RESOLUTION IS JUSTICE!

INTERNATIONAL JOURNAL FOR DISPUTE RESOLUTION

ISSN NO.: 2583-8989

VOLUME 1 ISSUE 1

2023

A STUDY ON SETTING ASIDE OF AN ARBITRAL AWARD WITH THE HELP OF CASE LAWS

Pranav Kapur[1]

ABSTRACT

The topic ***"A Study On Setting Aside Of An Arbitral Award With The Help Of Case Laws"*** is a subject of genuine interest and importance in the area of legal evaluation of the reasons for nullifying arbitral awards. The study discusses the court's ability to intervene during the consideration of any challenge to an arbitral decision reached by the arbitral tribunal. The Arbitration Act, 1940 and the act of 1996, when used in this context, somehow failed to give the term "Public Policy" a specific dimension along with the other grounds for setting aside Arbitral Awards. As a result, it provided a wide opportunity and example for inducing the Judiciary to interfere with the arbitral process. The term of "Public Policy" has been somewhat narrowed by the many amendments made to the Arbitration and Conciliation Act of 1996, but more changes are still needed to make the practise of setting aside arbitral awards an exception rather than a common occurrence. This article evaluates the many changes made to Section 34 of the Arbitration and Conciliation Act of 1996, identifying its shortcomings and stressing the ways in which they allow for the non-execution of arbitral rulings.

KEY WORDS - Lex Arbitri, Law of the Contract, Public Policy.

INTRODUCTION

Arbitration is a legally binding procedure which is initiated by referring a disagreement or dispute between two or more parties to an arbitral tribunal for judicial adjudication of their legal rights and obligations in accordance with the applicable laws.[2] This referral may result from an earlier understanding between the parties, from a subsequent agreement, or from a statutory obligation. Typically, the arbitral forum's ruling is referred to as a "award". An arbitral award is the final and legally binding verdict rendered by a single arbitrator or an arbitral tribunal that fully or partially settles the issue that was brought within its purview. The arbitral award is binding in the same way as a judicial judgement. This reform has facilitated a

[1] The author is a student at Symbiosis Law School, Hyderabad.
[2] 1 Fali Nariman, Arbitration in India 69 (Wolters Kluwer International 2021).

decline in litigation in certain sectors of arbitration. Previously, an award could not be enforced except if the court ordered for it to be filed and a decree issued in accordance with its contents.[3]

The 1899 Indian Arbitration Act was modelled after the 1889 English Arbitration Act. Then, in 1996, Parliament approved the Arbitration and Conciliation Act, relying at the "UNCITRAL Model Law on International Commercial Arbitration from 1985". Prior to the adoption of the 1996 Act, Section 30 of old act provided relatively wide grounds for vacating an arbitral award. 'Section 34(2)' of the Act, in contrast, seeks to limit the grounds for disputing an award. In order to serve as a check on arbitrator's powers and prevent them from exceeding their authority, setting aside procedures are given. However, there is another school of thought that holds that the possibility of annulling an arbitral ruling must not be considered. The parties should adhere to their award, and any error, regardless of how exaggerated it may be, or unjust award, should be considered as a final decision.[4]

The parties are precluded from appealing an arbitral award on its merits, and the court is unable to intervene on its merits. However, this does not imply that there's no control over the arbitrator's behaviour. To ensure the proper conduct of a procedure, the law permits several remedies against a judgement.[5] There is no mechanism for appealing an arbitral ruling, which is conclusive and enforceable between the parties. To examine malpractice, the court may review the arbitrator's file, but not interrogate it. Nonetheless, under Section 34[6] of the Arbitration and Conciliation Act, 1996, an aggrieved party may move to court to vacate the arbitral decision on the basis of certain defined circumstances.[7]

SETTING ASIDE OF AN ARBITRAL AWARD

Not everyone accepts loss with grace. Therefore, if an arbitral ruling goes against one of the disputing parties, he moves to overturn it. Only the reasons outlined in Section 34 of the Act may be used to vacate an award. The purpose of putting aside is to amend the award in whole or in part. The Supreme Court has said, "An arbitrator is a judge chosen by the parties, and as such, his award should not be tampered with lightly". However, this does not imply that there

