PUBLIC POLICY AND INDIAN ARBITRATION: CAN THE JUDICIARY AND THE LEGISLATURE REIN IN THE UNRULY HORSE ?

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Abstract

In India, access to justice is almost considered synonymous with justice itself. Judicial review is considered a feature of the basic structure of the Constitution such that the right cannot be abrogated by statute. Thus, paradoxically, even as specialised courts and tribunals mushroom to increase access and make judicial resolution more expedient, the avenues of appeals from these fora also increase to defeat the purpose. In such an environment, the idea that an arbitral tribunal will be the first and last word on a commercial dispute is counter intuitive and stands out in contrast. Over time, several successful attempts have been made by parties to convince the Indian judiciary and other stakeholders that an award based on incorrect reasoning on merits must be reviewed under the ground of public policy, be it through the creation of a new ground altogether such as patent illegality or by the characterisation of the acknowledgment of these mistakes as violations of the fundamental policy of India. At last, the judicial inroads that have gradually undermined the principle of party autonomy have finally been sought to be remedied by the Arbitration and Conciliation Amendment Act, 2015. In an unprecedented fashion, the legislation now contains specific prescriptions as to what a court can or cannot review. However, there is still reason to be sceptical. To understand it, the paper traces the history of the contraction and expansion of the term public policy to demonstrate that the problem runs deeper than that of mere interpretation and is one of underlying attitudes in respect of arbitration as an alternative and thus highlights the uphill task left for the judiciary even after legislative intervention.

I Introduction

A HOST of advantages greet parties who opt for arbitration over litigation in commercial disputes - the autonomy to determine the scope and nature of the dispute to be referred, the arbiters, and the consequent speedy resolution of their dispute are the foremost in this long list. However, such an agreement between parties also includes an implicit agreement to forego the right to subject the award to a traditional appeal before court of any jurisdiction so as to preserve the expediency of the process. Even so, minimal judicial oversight has been considered permissible to ensure that decisions rendered through this private mode of adjudication do not create obligations that are divorced

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and perverse to the legal order they are considered a part of. This is necessary because arbitral tribunals being a creature of consent have limited powers and no power at all to compel a party to implement the award by way of sanctions. Thus, parties must approach a court to enforce the award and a court by exercising its exclusive prowess grants recognition to an award as a part of its legal order. Thus, arbitral awards must measure up against all aspects that comprise the essential legal order of a jurisdiction and in no way harms larger public interest. Internationally, this benchmark is best encapsulated by the term public policy .[1]

The term though intuitive and familiar is also incredibly dynamic and subjective in its interpretation; it hinges on the field of law it is sought to be applied in, administrative law, contractual law and so or the jurisdiction they are applied in: civil or criminal. What was agreed, however, was that its application in the context of arbitration was not meant to be confused with a review of merits of the award; an arbitrator or arbitral tribunal was meant to be the final word on law and facts.[2] This is precisely why a section 34 application for setting aside an award is considered a challenge to an award and not an appeal. During the drafting of the United Nations Commission on International Trade Laws Model Law on International Commercial Arbitration (hereinafter UNCITRAL Model Law), that serves as a uniform template for national arbitration laws, the delegate of India was part of a sizable minority who cautioned that the term was too vague.[3] However, the international community in their wisdom considered retaining the term for this very flexibility, enabling each national jurisdiction to expound the term in light of their unique legal order. Indeed, in the case of India, over time, losing parties of an arbitration regretting and willing to renege from the initial agreement to forego an appeal on merits have convinced the court that overlooking the incorrect application of law to the facts or a misreading of facts by arbitral

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1 For instance, see art. 34 of the United Nations Commission on International Trade Laws Model Law on International Commercial Arbitration and art. V(2)(b) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.

2 UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Third Session (New York, Feb. 16- 1982) A/CN.9/216 *available at* : http://www.uncitral.org/pdf/english/travaux/arbitration/ml-arb/329meeting-e.pdf. (last visited on July 30, 2016).

3 See Analytical Compilation of Comments by Governments and International Organizations on the Draft Text of a Model Law on International Commercial Arbitration A/CN.91263, *available at* :https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/241/24/PDF/V8524124.pdf?OpenElement, para 14. (last visited on July 30, 2016).

tribunals would amount to their acceptance, which must be considered contrary to the fundamentals of any legal order, thus, also contrary to public policy. In India, precedent has developed in precisely this manner to only give credence to the predictions of the Indian delegates voiced during the drafting of the UNCITRAL Model Law. The decisions of the judiciary have had an adverse impact on India's eligibility to serve as a seat for international commercial arbitrations and have thus needed a course correction by both the judiciary and the legislature. This course correction has most recently culminated in the Arbitration and Conciliation Amendment Act, 2015 (hereinafter Act). Through the amendment, the Act now contains detailed prescriptions of what the judiciary can or cannot review while encountering a challenge to an award, yet it leaves it to the judiciary to interpret these standards. The problem has never been that of interpretation but of the attitude of the judiciary towards arbitration and the fate of the legislation being determined by judicial interpretation. Thus, apart from an interpretation of these amendments, it is necessary to understand the way in which the problem sought to be remedied, developed and sustained over time in the first place. The aim of the paper is to identify the stream of precedent that best represents this mischief and identify the task still left for the judiciary to embark on even after these legislative amendments. This inquiry takes root in the decision of the Supreme Court in *Renusagar* in 1994 and concludes with the decision in *Associate Builders*. At the same time, it is also necessary to understand the international standard of the court's jurisdiction in reviewing an award that serves as the most important benchmark.

II The international benchmark

Not only does the unbridled widening of the scope for courts to intervene and review an award make India unattractive as an arbitral seat, it also results in India violating international obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention) which India signed on June 10, 1958. The New York Convention's primary objective was to propagate a pro-enforcement bias in respect of foreign arbitral awards[4] across jurisdictions and this was ensured in a number of ways. *First* of all, the requirement of double exequatur has been removed,

4 As per art. 1 of the New York Convention, the convention applies to awards arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal, and to arbitral awards not considered as domestic awards in the state where their recognition and enforcement are sought.

in that the award does not have to first be made a rule of the court, in other words be validated in the country in which it was made before it can be enforced in another country.[5] *Secondly*, the scope of objections to enforcement was to be exhaustive and narrow. In particular, the term public policy was to be interpreted in its narrowest sense more similar to the French notion of *ordre public* that pertains only to fundamental notions of morality and justice.[6] The term public policy was chosen over the term *ordre public* since it was felt that the latter term was unknown to most jurisdictions.[7] That public policy was meant to be used in the narrowest sense is also evident from a reading of the provision in *pari materia* in the Geneva Convention as per which awards could be set aside for being contrary to the public policy or to the principles of the law of the country. [8] The reference to the principles of law of the country was intentionally dropped,[9] thus confirming that a review of merits was not permissible.[10] Further, it was specified that what would be considered was whether the enforcement of the award and not the award itself would result in the violation of public policy of the enforcing country.[11]

The UNCITRAL Model Law was drafted in 1985 with a view to provide a uniform template for jurisdictions to follow. While drafting article 34 *i.e.*, application for setting aside an award, on which section 34 of the Arbitration and Conciliation Act, 1996 is modelled, the committee expressly rejected the addition of new grounds apart from those enumerated in the New York Convention and public policy was intended to have the same meaning as under the New York Convention. However, the delegate of the United

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5 Marike R. P. Paulsson, *The 1958 New York Convention in Action* 8 (Kluwer Law International, 2016).

