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Interpreting section 34 of The Indian Arbitration and Conciliation Act, 1996 in light of Arbitrability and Public Policy.

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Abstract

Numerous reasons for annulling an arbitral award in a domestically situated arbitration, along with an award made in accordance with the New York Convention or the Geneva Convention, depending on the circumstances, are statutorily provided for within the Arbitration and Conciliation Act, 1996 (hereinafter "Act"). The issues of arbitrability, policy making, and patent validity have received the most attention among the several reasons listed in the Act. Although the Act's goal is to

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limit the role of the courts, challenges on the basis of arbitrability and public policy have arisen often, necessitating repeated sittings of Indian courts to develop, interpret, and address these grounds for challenge. It is further recognised that the question of arbitrability gives the courts the authority to decide whether the conflict is admissible or not, and that in doing so, the courts base their decision primarily on "public policy." In order to comprehend the current situation and breadth of the aforementioned basis of dispute, it is essential and crucial to track the legality and jurisdictional pronouncements in light of the subjection and involvement of the judiciary on the basis of arbitrability and political administration.

Keywords: Set-aside, Public Policy, Arbitrability, Arbitral Award

Introduction

In recent years, arbitration has become a popular forum for resolving disputes, both domestically and internationally. The concept of party autonomy, which allows parties to choose arbitration as a means of dispute resolution, is not absolute and is limited by the concepts of public policy and arbitrability. These limitations are recognized in international laws such as the United Nations Commission on International Trade Laws and the New York Convention. In India, the Indian Arbitration and

Conciliation Act of 1996 also allows for the setting aside of arbitral awards on the grounds of arbitrability and public policy. The author of this paper aims to explore the evolving jurisprudence of these two concepts in the Indian arbitration regime.

Understanding The Law Point, Content And Recent Trends

1. Using arbitrability to set aside an arbitral award

1.1 Meaning of Arbitrability

The concept of arbitrability, or whether a dispute can be adjudicated by an arbitral tribunal, has evolved through case law over time. The first discussion of arbitrability occurred in the case of *Booz Allen & Hamilton v. SBI Home Finance Ltd*[2], where the court held that national courts, rather than the arbitral tribunal, should decide on the arbitrability of a subject matter. The court also outlined three aspects of arbitrability: the suitability of the dispute for private arbitration, the coverage of the dispute by the arbitration agreement, and the scope of submission to arbitration. However, the court noted that even with a valid arbitration agreement, the court can refuse to refer the parties to arbitration if the subject matter is not suitable for arbitration. This case established a two-fold test for determining arbitrability, involving rights in *personam* and

[2] Booz Allen & Hamilton v. SBI Home Finance Ltd., (2011) 5 SCC 532.

rights *in rem*. The case has been criticized for ignoring the principle of *kompetenz*, leading to judicial interference in arbitration, and failing to define the extent of rights in *personam* and in rem in relation to arbitration.

1.2 Landmark Judgements which led to evolution of this concept

The Indian courts have extensively developed the concept of arbitrability, which was first established in the case of Booz Allen, in order to minimize the extent of challenges under the 1996 Act. In the case of *N. Radhakrishnan v. Maestro Engineers*[3], the Supreme Court rejected an application under section 8, stating that it would be "furtherance of justice" for allegations of fraud and manipulation of finances in a partnership firm to be tried in a civil court. However, the Delhi High Court in the case of *HDFC Bank v. Satpal Singh Bakshi*[4] held that the creation of a specialized tribunal does not exclude the jurisdiction of civil courts and will not hinder arbitration proceedings. This was criticized in the case of *Vidya Drolia v. Durga Trading Corporation*[5], and was declared bad in law. The principles in this case were further developed in *Kingfisher Airlines v. Prithvi Malhotra*

[3] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72.
[4] HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del. 4815.
[5] Vidya Drolia v. Durga Transport Corporation (2021) 2 SCC 1.

Instructor[6], where the court held that disputes involving public policy cannot be settled through arbitration. The judgment in *A. Ayyasamy v. A Paramasivam*[7] introduced a two-fold test to determine arbitrability, which was upheld in *Rashid Raza*[8]. The twin test for arbitrability established by the apex court in this case is: 1) Does the plea permeate the entire contract, rendering it null and void? 2) Do the allegations of fraud touch upon the internal affairs of the parties, having no implications in the public domain?