[3] K.D. Kerameus, *"Waiver of Setting Aside Procedures in International Arbitration"*, 41 The American Journal of Comparative Law (1993).
[4] "Bungo Steel Furniture Pvt. Ltd. v. Union of India, AIR 1967 SC 378".
[5] A. Redfern & M. Hunter, "Law & Practice of International Commercial Arbitration" 404 (Sweet & Maxwell, 2004).
[6] The Arbitration and Conciliation Act 1996 S 34.
[7] "I-Pay Clearing Services Private Limited v. ICICI Bank Limited, 2022 SCC OnLine SC 4."

is no control over the arbitrator's actions.[8] To ensure the proper conduct of a procedure, the law permits several remedies against a judgement. Under the abolished 1940 Act, an award was subject to three remedies: modification, remission, and setting aside. The 1996 Act categorises these remedies into two types. In the case of *Adarsh Kumar Khera v. Kewal Kishan Khera*[9], the arbitral decision was tossed out since it was formed without the parties' knowledge, it was considered invalid, and both sides demanded its revocation. Insofar as the remedy included the correction of mistakes. Usually, the relief for setting aside consists of returning the award to the Tribunal for correction of flaws. This research argues that while resort to arbitration was meant to make the "dispute resolution system" simple and less complex, arbitration was never intended to be insensitive to the principles of fairness and justice. Thus, in case the 'arbitrator' does not adhere to the standards of fairness, the injured party must have a remedy, since justice must not only be speedily administered, but it must also seem to be administered. The contention about the effectiveness of a arbitral ruling lacks merit. Recently, the Hon'ble Supreme Court ruled in favour of minimal judicial intervention and holding that courts can't alter, edit, or change an arbitral ruling in proceedings initiated under "Section 34 of the Arbitration Act".[10] "The Civil Procedure Code" has procedures for review and change. Similarly, the assumption that arbitration is subordinated to adjudication by offering setting aside procedures is false. Arbitration and adjudication are only alternative methods of pursuing justice. Therefore, if one approach fails to produce justice, the other way should be used. Both must be seen as complimenting one another rather than competing for domination.

SECTION 34 - APPLICATION FOR SETTING ASIDE ARBITRAL AWARD

1. It precludes any remedy against an arbitral award other than the one specified in Section 34(1).
2. It restricts the grounds for challenging the award under subsection (2) of section 34.
3. In subsection (3) of section 34, it provides a very little timeframe within which the application for setting aside may be lodged.
4. It allows for the award to be remitted to the arbitral tribunal for correction of flaws.

In accordance with subsection (3) of section 34, a request to set aside a decision must be made within three months, commencing on the day the applicant receives the award. The subsection's

[8] Srinivasan and Badrinath, "*Public Policy and Setting Aside Patently Illegal Arbitral Awards in India",* 35 (March 27, 2008).
[9] Adarsh Kumar Khera v. Kewal Kishan Khera, 2019 SCC Online Del 6636.
[10] "Project Director, National Highway Authority of India v. M Hakeem & Anr., 2021 SCC OnLine SC 473".

proviso states: the applicant can demonstrate that he was restrained by adequate reason from submitting the request within 3 months, he/she can be allowed extra 30 days to do so, but not longer.[11]

In *Union of India v. Tecco Trichy Engineers & Contractors*[12], the Hon'ble Supreme Court ruled that the statute of limitations for filing an application under "Section 34 of the Arbitration Act" begins only after a proper delivery of the decision under Section 31(5).

GOVERNING LAW OF CONTRACT

The appropriate law of the contract, the applicable law of the contract, or the substantive law of the contract are some of the several terms for the "governing law of the contract". All of these classifications pertain to the law controlling the parties' contractual relationship with regard to the contract's formation, legality, performance, remedies, and other features that mainly deal with the relationship's substantive issues.[13] In *National Thermal Power Corporation v. The Singer Co.*[14], the Hon'ble Apex Court expressed that "In India, the acknowledgment of a person's choice seems to be governed more by common law than by a particular regulation". Generally, the party autonomy concept is used to accept the parties' choice of the law to regulate the contract. The essential tenet of the party autonomy concept is that it is desirable for the parties to a contract to choose the law that best suits their cross-border transaction. The notion, which is almost generally acknowledged with the exception of state policy constraints, is crucial to contractual relationships in global trade.[15]

