from some incapacity. Thus, if a party to arbitration is not capable of looking after his own interests and is not represented by a person who can protect his interests, the award will not be binding on him and may be set aside on his application. For instance, if a minor, or a person of unsound mind is a party, he must be properly represented by a guardian, otherwise the award would be liable to be set aside.

(ii) Invalidity of an agreement: [S. 34 (2)(a)(ii)]

The validity of an arbitration agreement can be challenged on any of the grounds on which the validity of the contract may be challenged. In cases where the arbitration clause is contained in a contract, the arbitration clause will be invalid if the contract is invalid. If the arbitration agreement is invalid, the reference there under and consequently the award on the basis of such reference would be invalid and can be set aside.

(iii) Absence of notice, unable to present case: [S. 34 (2)(2)(iii)]

The present section states that an arbitral award may be set aside by the court only if the party making the application furnishes the proof that the party was not given a proper notice of the appointment of an arbitrator, or that the party was not given proper notice of the arbitral proceedings, or that the party was forced for some reason enable to present his case.
Section 12 of the 1996 Act gives a party the right to challenge the appointment of an arbitrator on the ground if the party is not given notice of the appointment of an arbitrator [3]. Thus, it is essential that the parties be given proper notice of the arbitral proceedings in order to file statements of claim or defence as required by section 23.
Thus, the failure to give notice to the party on various accounts eventually lead to the setting aside of the arbitral award as it thwarts the observance of the principles of natural justice [4].

(iv) Award beyond scope of reference: **[S. 34(2)(a)(iv)]**

It provides that an arbitral award is liable to be set aside if it deals with a dispute which is not contemplated by agreement, or is not falling within the terms of the reference, or it contains a decision in matters beyond the reference. Further, the proviso to the said section provides that if the decision in respect of the matter outside the tribunal's jurisdiction can be separated from the decision on matters within its jurisdiction, then only that

part of the arbitral award which contains decisions on matters outside its jurisdiction will be set aside.

There is a distinction between disputes as to the jurisdiction of the arbitrator and dispute as to which the jurisdiction should be exercised. The court can interfere in the former type of situation where there has been a challenge to the jurisdiction of the arbitrator [5].

Further, the 1996 Act provides for the enlargement of reference and it is to be prominently noted that the scope of reference becomes enlarged when the parties file their statement putting forth claims not covered by the original reference [6]. As discussed above, section 16 marks the stages at which objections to jurisdiction should be raised.

Where it appears that a part of the award is upon a matter not referred and such part can be separated from the other part without affecting the decision of the matter referred, the court can modify the award accordingly. In connection with the requisites of a valid award that the award should not go beyond the submission and that if it does and the excess part cannot be separated, the whole of the award becomes void [7].

In *Olympus Superstructures (P) Ltd. v. Meena Vijay Khaitan* [8], M. Jagannadha Rao J. stated that, it may be argued on one side that the time limit set in clauses 2 and 3 of section 16 are mandatory and do not permit the question to be raised at a later point of time even under section 34. And opposite view could be that these being jurisdictional issues, the fact that they were not raised earlier could not preclude the question from being raised under section 34 as consent, express or implied, could not confer jurisdiction.

(v) Illegality in composition of tribunal or in procedure: [S. 34 (2) (A)(V)]

As per the provision, an arbitral award may be set aside by the court only if the party making the application furnishes proof that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the in the absence of agreement as to procedure, the procedure prescribed by the Act was not followed. Thus, the said section requires that the composition of the Arbitral tribunal and the procedure which is required to be followed by arbitrators, should be in accordance with the agreement. In absence of such agreement, it should be in accordance with the procedure prescribed in Part 1 of the Act [9].

In this regard it is significant to discuss section 28 of the 1996 Act which provides that domestic arbitration shall be carried out in accordance with the substantive law for the time being in force in India [10]. Further, the said section provides that in an international commercial arbitration having the seat of arbitration in India, the arbitral tribunal shall decide the dispute in accordance with the rules designated by the parties as applicable to the substance of the dispute [11]. Unless otherwise agreed by the party, any designation by the parties of the law or legal system of a given country shall be construed as directly referring to the substantive law of that country and not to its conflict of laws rules [12]. It is provided further that failing any designation of the law under clause (a) by the parties, the arbitral tribunal shall apply the rules of law it considers appropriate given all the circumstances surrounding the dispute [13].

In *ONGC Ltd. v. Saw Pipes Ltd* [14], the award was held to be violative of sub-section 2 and 3 of section 28 of the 1996 Act. Hence, the award was set aside under sub-section 2 of section 34. The said section provides that the arbitral tribunal can decide the matter according to its own good sense (ex *aequo etbono*) or on the basis of amicable settlement (*amiable compositeur*) but only if expressly authorized by the parties. Also, sub- section 3 of the said section provides that the arbitral tribunal shall decide the dispute in accordance with the terms of the contract and after taking into account the usage of the trade applicable to the transaction.

(vi) Arbitrability of dispute: [S. 34(2)(B)(I)]

The existence of an arbitrable dispute is a condition precedent for the exercise of power by an arbitrator. Thus accordingly, as per the section an arbitral award may be set aside by the court if it finds that the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force [15]. Generally almost all matters in dispute, not being of a criminal nature, may be referred to arbitration [16].