6 Recognition and Enforcement of Foreign Arbitral Awards- Travaux Summary Record of the Fifth Meeting, U.N. Doc E/AC.42/SR. 7 (Mar. 29, 1955) at 3 5; Recognition and Enforcement of Foreign Arbitral Awards , Report by the Secretary-General, at 22, U.N. Doc E/2822, Annex II (Jan. 31, 1956), Paulsson, *supra* note 5 at 221.

7 *Ibid.*

8 Art. 1(e) of the Convention on the Execution of Foreign Arbitral Awards, 1927 reads: [t]hat the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

9 United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, UN DOC E/CONF.26/SR.17 (Sep. 12, 1958) at para 15 16.

10 Patricia Nacimiento *et al*, *Recognition and Enforcement of Foreign Arbitral Awards : A Global Commentary on the New York Convention* 634 (Kluwer Law International, 2010).

11 *Ibid.*

Kingdom cautioned that the term *ordre public* was broader in its ambit than public policy for the former also included procedural injustices. Therefore, in its final report, the commission clarified that, it was understood that the term public policy, which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside.[12] It is only in this sense of the inclusion of procedural injustices that the term public policy was used in a broader sense. In fact, it was also understood that public policy was not used in the traditional sense as in common law countries to be equivalent to the political stance or international policies of a state but instead comprised the fundamental notions and principles of justice.[13] The commission was unanimous on the point that the ground was not intended to permit a review on merits of the award.[14] This has been maintained by and large.[15] Most jurisdictions largely converge on the buzzwords and concepts that attract the public policy charge. These are those decisions that are considered, unconscionable or reprehensible, [16] contrary to essential morality [17] and to the most basic and explicit principles of justice and fairness [18] and clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public or where it violated. [19] Even in India, the term public policy was intended to consist of the fundamental

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12 See H. M. Holtzmann and J. E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* 913(Kluwer Law International, 1989).

13 *Id.* at 914.

14 Report Of The Working Group On International Contract Practices On The Work Of Its Third Session (New York, Feb. 16-26, 1982), (Mar. 23, 1982) A/CN.9/216, *available at* : https://www.uncitral.org/pdf/english/yearbooks/yb-1984-en/vol15-p189-212-e.pdf at para 107 (last visited on July 30, 2016).

15 UNCITRAL, 2012 Digest of Case Law on the Model Law on International Commercial Arbitration, *available at*: http://www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf (last visited on July 30th, 2016) at 141-2.

16 *Protech Projects Construction (Pty) Ltd.* v. *Al-Kharafi & Sons* [2005] EWHC 2165 (Comm) (United Kingdom).

17 *United Mexican States* v. *Marvin Roy Feldman Karpa*, Bring File No. 03-CV-23500 at 87 (Canada).

18 *TCL Air Conditioner (Zhongshan) Co Ltd.* v. *Castel Electronics Pty Ltd.*, (2014) 311 ALR 387 (Australia).

19 *PT Asuransi Jasa Indonesia (Persero)* v. *Dexia Bank SA.* [2007] 1 SLR(R) 597 (Singapore).

policy of India, interests of India, and morality and justice and so did until an expansive approach was taken. The story for India begins with the case of *Renusagar Power Co. Ltd* v. *General Electric Co.*[20] (hereinafter *Renusagar*)

III The Indian experience

The Indian judiciary s exemplary approach in *Renusagar*

In *Renusagar*,[21] faced with an enforcement application for an award rendered in New York under the ICC rules pursuant to a dispute between an Indian and an American company, a three judge bench of the Supreme Court seized the opportunity to clarify the interpretation of section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 (hereinafter Foreign Awards Act) on the scope of the term public policy used therein.[22]

This Act was repealed with the coming into force of the Arbitration and Conciliation Act, 1996 (hereinafter A&C Act) but the relevance of the decision has endured over the years. The appellant took a number of objections against the award - that the award contravened provisions of the Foreign Exchange Regulation Act for permitting the payment of delinquent interest, allowed damages on damages, recovery of compoundable interest on interest and would result in the unjust enrichment of the respondent. Acknowledging the narrow and broad views of public policy,[23] the Supreme Court made it clear that their choice of the standard applicable was dictated by the context and purpose of the provision. The court opined, a distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. [24] It was accepted that the courts are slower to rely on the broader notion public policy when a foreign element is involved.[25] In its reasoning, the court was mindful of the pro-enforcement bias and the need to give disputes finality for their quick resolution which

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20 *Renusagar Power Co. Ltd.* v. *General Electric Co.*, AIR 1994 SC 860.

21 *Ibid.* Art. 5(2)(b) states that: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: The recognition or enforcement of the award would be contrary to the public policy of *that country.*

22 S. 7(1)(ii)(b) of the Foreign Award Act states that: (1) A foreign award may not been forced under this Act (b) If the Court dealing with the case is satisfied that (ii) The enforcement of the award will be contrary to public policy.

23 According to the narrow view courts cannot create new heads of public policy whereas the broad view countenances judicial law making in this areas, see *Renusagar*, *supra* note 20 at para 48.

24 *Id.*, para 51.