LAW OF THE ARBITRATION AGREEMENT

The arbitration agreement's capacity, legality, application, and interpretation are all determined by the applicable law (Lex Arbitri). In cases where the parties have specifically selected the law to govern the arbitration agreement, such decision will be honoured under the party autonomy theory. When there is no stated choice of legislation, the issue becomes difficult. In these situations, it is often assumed that the arbitration clause would be governed by the same law that the parties have selected to regulate the contract as a whole. This is a presumption that

[11]Arunav Prakash, "*Setting Aside of Arbitral Awards under section 34 - An Ambiguity of Legal Interpretation"*, 12 journal of Xi'an University of Architecture & Technology 1747 (2020).
[12] Union of India v. Tecco Trichy Engineers & Contractors, AIR 2005 SC 1832.
[13] Mustill & Boyd, "*Law and Practice of Commercial Arbitration in England"*, 2 (1989).
[14] National Thermal Power Corporation v. The Singer Co., AIR 1993 SC 198.
[15] Dhanrajamal Gobindram v. Shamji Kalidas, MANU/SC/0362/1961.

may be contested in some situations, such as where the contract law disallows the parties' decision to hold the arbitration at a location other than where the contract law is applied. The law having the closest link shall regulate these features in cases where the parties have not agreed on the law governing either the contract or the arbitration agreement.[16] The law that applies to the 'arbitration agreement' would be the seat's law if the parties had selected a location or seat for the arbitration. This is because the arbitration agreement will be most closely related to the seat's law.[17] The closest connection test takes into account a variety of elements, including the place of performance, the parties' places of residence, the location of the arbitration, the text of the contract, the structure of the papers, the currency of payment and more.[18]

PUBLIC POLICY

According to the Act, an arbitral ruling may be annulled if it conflicts with Indian public policy. In the Act, the phrase "public policy" is not defined. Public policy is defined as "a collection of ideas in accordance with which communities need to be controlled to ensure the welfare of the whole community or public". It is obvious that the word "public policy" is extremely broad, dependent on certain socio-cultural ideas that are prevalent in the community, and hard to confine. The fundamental inclusive and exclusive character of public policy cannot be categorised.[19]

In England, "public policy" is defined as anything that does not contravene the fundamental moral principles and beliefs of the English system, anything that does not prejudice national interests or relations with other nations, and anything that does not contravene the English conception of individual liberty and freedom of action. As a result, we could observe that England had specific and constrained areas of public policy.[20]

The Apex Court provided a limited interpretation of public policy in it's prior rulings in "*Gherulal Parekh v. Mahadeodas Maiya"*.[21] It was stated that some fixed heads fell within Indian public policy and that looking for new heads would not be wise. On the other hand,

[16] id 14.
[17] Alan Redfern , J. & Martin Hunter, *Redfern and Hunter on International Arbitration*, 184 (2009).
[18] The Hague Conference on Private International Law, "Commentary on the Principles on Choice of Law in International Commercial Contract" (2015),
[19] Haryana Tourism Limited v. M/s Kandhari Beverages Limited, (2022) 3 SCC 237.
[20] "O.P. Malhotra, The Law And Practice Of Arbitration And Conciliation 786 (Lexis Nexis Butterworths, 2002) at 786".
[21] Gherulal Parakh v. Mahadeodas Maiya And Others, AIR 1959 SC 781.

"*Central Inland Water Transport Corp. Ltd. v. Brojo Nath Ganguly"*[22], the Hon'ble Supreme Court supported a broader viewpoint by defining public policy in accordance with the tenets of 'public conscience', 'public welfare' and 'public interest'.

In "*Renusagar Power Co. v. General Electric Co."*[23] once more, the concept of 'public policy' in relation to foreign awards was interpreted skimly. The Court ruled that the award would be seen as being against Indian 'public policy' if it was shown to be against the basic policy of Indian law; (ii) India's interests; (iii) fairness; or (iv) morality. In its most recent decision, *ONGC v. Saw Pipes*[24], the Supreme Court gave the word "public policy" a broad definition. The Apex Court ruled that there is no need to give the phrase "public policy of India" a limited connotation in cases where the legality of awards is disputed. Contrarily, a broader interpretation is required in order to overturn the tribunal's blatantly illegal award.