(vii) Public policy S. 34 (2) (b)(ii)

The present section provides that an application for setting aside an arbitral award can be made if the arbitral award is in conflict with the public policy of India. Further, the explanation of clause (b) of sub- section 2 of section 34 provides that without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81. Thus, it necessarily indicates that an award obtained by suppressing facts, by misleading or deceiving the arbitrator, by bribing the arbitrator, by exerting pressure on the arbitrator etc, would be liable to set aside [17].

Parties have autonomy to enter into contracts, when autonomy is outweighed by the public interest, the court will refuse to enforce the contract [18]. The concept has been taken to connote larger public interest or public good. Thus, it undoubtedly covers the policy of law and indicates that whatever would tend to abstract public justice or violate a statute, whatever is against good morals is against public policy [19].

In *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd*, [20] Court held that the term "public policy of India" should be given wider interpretation. The award could be set-aside on the ground of public policy if the award is made in contravention to:

- Fundamental policy of India
- Interest of India
- Justice or morality; Or,
- If it is patently illegal.

The Court also held that the term "Public Policy" is not defined under the Act. It has to be constructed in the context it has been used and its definition may vary from generation to generation. In Arbitration Act this term has to be given meaning in the light and principal underlying Arbitration and Conciliation Act, 1996, Contract Act and Constitution of India.

While delivering the judgment in *ONGC* case, the two judges' bench bypassed the ruling of the three judges Bench of Supreme Court in the *Renusagar* case [21]. While the Bench in *Renusagar* case held that the term 'public policy of India' was to be interpreted in a narrow sense, the Division Bench went ahead of the prior precedent and expanded the same to such an extent that arbitral awards could be reviewed on their merits.

The SC in *SAW Pipes*, expanded the concept of public policy

and held that, the award would be contrary to public policy if it is "patently illegal" which a step was backward in laws relating to alternate dispute resolution in the era of globalization.

Some critics have argued that, the interpretation given to public policy in SAW Pipes "will cause unnecessary delay in the resolution of disputes [22]. They also suggest that losing parties will challenge awards as contrary to the public policy of India, perhaps on spurious grounds, and that such challenges, "even if unsuccessful, can delay enforcement for several years [23].

Moreover, as per the *ONGC* case, the award must be in accordance with the agreement of the parties and the agreement of the parties must lie within the parameters prescribed by the non-derogable provisions of Part I. If the award does not meet the said criteria, it may be set aside under section 34(2) (a) (v) read in conjecture with section 28(1) (a).

Thus, *ONGC's* case modifies and expands the purview of the doctrine of "Public Policy" which was delimited by *Renusagar's* case. It has rightly set the clock back to the pre-1996 era wherein delay in the arbitral awards had become the order of the day. It has further added one more head of "Patent Illegality" under the doctrine of "Public Policy", provided that the illegality goes to the root of the matter or is as unfair and reasonable as it shocks the conscience of the court. Contrarily, if the courts have not modified the doctrine, it would have failed in its duty of preventing subversion of societal goals and endangering public good [24].

Thus, recognition or enforcement may be refused if the award is in respect of a matter which is contrary to the public policy. What has to be shown that there is some element of illegality or the enforcement of the award would be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public [25].

Amendment of 2015 to Sec. 34

Explanation 1 to the term 'public policy of India' substituted in Section 34(2) (b):

Arbitral award shall be treated as an award in conflict with the public policy of India only where making of the award was induced or affected by fraud or corruption or was in violation of provisions of confidentiality (section 75) or admissibility of evidence of conciliation proceedings in other proceedings (section 81); or is in contravention with the fundamental policy of Indian law; or it is in conflict with the most basic notions of morality or justice.

Explanation 2 inserted in Section 34(2) (b):

The test as to whether the award is in contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.

Insertion of new sub section (2A) in Section 34:

This provision gives an additional ground of patent illegality to challenge an arbitral award arising out of arbitrations other than international commercial arbitrations.

Insertion of new sub section (5) in Section 34:

An application for setting aside of award under this section is to be filed after issuing prior notice to the other party.

Insertion of new sub section (6) in Section 34:

A period of one year has been prescribed for disposal of an application for setting aside an arbitral award.

Critique on Sec. 34

- Section 31 (3) requires reasons to be given in the award (except in cases where parties otherwise agree that reasons need note given or the award is one by settlement), no adequate provision is made in Section 34 in this behalf, if reasons are not given in the award [26].
- The ground of misconduct was incorporated under the old Act of 1940 in sec.30 (a) – '*the arbitrator must have misconducted himself or the proceedings*'. The ground is absent in 1996 Act.
- The period of three months after passing of award u/s 34 (3), leads to undue delay to arbitral proceedings. The period may be reduced to 45 days, subject to further extension by court.

2. Conclusion

The comprehensive analysis of section 34 of the 1996 Act suggests that the power of judicial review can be exercised by the court only in accordance with said section and no other, as it is explicitly mentioned in the language of the said section that recourse to a Court against an arbitral award may be made only by an application for setting aside such award in accordance with sub- section (2) and subsection (3) [27]. But as observed above that the courts have tried to stretch their fangs in the garb of judicial review by expanding the scope of the doctrine of public policy so as to include the patent illegality in it and expanding the extent of judicial review of the international commercial arbitral awards ignores the needs of the international mercantile community.

The courts must keep in mind while deciding objections under this section that the intention of the legislature in repealing the 1940 Act and substituting it by the 1996 Act was primarily to attach finality to arbitration proceedings and interference by the courts was intended to be curtailed drastically [28].

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