25 *Ibid.*

were also the main impetus behind the New York Convention and the Foreign Awards Act to hold that the ground of public policy in this context could not include a review of merits of the award, such that the stage of challenge serves as a stage of appeal.[26]

The apex court held that neither the Foreign Awards Act nor the New York Convention indicates that the term public policy includes a *mere* violation of the laws of India or the provisions of the contract.[27] Instead, it laid down that the enforcement of the award would only be refused if the award is contrary to: (i) fundamental policy of Indian law, (ii) interests of India or (iii) justice or morality.[28] The court did not define these terms. The court made it amply clear that this definition of public policy or its components did not permit a review of the merits of the award. When the appellant argued that the award amounted to a violation of the provisions of the Foreign Exchange Regulation Act, the court reasoned that the statute was enacted to preserve national economic interest and a violation of these provisions would amount to a violation of public policy.[29] Even so, the court was careful to make a distinction in the submission of the appellant. The court held that it could not look into the award of delinquent interest for violations of FERA by the arbitral tribunal since it would amount to a review of merits of the award which was impermissible.[30] The court did, however, consider the submission of the appellant that the payment under the award would amount to a violation of section 9 and section 47 of FERA since the payment could not have been made without the prior permission of the Reserve Bank of India and the Central Bank of India.[31] The court held, in light of its previous judgments that they could not be used by defendants to avoid making payments in legal proceedings and thus found that there had been no violation of the legislation or endangering of the economic interest of the country.[32] The *dictum* of the Supreme Court in *Renusagar* has been rightly lauded internationally.[33]

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26 *Id.*, para 61.

27 *Id.*, para 63.

28 *Id.*, para 65.

29 *Id.*, paras 71-72.

30 *Id.*, para 73. The court thereafter examined the issue and held that in any case the same had been approved by the Supreme Court in previous orders passed in the same dispute.

31 *Id.*, para 77.

32 *Id.*, at para 80.

33 L. Ebb, Reflections on the Indian Enforcement of the GE/Renusagar Award 1(3) *Arbitration International* 149 (1994) .

In fact, the case is considered a seminal authority on the point that a court cannot review an award on its merits.[34] Indeed, the court's analysis is nuanced and recognises the distinction that was discussed during the drafting of the New York Convention, *i.e.*, whether the enforcement of the award would result in violation of India's public policy and not the award itself. The question the court answered in the case was whether the payment under the award would contravene provisions of FERA and not whether the decisions on merits such as payment of interest amounted to a violation of FERA. In the opinion of the author, this is the most ingenious abstraction of the test that can be articulated, *i.e.*, one must look at the effect of the enforcement as opposed to different aspects of the award to test them against the standard of the award. Indeed, this would not always mean that the merits would be insulated from such an enquiry, as they were in this case where the court could make a clear demarcation. Take for instance, a contract made for solicitation or offering a bribe as a consideration. The enforcement of an award that enforces such a contract would imply that India recognises prostitution or bribery as legal and permissible. Thus, here, the public policy implications of an award are inextricably linked with and will carry forward to the enforcement of the award. But this distinction would not always be present. In such situations where the enforcement of the award would not lead to a violation of public policy but a component of the ruling on merits may be taken to be a violation of public policy, the latter would have to be ignored in most situations.

Of course, this test in abstract terms is susceptible to extrapolation. It could always be contended that the enforcement of an award with incorrect reasoning and conclusions on merits would render India a legal order which permits the incorrect application of law and is contrary to the notions of justice fundamental to India. Thus, it was necessary for the judiciary to be careful and true to the *ratio* of *Renusagar*. Whether the judiciary was able to dig their heels to prevent sliding down the slippery slope is examined later in this paper.

With the enactment of the A&C Act the Foreign Awards Act stood repealed. The A&C Act was supposed to serve as an omnibus legislation that would deal with the conduct of arbitrations in India and the awards rendered therein

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34 Alan Redfern and Martin Hunter *et al* (eds.), *Redfern and Hunter on International Arbitration* fn. 159, ch. 11. (Oxford University Press, 6th edn, 2015).

under part I[35] and the enforcement of foreign awards and other attendant provisions under part II. In addition, the amendment was intended to bring India s arbitration regime in line with the UNCITRAL Model Law and was largely based on it.[36] Section 34 and 36 in part I dealt with setting aside and enforcement of a domestic award where as section 48 in part II dealt with enforcement of a foreign award. Public policy was retained as ground in both sections 34 and 48. The continued applicability of *Renusagar*, however, was not certain until it received judicial endorsement in respect of awards under the new legislation. The Supreme Court first encountered this opportunity in context of an application to set aside a domestic award under section 34 of the A&C Act in the case of *ONGC* v. *Saw Pipes*.[37]

Saw Pipes and the eclipsing of *Renusagar*

Domestic awards

The question framed in *Saw Pipes* was whether the court would have jurisdiction under section 34 of the Act to set aside an award passed by the arbitral tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract ?[38] In other words, could the court sit in appeal over the award to re-examine its merits? The court answered in affirmative, a conclusion that it attempted to arrive at through meticulous, albeit flawed, reasoning. The court first noted that since an arbitral tribunal was a creation of the A&C Act, the arbitral tribunal would be acting *de hors* its jurisdiction by passing an award that violated provisions of the Act and therefore, it would be appropriate for courts to interfere. To hold otherwise would render the provisions of the A&C Act nugatory since there would be no way to ensure their enforcement.[39] The reasoning of the court in that every right must have a remedy is clearly unmindful of the global acceptance of the notion that parties have the autonomy to contract out of an appeal like remedy against arbitral awards. Further, the A&C Act already provides for a specific ground as per which an award can be set aside if it exceeds its jurisdiction. However, jurisdiction under that ground refers to jurisdiction in its truest sense *i.e.*, on the nature of scope of reference, validity of arbitration agreement, arbitrability, *etc.*

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35 As per s. 2(2) of the Act as it then was, part I applies where the place of arbitration is in India.

36 See statement of objects and reasons of the A&C Act.

37 *Oil and Natural Gas Co.* v. *Saw Pipes*, AIR 2003 SC 2629 .

38 *Id.*, para 1.

39 *Id.*, paras 11-13.

The court in *Saw Pipes* conflates jurisdiction with procedural violations by holding that every violation of the A&C Act would amount to a jurisdictional violation by the arbitral tribunal. Further still, the court ingeniously invokes section 28 of the A&C Act as per which, it is the duty of the tribunal to decide the dispute in accordance with the terms of contract of the parties, substantive provisions of law chosen by the parties (Indian law if it is a non-international commercial arbitration) to hold that if the arbitral tribunal s award violates provisions of the contract or substantive law, it would amount to a violation of the A&C Act. Admittedly, the court seems conscious of the possible ramifications of characterising these contraventions as jurisdictional violations and thus characterises them as patently illegal.