The case of *Avitel Post Studioz*[9] affirmed the principles of the "serious allegation" test as established in both Ayyasamy & Rashid Raza. This test holds that a dispute is arbitrable if the allegations of fraud do not have a "public flavor." The case of *Vidya Drolia v. Durga Transport Corporation*[10] established a four-fold test for determining the arbitrability of disputes. The test involves: (1) determining the kind of rights involved (i.e. rights in rem vs. rights in personam), (2) considering the effect on the public domain (i.e. *erga omnes* effect), (3) determining if the matter involves sovereign functions, and (4) checking if the matter is barred by statutory provisions.

[6] Kingfisher Airlines Ltd. v. Prithvi Malhotra Instructor, (2013) (1) AIR Bom R 25.
[7] A. Ayyasamy v. A Paramasivam, (2016) 10 SCC 386.
[8] Rashid Raza v. Sadaf Akhtar, (2019) 8 SCC 710.
[9] Avitel Post Studioz Limited & Ors. v. HSBC PI Holdings, 2020 SCC OnLine SC 656.
[10] 9 Vidya Drolia v. Durga Transport Corporation (2021) 2 SCC 1.

1.3 Analysis

The use of arbitration as an alternative dispute resolution (ADR) mechanism has been a topic of debate in India for over a decade. The goal of using ADR was to reduce the number of court cases and allow parties to resolve disputes on their own terms. However, India has yet to fully embrace arbitration and its principles of party autonomy and out-of-court resolution. The arbitration system in India has faced interference from the courts since the implementation of the 1940 and 1996 legislations. Issues concerning the location of arbitration proceedings (seat-place), the arbitrability of certain disputes, and appointments have been among the matters that have been addressed by the courts. In the case of *Sukanya Holdings Pvt. Ltd. v. Jayesh H. Pandya*[11], the Supreme Court upheld the reasoning of the High Court and stated that the scope of section 8 of the Act is broader than just referring parties to arbitration. The court can also decide whether a matter falls within the scope of arbitration and issue directions to parties who are not part of the signed agreement.

[11] Sulanya Holdings Pvt. Ltd. v. Jayesh H. Pandya, (2003) 5 SCC 531.

2. Arbitral Award in conflict with the Public Policy of India

The concept of "public policy" has been difficult to define because it varies depending on the jurisdiction. The changing nature of this term over time and across different societies has resulted in many different interpretations. Some consider it to be vague and unstable, while others have described it as a "treacherous ground for legal decision."[12] This difficulty in defining the term has been likened to trying to control an "unruly horse"[13] that can take you to unexpected places.

2.1 Public Policy in accordance with the New York Convention and UNCITRAL Model Law

The UNCITRAL Model Law and the New York Convention both recognise the concept of public policy as a valid defence for refusing to recognise and enforce foreign arbitration awards. However, the UNCITRAL Model Law does not provide a specific definition of the term. The 18th Commission report offers guidance, stating that "public policy" is not the same as a state's political stance or international policies, but rather encompasses the fundamental principles of justice.[14]

[12] Janson v. Driefontein Consolidated Mines Ltd. [1902] AC 484: [1902] 8 WLUK 12.
[13] Richardson v Mellish (1824) 2 Bingham 229.
[14] Report of the United Nations Commission on International Trade Law, 18th Session, Supplement No. 17 (A/40/17) (3-21 June 1985), para 296, available at https://documents-dds-

The New York Convention under Article V(2)(b)[15] also acknowledges the importance of "public policy" and allows for the refusal of recognition and enforcement of an arbitration award if it is found to be in conflict with the public policy of the country where recognition is sought.

2.2 Scope of Public Policy as a ground for setting aside an Arbitral Award under Indian Law

According to section 34 of the 1996 Act, an arbitral award may be set aside by the court if it conflicts with the public policy of India. This provision was not included in the 1899 Act[16] or the 1940 Act[17]. As was already said, it is important to highlight that the 1996 Act properly and expressly included "public policy" as a cause for rescinding an award in addition to other pertinent and essential grounds. The 1996 Act, including Sections 34(2)(b)(ii), 48(2)(b), and 57(1)(e), authorises and permits the public policy defence with respect to domestic awards[18] as well as the execution of New York and Geneva Convention awards.

ny.un.org/doc/UNDOC/GEN/N85/325/11/PDF/N8532511.pdf?OpenElement.

[15] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature June 10, 1958, 330 U.N.T.S. 38, Article V(2)(b), available at https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=626&opac_view=-1#:~:text=Article%20V%20(2)(b),contrary%20to%20its%20public%20policy.

[16] The Indian Arbitration Act IX of 1899.

[17] The Arbitration Act, 1949, Act No. 10 of 1940 [11th March 1940].