In *Mohan Steels Ltd. v. Steel Authority of India (SAIL)*[25], the decision overturned the arbitral award because the arbitrator had read the contract in light of regulatory notifications that had only been made after the partie's closing arguments, rather than the provisions of the contract itself. This was done without providing the petitioner an opportunity to dispute its applicability to the case, despite the fact that it was categorically rejected in its statement of claims.

INTERNATIONAL PERSPECTIVE[26]

Malaysia

For an award to be enforceable, it must be in accordance with section 33 of the Arbitration Act of 2005. 'Section 33' of the 2005 Act stipulates that an award must be in writing and signed by the arbitrator. Regarding an award by a bigger tribunal, just a majority signature is required, but for clarity and precaution, all members are urged to sign the award. If they do not, they must explain justifications for their absence. A prize must also include an explanation of its rationale. Exceptions exist when parties have a conflicting agreement or when the award is a

[22] Central Inland Water Transportcorporation Ltd. & Anr. Etc v. Brojo Nath Ganguly & Anr., AIR 1986 SC 1571.
[23] Renusagar Power Company Limited v. General Electric Company, AIR 1994 SC 860.
[24] Oil & Natural Gas Corporation Ltd v. Saw Pipes Ltd., 2003) 5 SCC 705.
[25] Mohan Steels Ltd. v. Steel Authority of India (SAIL), (2021) 277 DLT 348 (DB).
[26] Vanya Verma and Aditya Patel, 4 "*The Critical Analysis of Enforcement of Foreign Arbitral Awards: A Legal Study"*, 3559 International Journal Of Law Management & Humanities (2009).

consent award. In addition, the award be dated and indicate the location of the arbitration tribunal.[27]

Singapore

In Singapore, "under section 38(1) of the Arbitration Act (Cap. 10) (AA) or article 31(1)" of the relevant act. The award must provide an explanation of its grounds (AA section 38(2); Model Law article 31(2)). Additionally, the award must include the date and location of the arbitration and the award is presumed to have been rendered in the location of the arbitration.[28]

United Kingdom

In UK, the parties are at liberty to choose the form of the award. In the absence of such a condition, clauses 3 to 5 of the of the "UK Arbitration Act 1996", provide that an award must be written and signed by arbitrators or parties who consent to it. The award should include reasoning, except the parties have chosen not to provide them or it is an agreed-upon award. Until parties agree to a different approach, the award shall be communicated to the parties by serving copies of the award on them without delaying; after the judgement has been made (Act, section 55).[29]

CONCLUSIONS AND SUGGESTIONS

One must realise that the fundamental reason parties choose arbitration over litigation is to promptly settle their disputes and responsibilities through arbitration. However, the majority of arbitral rules merely provide that the award is enforceable. The existing arbitration rules and regulations are more of a suggestion than a comprehensive legal framework that addresses the binding impact of an arbitral ruling. In accordance with the seat theory, and notwithstanding the fact that the "law of the arbitration agreement" differs from "the law of the seat", setting aside procedures shall be regulated completely by the law of the seat in accordance with Indian law. India must make several modifications to the laws controlling the annulment of arbitral awards, ambiguity in public policy, and time constraints, among others, in order to successfully

[27] Ghazwi, Mohamed F. & Masum, "*Recognition and Enforcement of International Arbitration Awards: A Case Study of Malaysia and Saudi Arabia"*, 1 International Journal of Accounting and Financial Reporting, 540 (2014).
[28] Campbell and Mark, "*Setting aside arbitral awards in Singapore: due process and good faith obligations"*, Arbitration International (2020).
[29] Virtus Chukwutoo Igbokwe, *Public Policy and Privatized Justice: The setting aside of arbitral awards*, 4 The University of British Columbia, 178 (2014).

implement and accomplish the act's objectives. However, the interference of the Judiciary in arbitral rulings must be restricted in order to give Arbitration processes the significance and credibility they deserve.