Two points are necessary to discuss here. *Firstly* the very basis for the reasoning of the court was that tribunal having been given jurisdiction as a result of the Act cannot act *dehors* this jurisdiction and the court must set aside jurisdictional violations, and not patent illegalities. *Secondly*, in any case that an award is patently illegal is not an express ground to set aside the award under section 34 of the Act. The court gets around this second hurdle by accepting the submission of the counsel for the appellant that patent illegality must be considered an additional ground under public policy under section 34 beyond what was set out in *Renusagar* by contending that the scope of section 34 is distinct from section 48. The appellant argued, at the stage of section 34, the award has not attained finality and, therefore, could be subjected to a broader review. Whereas in section 48 application, the award would be subject to double exequatur first being subjected to setting aside proceedings in the jurisdiction in which the award was made and then made final after these proceedings are concluded.[40]

This reasoning is extremely flawed. With the coming into force of the New York Convention, the requirement of double exequatur was removed, in that the award no longer needed to be declared as enforceable in the country of origin and was considered to be final on the date of its making and could be automatically enforced in a country where the assets were located.[41] This was further reiterated in the *travaux pr paratoires* of the UNCITRAL Model law which finally held that the award would become final the day the award is rendered and not after it survived the test under section

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40 *Id.*, paras 19-21.

41 See G. Born, *International Commercial Arbitration* 721 (Kluwer Law International, 2009).

34.[42] The legislative history of the A&C Act also does not mention any need to interpret section 35 in any other way. Therefore, the counsel was incorrect to contend that the award would not have become final at the stage of setting aside proceedings. The case has been rightly assailed as a step back in the arbitration world for India.[43] Whether *Renusagar's* rational approach would be obliterated altogether was dependent on the interpretation accorded to *Saw Pipes*.

The most troublesome interpretation argued that the *Saw Pipes* decision brought about a blanket expansion of the scope of the term public policy so as to even apply to section 48. It has also been argued that the decision is not contrary to what was expounded in *Renusagar*, since *Renusagar* only cautioned that a mere violation of the laws of India would not be contrary to public policy. The decision in *Saw Pipes* too referred to patent illegality as illegality or contraventions that go to the root of the matter and is not of a trivial nature, thus merely re-stating what *Renusagar* said in negative terms in positive terms. However, a careful reading of *Renusagar* clearly indicates that any sort of review of merits except incidental to analysing the effects of enforcement of the award is not permissible.

A more compelling interpretation recognises that the Supreme Court clearly stated that the interpretation of public policy was dependent on its context.[44] The context in the case of *Saw Pipes* was the setting aside of a domestic award. Therefore, instead of an unqualified adoption of a wider meaning, it is reasonable to contend that the counsel for the appellant sought to distinguish *Renusagar* on the basis of its own context. *Renusagar*, if read closely reveals that the reason why the court adopted a narrower conception of public policy was not only because the proceedings were at the stage of enforcement but also because the case involved a foreign element. The court noted that,

> the application of the doctrine of public policy in the field of conflict of laws is more limited than that in domestic law and the courts are slower to invoke public policy in a case involving a foreign element than when a purely

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42 Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration Report of The Secretary-General, A/CN.91264, (Mar. 25, 1985), *available at*: https://documents-dds-ny.un.org/doc/UNDOC/GEN/V85/267/01/PDF/V8526701.pdf?OpenElement (last visited on Aug. 1, 2016).

43 S. Hilmer, Did Arbtiration Fail India or did India Fail Arbitration 10 *International Arbitration Law Reporter* 33 (2007); see also, Law Commission of India, 246th Report: Amendments to the Arbitration and Conciliation Act, 1996, *available at*: http://lawcommissionofindia.nic.in/reports/Report246.pdf. (last visited on Aug. 1, 2016).

44 *Saw Pipes*, *supra* note 37 at para 30. Therefore, in our view, the phrase Public Policy of India used in Section 34 in context is required to be given a wider meaning.

municipal legal issue is involved. [45] Thus, it could be contended that the applicability of the *Saw Pipes* decision would be limited to setting aside of awards made in purely domestic disputes.

Indeed, any contrary interpretation to section 48 would also be inconsistent with India s international obligations under the New York Convention and international consensus evinced through the UNCITRAL Model Law. Unfortunately, the court in *Saw Pipes* did not seek to distinguish the case from *Renusagar* on these grounds. This distinction should have been made in the case itself since section 34 too can have an impact on the international obligations of India given the unique scheme of the A&C Act. Part I applies only when the place of arbitration is in India.[46] On the basis of this, it is argued by many that the basis of differentiation in the Act is the place of arbitration, in other words the territoriality principle.[47] Admittedly, the territoriality principle is admitted to ensure certainty, however the UNCITRAL Model Law makes the basis of distinction, the nationality of parties, to focus on international and non-international awards instead of the traditional demarcation between foreign and domestic awards.[48] Hence, the purpose of the model law was to provide for a uniform policy regarding international arbitral awards irrespective of the place of arbitration.[49] Even though the New York Convention is confined to foreign awards, the UNCITRAL provisions are modelled on the New York Convention such that it supplements without

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45 *Renusagar*, *supra* note 20 at para 51. A distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in case involving a foreign element than when a purely municipal legal issue is involved,

46 This can now be claimed with utmost certainty owing to the decision of the Supreme court in *Bharat Aluminum Company Ltd.* v. *Kaiser Aluminum Technical Service Inc.* (2012) 9 SCC 552 (hereinafter *BALCO*). But after the amendment certain provisions have been made applicable to arbitrations outside of India. S. 34, however, is still applicable only to part I arbitrations.

47 See generally, *BALCO*, *ibid.*

48 Explanatory Note by the UNCITRAL Secretariat on the Model law on International Commercial Arbitration , *available at*:http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote209-07.pdf at para 11, (last visited on Aug. 1, 2016).

49 In fact, in the report of the UNCITRAL at the time of adoption of the Model Law, a proposal to provide for two different articles for foreign and domestic awards in International Commercial Arbitrations was rejected *cf* A. Wadhwa and A. Krishnan (eds.), *Justice R.S. Bachawat s Law of Arbitration and Conciliation* 2045(LexisNexis India, 2010) .

conflicting with the regime of the New York Convention .[50] By that logic the *Renusagar* standard of public policy should apply to international commercial arbitrations under part I. Thus, by distinguishing *Saw Pipes* merely on the basis of the stage the award is at, as opposed to the nature of the award, also endangers India s international obligations.