[18] Indian Arbitration and Conciliation Act, 1996.

The 2015 Amendment to the 1996 Act[19] added Explanations 1 and 2 to section 34(2)(b)(ii) to provide more clarity on what constitutes a conflict with the public policy of India, such as fraud, corruption, violation of Indian law, and conflicts with morality and justice. Explanation 2 also provides a test for examining an award to determine if it contravenes the fundamental policy of Indian law. This amendment expanded the meaning and scope of the term "public policy" under the Indian Arbitration and Conciliation Act.

2.3 Landmark Judgements which led to evolution of the term "Public Policy"

The doctrine of public policy in India is not limited to sections 34 or 48 of the Indian Arbitration Act of 1996. While the 1996 Act does include "public policy" as a reason for setting aside an arbitral award, the term is not defined in that Act or the Indian Contract Act of 1872. The courts have therefore had to interpret the concept of "public policy" in various cases. In *Renusagar Power Co. Ltd. v. General Electric Co.*[20], the court held that enforcement of an award can be denied if it is contrary to the fundamental public policy of India, the interests of India, or justice or morality. This case also distinguished between the application of the

[19] The Arbitration and Conciliation (Amendment) Act, 2015, No. s.34(2)(b).
[20] Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860.

doctrine of public policy to domestic and foreign arbitration. The doctrine is seen as applying more narrowly to foreign arbitration. In *Oil and Natural Gas Corporation v. Saw Pipes*[21], the court added "patent illegality" as a ground for setting aside an award, in addition to the grounds established in Renusagar. The court in *McDermott International Inc v. Burn Standard Co. Ltd.*[22] later clarified that "patent illegality" must be so unfair and unreasonable as to shock the conscience of the court in order for an award to be set aside on this ground. In *D.D.A. v. R.S. Sharma & Co.*[23], the court provided a summary of the scope of section 34 of the 1996 Act, stating that an award can be set aside if it is contrary to substantive provisions of law, the 1996 Act, the terms of the contract, patently illegal, prejudicial to the rights of the parties, contrary to the fundamental policy of Indian law, the interests of India, or justice or morality.

3. Arbitrability & Public Policy

The issue of arbitrability determines whether or not a dispute is suitable for arbitration. In making this determination, courts often consider "public policy" as a key factor. This concept was introduced through the

[21] Oil and Natural Gas Corporation v. Saw Pipes, AIR 2003 SC 2629.
[22] McDermott International Inc v. Burn Standard Co. Ltd., (2006) 11 SCC 181.
[23] D.D.A. v. R.S. Sharma & Co., (2008) 13 SCC 80.

case of Renusagar, which distinguished between international and domestic arbitration. In general, the issue of public policy is more relevant in domestic arbitration, as courts have limited power in international arbitration due to the application of conflict of laws. However, it is worth noting that non-arbitrability of a dispute does not necessarily mean that the arbitral agreement is invalid, but rather that the subject matter has been wrongly applied. Awards rendered by such tribunals can be challenged on the basis of public policy. The scope of

challenging an award on the basis of public policy in international arbitration was first addressed in the case of *Bhatia International v. Bulk Trading*[24], in which the court held that parties to an international arbitration can seek remedies under Part I of the relevant act. This was later clarified in the case of *Bharat Aluminium Co.*[25], in which the court emphasized that national courts should not intervene in international arbitration and should not consider the merits of the case. In general, objections to the arbitrability of a dispute can be raised at any time, including before, during, or after the arbitration proceedings. However, public policy as a ground for objection is typically raised after the award has been made, during the enforcement process.

[24] Bhatia International v. Bulk Trading, [2002] 4 SCC 2629.
[25] Bharat Aluminium Co. v. Kaiser Technical Services Inc., Civ. App 3678 of 2007.

Conclusion

The concepts of "arbitrability" and "public policy" have been changed and interpreted in various judicial decisions. Although these grounds can be used to challenge an arbitral award under section 34 of the 1996 Act, it is difficult to do so and requires careful evaluation of the facts and legal situation of the case. The application of the four-fold test in Vidya Drolia will improve the understanding of arbitrability, and reduce the use of arbitrability as a tool to set aside the award under section 34 of the Act. "Public policy" as a ground for challenging an award is limited by the tests and grounds set out in judicial precedents, and the scope and application of "public policy" has been expanded and explained by the 2015 amendment. Therefore, the series of judgments limiting the scope and application of these grounds has limited the intervention of courts and strengthened the limitations on party autonomy.