Foreign awards

Foreign awards to which part II of the A&C Act applies could have been shielded from the vice of *Saw Pipes* since section 34 ordinarily does not apply to foreign awards. An Indian party cannot file an application to set aside the award in India but can only file objections to an application for enforcement of the award.[51] Unfortunately, subsequent decisions of the Supreme Court rendered this sense of security a pipe dream. The then infamous judgment of *Bhatia International* v. *Bulk Trading*,[52] generally extended the application of part I of the A&C Act to arbitrations seated outside India unless the parties had expressly or impliedly excluded part I by the agreement between the parties. The ramifications of the judgment could have been confined to the context in which the holding of the court was necessitated *i.e.*, interim measures provided under section 9 of the A&C Act where the court opined that by deviating from the model law and not making section 9 of the A&C Act applicable to foreign arbitrations, the legislature had virtually left parties remediless in situations where assets were only located in India. However, subsequently in 2008, in *Venture Global Engineering* v. *Satyam Computer Services Ltd*, the Supreme Court extended the application of the *ratio* of *Bhatia International* to an application for setting aside a foreign arbitral award under section 34 of the A&C Act.[53]

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50 *Supra* note 48 at para 51.

51 *Jindal Drugs* v. *Noy Vallesina* (2002) 3 Raj. 46; See also, *Force Shipping Limited* v. *Ashapura Minechem Limited,* 2003 (6) Bom C R 328.With the decision of the Constitution bench in *BALCO supra* note 46, these decisions are once again good law.

52 (2002) 4 SCC 105 at para 32. More writing on the judgment can be found in F.S. Nariman, India and International Arbitration 41 *George Washington International Law Review* 367 (2009); R. Sharma, Bhatia International v. Bulk Trading S.A.: Ambushing International Commercial Arbitration Outside India? 26(3) *Journal of International Arbitration* 357 (2009); M. Kapur, Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law 2 *Contemporary Asia Arbitration Journal* 325 (2009).

53 AIR 2008 SC 1061 (*Satyam*). For more writing on the judgment see A.P. Robello, Of Impossible Dreams and Recurring Nightmares: The Set Aside of Foreign Awards in India 6 *Cambridge Student Law Review* 274 (2010).

To make matters worse, the case went on to accept the definition of public policy as expounded in *Saw Pipes*.[54] It is pertinent to note that in case of a foreign arbitration, the applicable law would be (in most cases) be a foreign law. In such a case the Indian courts would have to test the conformity of the award with that foreign law. This concern was aptly expressed in the case of *Penn Racquets*[55] but blatantly ignored in *Saw Pipes* and *Satyam*. Proponents of this decision would adopt the interpretation discussed above, that the Supreme Court in *Saw Pipes* made a distinction between the scope of jurisdiction at the stage of setting aside and enforcement of awards and not in the nature of the award. However, the court in *Satyam* held that there was no conflict between section 48 and section 34 and instead seemed to justify the decision on the ground that a judgment debtor who has properties situate in India be entitled to defend the award on the basis of the public policy of India.[56] Therefore, a protectionist attitude is all that seems to have misguided the court.[57]

Indeed, this is a slippery slope, and a protectionist rationale could easily be applied to enforcement proceedings of a foreign award against an Indian party requiring the judgment creditor to withstand a wider notion of Indian public policy. High courts diverged on the issue.[58] Unfortunately, in *Phulchand*

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54 *Satyam*, *id.*, para 19.

55 In the present case, the task of the judgment debtor is even more onerous inasmuch, as, this Court is dealing with a foreign award, and the agreement of the parties was that the agreement would be governed by the Austrian law. Consequently, the interpretation of the contract cannot be done by application of Indian law. As to what is the Austrian law has not even cited before me. No expert opinion has been led in evidence to controvert the opinion of the learned arbitrator. The endeavour of the judgment debtor has been to interpret the contractual clause in question by application of the Indian law, which is not permissible, *Penn Racquet Sports* v. *Mayor International Ltd* (2011) DLT 474 at para 40.

56 *Satyam, supra* note 53 at para 19.

57 See D. Sabharwal, Another Setback for Indian (and Foreign Investors) *International Disputes Quaterly*, *available at*: http://www.whitecase.com/idq/spring_2008_4/#.UXTQTLWmiAg (last visited on April 22, 2016).

58 In *Penn Racquets, supra* note 55, the court correctly noted that impracticality of analysing a foreign award passed under Austrian Law for patent illegality of a violation of Indian law since an arbitrator was never bound to consider the law. Admittedly, by way of an *arguendo*, the court also examined the award on patent illegality; Similarly, while in *Glencore Grain Rotterdam B.V.* v. *Shivnath Rai Harnarain Co.,* 2008 (4) ARB LR 497 (Del) the Delhi High Court stood resolute in maintaining the distinction between a s. 34 and s. 48 proceedings as did the Bombay High Court in *Italy* v. *Jindal Drugs Limited* 2006 (5) Bom CR 155. However, the Calcutta High

Exports Ltd. v. *Ooo Patriot*,[59] the Supreme Court in 2011 fell prey to this protectionist attitude. Proceedings were brought under section 48 of the A&C Act in respect of a foreign award, which were objected to by the respondent on grounds of public policy. Relying on *Renusagar*, both the single judge and division bench of the High Court of Bombay rejected the contentions of the appellants. The Supreme Court, none the wiser, agreed with the submission of the counsel for the respondents and did not provide any reasons for accepting the wider definition of public policy as proposed in *Saw Pipes* and for ignoring the underlying objective behind section 48 (and India s obligation under the New York Convention to enforce a foreign arbitral award without hindrance or delay).[60] This move of the Supreme Court has been met with significant criticism and hence must be remedied.[61] A decision such as *Phulchand* would not have come about in isolation but instead can solely be attributed to the trajectory that Indian arbitration took, starting with the case of *Saw Pipes and Bhatia International* serving as the first significant cracks in the dam and eventually bursting with *Satyam* and *Phulchand*. This trajectory reveals that the problem is not of a difference of opinion about the interpretation and scheme of the Act but is rooted in the attitude of the judiciary and other stakeholders towards arbitration and their reluctance to accord finality to arbitrators findings and conclusions. That the judiciary is willing to introspect and reconsider this attitude would best be signalled through a series of decisions geared in that direction.

Course correction by the judiciary

The judiciary did deliver on this promise to a great extent through two decisions. First, through the decision in *Bharat Aluminium Company Ltd.* v. *Kaiser Aluminium Technical Service Inc*,[62] where a five judge bench overruled the decision in *Bhatia International* to hold that part I would no longer apply to foreign arbitrations. A year after *BALCO*, more good news came in the decision of *Shree Lal Mahal* v. *Progetto Grano*,[63] where Lodha J while

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Court fell prey to this protectionist attitude in *KTC Korea Co. Ltd.* v. *Hobb International Private Ltd* (2005) 2 CAL LT 556 (HC) where the *Saw Pipes* standard was applied to an award in an enforcement application under s. 48 of the Act.

59 (2011) 10 SCC 300.

60 New York Convention, art. III. A concern aptly, recognized in *Penn Racqets*, *supra* note 55 at para 28.

61 K. Mahajan & M. Anand, Heralding a New Dawn for Arbitration in India: Is There Reason to Be Circumspect Anymore? 79(1) *Arbitration* 28 (2013).

62 *BALCO*, *supra* note 46.

63 (2014) 2 SCC 433.

dealing with the enforcement of an award passed in London reconsidered his own decision in *Phulchand* to hold that the term public policy under section 48 must be given the same interpretation as it was in *Renusagar* and the enforcement of a foreign award could not be objected to on the ground that it was patently illegal. While the problem may have been remedied for foreign-seated arbitrations, *Saw Pipes* still posed a problem in the following respects. *Firstly*, *Bhatia International* has only been prospectively overruled in *BALCO* from the date of the decision in *BALCO* such that *Bhatia International* would continue to apply to agreements entered into between March 13, 2002 and September 6, 2012. Thus, *Satyam* will continue to be good law for awards rendered in respect of these arbitrations such that a section 34 application can be made to set aside a foreign award and the awards be tested for patent illegality. *Secondly*, *Saw Pipes* also applies to international commercial arbitrations seated in India. Thus, either a judicial or legislative reconsideration of *Saw Pipes* was the need of the hour. The answer was to some extent found in legislative intervention but not until some more mistakes were committed by the judiciary.

Veering off course correction: Some fundamental mistakes

The improvements that the court made on the ground of patent illegality were offset by two decisions of the Supreme Court rendered in 2014. In the case of *ONGC* v. *Western Geco*,[64] the Supreme Court dealt with an application to set aside an award in an international commercial arbitration seated in India. The parties had entered into a contract for the upgradation of the appellant's seismic survey vessel, in particular, the installation of streamers fitted with hydrophones. The contract could not be performed since the respondent company was unable to obtain a license from authorities in the United States for sale of hydrophones. The respondent invoked the *force majeure* clause on this account. While the tribunal held that the respondents were not entitled to invoke the *force majeure* clause since the delay was not solely attributable to the action of the license authorities, they also concluded that the entire period of delay was also not attributable to the respondent.[65] The appellant sought to assail the finding of the arbitral tribunal that the delay in supply under the contract was not attributable to the respondent. Expectedly, the respondent contended that the court's jurisdiction under section

64 *Oil and Natural Gas Corporation Ltd.* v. *Western Geco International Ltd.* (2014) 9 SCC 263.

65 *Id.*, para 13.

34 did not permit such an enquiry into merits.[66] The court noted that the decision of *Saw Pipes* while enumerating different grounds of public policy including fundamental policy of India had not expanded on their scope and meaning[67]and took the opportunity to exposit the contours of these terms in this case. As per the court, the duty of a judicial authority to adopt a judicial approach, apply principles of natural justice, and be reasonable, are fundamental enough and deeply embodied in our jurisprudence to comprise the fundamental policy of India. It is pertinent to note that the grounds of natural justice and bias already set out as specific grounds under sections 34 and 48, now find duplication under the ground of public policy.[68] In any case, that the courts holding seems to permit a deeper enquiry into merits, is evident from the manner in which the aforementioned terms were explained in the judgment. To quote: [69]

1. A judicial approach: ensures that the authority acts *bonafide* and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or Authority vulnerable to challenge.

2. Principles of natural justice: Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking.

3. Wednesbury principle of reasonableness: decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. The court notes that in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available. One cannot equate the jurisdiction of a

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66 *Id.*, para 24.

67 *Id.*, para 26.

68 See A&C Act, s. 34(2)(a)(iii) and s. 48(1)(b) of the A&C Act.

69 *Supra* note 64 at paras 26- 29.

court over an arbitral award to that of a court in writ jurisdiction.

Thereafter, the court notes that while an exhaustive exposition on what amounts to fundamental policy of India was impossible, an award could be successfully challenged if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice. [70] Recall that on facts, the arbitral tribunal had held that the delay from the point after when the respondents informed the appellant that the license could not be obtained from the United States (US) authorities and offered to supply Canadian hydrophones was not attributable to the respondent and disallowed the deduction made for this period. However, the court was of the opinion that this period would have to be divided into four different components. *First*, the time taken by the appellant to decide that an application should nonetheless be made to the US authorities; *second*, the time taken by the respondent to make the application; *third*, the time expended by the US authorities to finally reject the application; and *fourth*, the time taken by the respondent to convey the rejection of the application to the appellant.

The court found itself unable to agree with the view of the tribunal that the delay in respect of the second and fourth intervals should be attributable to the respondent, characterising it as an error resulting in the miscarriage of justice apart from the fact that they failed to appreciate and draw inferences that logically flow from such proved facts.[71] There are several reasons to be disgruntled by this judgment.

Firstly, the court has expanded the term fundamental policy of India to include a review of the merits of the award. Fundamental policy of India was a component of the narrow conception of public policy put forth in *Renusagar* that specifically precluded a review of merits of the award. It may be contended that certain violations of public policy may be violations rooted in the merits of the award. Indeed, this is possible but as discussed above, the test is whether the enforcement of the award and not the award or merits itself would result in the violation of public policy, thus merits could only be looked at to the extent that the issue is intertwined and inextricably linked with the enforcement of the award. In effect, it is an effects based test. It is for this reason that the court in *Renusagar* did not review the award for grant

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70 *Id.*, para 30.

71 *Id.*, para 31.

of delinquent interest as a violation of FERA, unjust enrichment of the respondent, and grant of compound interest on compound interest. It is possible to argue that the court in *Western Geco* too adopted an effects based test to hold that enforcing an award that did not pass the test of judicial approach, natural justice and Wednesbury reasonableness would render India a legal order which turns a blind eye to these errors and thus accepts such errors as a valid part of the India s legal order. However, this is precisely the slippery slope that the author warned against earlier. Indeed, every country would like to avoid being reckoned as a nation with a casual attitude in respect of justice where expediency is preferred over correct reasoning. The effects based test cannot be stretched to a blanket permission to review the merits of the award as has been done in *Western Geco*. *Secondly,* in any case, *Renusagar* made it clear that the court cannot merely set aside an award because it disagrees with the reasoning of the arbitrator on law and facts. However, the court in *Western Geco* does precisely this by taking an approach different from the arbitrator - dividing the delay into four different intervals and holding that certain periods of delay are attributable to the respondent. What is even more troubling is that the court conflates such an error of an inference of logic with a miscarriage of justice, which can now only open floodgates for appeal like challenges to awards on a ground apart from patent illegality.[72]

The next judgment in tow was the decision of *Associate Builders*[73]where the arbitral tribunal had held that the delay in the construction of a colony by the petitioner builder for the respondent (Delhi Development Authority) was not attributable to them but to the respondent themselves. But a division bench of the high court set aside this finding. As per the Supreme Court, a review of merits of the award is precluded except through the ground of public policy, that too, in limited circumstances.[74] Tracing the history of the expansion and contraction of the term public policy from *Renusagar, Saw Pipes* to *Western Geco*, the court sought to exposit the meaning of each sub-term under public policy.[75] Admittedly, there was no need for the court to go

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72 Further, it is extremely well established that a mere disagreement with the result of the arbitration on a reappreciation of facts and evidence does not constitute a valid exercise of supervisory jurisdiction of the courts over an arbitration. Finally, the court conflates an error of an inference of logic with a miscarriage of justice

73 *Associate Builders* v. *Delhi Development Authority* (2015) 3 SCC 49 (hereinafter *Associate Builders*).

74 *Id.*, para 17.

75 *Id.*, para 27.

into this exposition. A reading of the case appears to indicate that the bench was well intentioned and was seeking to un-do the damage done by these earlier judgments. For instance, in respect of the ground of patent illegality, the court burdened by precedent had to concede that violations of substantive law of India including the A&C Act would amount to the award being patently illegal. But the court managed to tactfully quote only the dicta of *McDermott International Inc*[76] and *Rashtriya Ispat Nigam Ltd.*,[77] which represent two rare prior instances of judicial restraint where the court cautioned that merely because the court is of the opinion that a contract can be interpreted in a particular way, it would not be a ground to overrule the interpretation accorded by the tribunal. However, the burden of precedent was most felt while interpreting fundamental policy of India. The two judge bench of Nariman and Gogoi JJ could not overrule the three judge bench decision in *Western Geco*.

As per the decision of *Western Geco*, the principle of Wednesbury reasonableness now stands rooted as a tool of inquiry for the validity of arbitral awards such that an award can be set aside for being arbitrary and capricious. The test of Wednesbury reasonableness was evolved in the field of administrative law and was to be used in exceptional circumstances where the reasoning of a judicial authority is so unreasonable such that no person acting reasonably could have arrived at the decision. It is clear that what needs to be tested is the process of reasoning.[78] Unfortunately, the effects based test finds incorrect application here such that the court judges the process of reasoning by judging the result it reaches, and thus, works backwards to presume a disagreement with the reasoning, if there is disagreement with the result.[79] However, the process of adjudication must take into account the possibility of more than one plausible and reasonable result. The result based approach is flawed for eliminating this possibility. Indeed, the facts in *Western Geco* serve as the easiest illustration for this issue. Over and above the manner of application of the Wednesbery principle is its very importation into arbitration which now means that the court will

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76 *McDermott International Inc.* v. *Burn Standard Co. Ltd.* (2006) 11 SCC 181.

77 *Rashtriya Ispat Nigam Ltd.* v. *Dewan Chand Ram Saran* (2012) 5 SCC 306.

78 *Associated Provincial Picture Houses Ltd.* v *Wednesbury Corporation* [1948] 1 KB 223; *Council of Civil Service Unions* v. *Minister for the Civil Service* [1985] AC 374.

79 See apprehensions expressed in *R (Bloggs 61)* v. *Secretary of State for the Home Department* [2003] 1 W.L.R. 2724.; *R (Wilkinson)* v. *Broadmoor Special Hospital* [2001] EWCA Civ 1545 as to how the Wednesbury test is being used for a merits based review.

have to look into merits and use their discretion and wisdom to decide if the result and reasoning merit interference. The uneasiness of the court in *Associate Builders* about the importation of the Wednesbury principle into arbitration law is palpable even though it is not express. In paragraph 31 the court holds that those findings which are based on no evidence, irrelevant evidence and /or ignorant of vital evidence are liable to be set aside. In paragraph 33, the court tries to remedy this by warning that courts cannot sit in appeal of the arbitral award to correct errors of fact to hold that an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. At first instance, this seems inconsistent with its holding in the earlier paragraph. What the court is trying to do is prevent a result based approach that has become endemic to administrative law. This emphasis is evident from the following exposition once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on facts. In all, the decision of *Associate Builders* must be lauded for being a conscientious decision that could only do so much under binding precedent. A careful reading of the judgment would provide enough guidance for the high courts to take a more restrained approach, provided that the courts are careful to pick up the cues left in the judgment. Unfortunately, not every subsequent decision after *Associate Builders* has towed the line as succinctly as *Associate Builders*. Yet solace can be found in a majority of decisions where the court has cited paragraph 33 of the judgment to hold that an arbitral tribunal must be considered the last word on facts even if the finding is based on little or no evidence unless it is shown to be perverse or illegal,[80] and thus courts have refused to interfere in respect of possible errors by the arbitral tribunal on the question of calculation of the value of work done under a contract,[81] the question of calculation of compensation,[82] loss of profit,[83] *etc.*

Even so, the larger problem that the courts were now permitted to review the merits of an award still remained in need of a remedy. The problem was exacerbated by those decisions of high courts which did not notice the tapering

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80 *Puri Construction P. Ltd.* v. *Larsen and Toubro Ltd.*, MANU/DE/1316/2015; *Silver Resorts Hotel India Pvt. Ltd.* v. *Wimberly Allison Tong & Goo (UK)*, MANU/DE/1650/2016; *Rajesh V. Choudhary* v. *Kshitij Rajiv Torka* MANU/MH/2436/2015; *Valecha Engineering Limited* v. *Airports Authority of India* (I.A.D.), MANU/MH/2375/2015.

81 *Mariners Buildcon India Ltd.* v. *K.V. Makkar Contracts*, 2015(1) ARB LR 289 (Delhi).

82 *National Highways Authority of India* v. *Oriental Pathways (Nagpur) Pvt. Ltd.* , MANU/DE/1237/2016.

83 *Delhi State Industrial Infrastructure & Developoment Corporation* v. *Roshan Real Estates Pvt,* MANU/DE/1371/2015.

of the *dicta* of *Western Geco* in *Associate Builders* and went into an unabashed enquiry of merits of the award and set aside awards where there was no unity in the tribunal s and court s opinion on law and evidence.[84] Unfortunately, the Supreme Court too did not differentiate between the *dicta* of *Western Geco* and *Associate Builders*. In *National Highways Authority of India* v. *ITD. Cementation India Limited*,[85] the court cited the decision of *Associate Builders* and *McDermott* to hold that the interpretation given by the arbitral tribunal to the price escalation clause in a contract for laying a five land highway and payments thereunder was a plausible interpretation and thus did not warrant interference.[86] However, the direction of the arbitral tribunal to refund royalty was set aside on the ground that it was not covered by any clause of the contract and therefore considered beyond the scope of the contract jurisdiction of the arbitrator.[87] Once again, the court conflated a finding on merits as an error of jurisdiction.

In the decision of *State of Orissa* v. *Samantary Construction. Pvt. Ltd.*,[88] the Supreme Court cited the decisions of the *Western Geco* and *Associate Builders* to set aside the arbitral award as it did not agree with the calculation of compensation for wrongful seizure of the vehicle merely on the basis of hire charges exclusive of the value of the machinery, thus choosing to ignore the holding of *Associate Builders* that the errors of the arbitral tribunal in this respect would be final.

Indeed, it is astonishing that these judgments came at a point when the judiciary was well along the way of a pro-active course correction to rectify the damage done by the judgments discussed hereinbefore. In fact, *Saw Pipes* was perhaps the only blot left to be erased. In any case, the judiciary was well aware of the prevailing sentiment in favour of judicial restraint in reviewing the merits of an award. Interestingly, these mixed signals came at a time when the legislature had embarked on its own course correction through the Law Commission which culminated in the 246th Report.[89] These two judgments prompted the Law Commission to urgently issue an addendum

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84 See *Seemaben* v. *Motibhai K. Patel Manguben*, 2015(3) BomCR 288, *B.E. Billimoria & Co. Ltd.* v. *Raheja Universal Private Ltd.*, MANU/MH/2917/2015.

85 *National Highways Authority of India* v. *ITD. Cementation India Limited*, MANU/SC/0490/2015

86 *Id.*, para 21.

87 *Id.*, para 36.

88 2015 SCC OnLine SC 856.

89 Law Commission of India, 246th Report, *supra* note 43.

to clarify the scope of the phrase fundamental policy of India and caution that it did not entail a review on the merits of an award.

IV Legislative course correction

By legislating the Arbitration and Conciliation Amendment Act, 2015, that was passed early last year, the legislature accepted the recommendations made by the Law Commission in its report. In particular, an explanation to section 34 has been introduced that states, 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. [90] The tenor of this amendment is interesting, it is almost a proscription to the judiciary from the legislature on what it is no longer empowered to do and appears to be unprecedented in this respect. Indeed, even the Law Commission's report reeks of exasperation on the fact that the judiciary had allowed appeal like challenges to awards under the ground of fundamental policy of India.[91] The small sample size of cases, considering and applying the amendment, however, show that the judiciary has not treated this amendment as a complete proscription from looking into merits. While the amendment is in effect an overruling of the decisions of *Western Geco* and *Associate Builders*, only one decision has treated it so the High Court of Delhi in *Royal Sundaram Alliance Insurance Co. Ltd.* v. *CEPCO Industries Pvt. Ltd.*[92] unequivocally held that the award could not be reviewed on merits. However, in the case of *Silver Resorts Hotel India Pvt. Ltd.* v. *Wimberly Allison Tong & Goo (UK)*,[93] the court still enquired into the merits of the award and then adopted a restrained approach to hold that the court could not sit in appeal of the award, thus merely toeing the line of *Associate Builders*. Worse, the Madras High Court in *S.K.S. Logistic Ltd.* v. *Oil & Natural Gas Corporation Ltd.*[94] despite reproducing the amendment in its judgment, reviewed merits, disagreed with the findings on evidence to hold that the award was patently illegal and against the fundamental policy of India. If these decisions are to serve as a clue, the

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90 Law Commisision of India, Supplementary to Report no. 246: Amendments to the Arbitration and Conciliation Act 1996 (Feb. 2015), *available at*: http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf. (last visited on Aug. 1, 2016).

91 *Id.*, paras 10.4-10.6.

92 *Royal Sundaram Alliance Insurance Co. Ltd.* v. *CEPCO Industries Pvt. Ltd.*, MANU/DE/4111/2015.

93 *Silver Resorts*, *supra* note 80.

94 *S.K.S. Logistic Ltd.* v. *Oil & Natural Gas Corporation Ltd.*, MANU/TN/1379/2016.

legislature should have in fact laid down more restrictive covenants by expressly overruling *Western Geco* and *Associate Builders* to rein in and ensure uniformity from the judiciary.

In this vein, the amount of leeway given to the courts under the amendment is troubling. Section 34 of the new Act provides that an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court find 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.

The following points need to be considered. It is appreciable that the legislature has now recognised the difference between domestic awards rendered in a non-international commercial arbitration and international commercial arbitration and the standard of public policy applicable to each. Similarly, section 48 now specifies the heads of public policy and does not mention patent illegality as a ground in line with *Shree Lal Mahal*.[95] The Law Commission reasoned that the courts would have greater legitimacy in intervening in a purely domestic arbitration as opposed to a domestic arbitration with certain international features. However, it does not clarify how the judiciary has such legitimacy.[96] The only distinction that perhaps exists between the two awards is that while intervening in domestic awards no international obligations are violated. That there is no principled basis for intervening in arbitral awards is recognised by the Law Commission as well when they recognised that the standard in *Saw Pipes* was extremely unwarranted yet the legislature needed to allay the fears of the judiciary and other stakeholders in the quality of arbitral awards rendered domestically.

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95 S. 48 of the new A&C Act, now states:

Explanation 1. For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,

(i) the making of the award was induced or affected by fraud or corruptionor was in violation of section 75 or section 81; or

(ii) it is in conflict with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions or marality or justice.

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 ential a review on the merits of the dispute. .

96 Law Commission 246th Report, *supra* note 43 at paras 34-35.

This signals that the court is still reluctant to give arbitration the parity it deserves with other judicial processes. While it is true that there is great room for improvement in the domestic landscape of arbitration, a signal of confidence from the legislature and the judiciary should be simultaneous. The judiciary can still send this signal since the legislature has effectively left the ball in their court; as under the amended section 34, the judiciary can still review a purely domestic award on the ground of patent illegality.

However, it is made express that an award cannot be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence. [97] Thus it seems that the legislature intends to go back to the interpretation given to *Saw Pipes* that patent illegality must go to the very root of the matter and a mere violation of merits of the award is not sufficient to merit a review. Deciding what reasons or facts may contribute to an incorrect reading of the law or facts to render the award patently illegal that goes to the very root of the matter is still the prerogative of the judiciary. It is hoped that the lease of life given to arbitration in India through the Arbitration and Conciliation Amendment will not be short-lived.

V Conclusion

While ground of patent illegality can be presently used to set aside domestic awards arising out of non-international commercial arbitrations, it is not applicable on domestic awards arising out of international commercial arbitration. With respect to setting aside foreign awards, this ground is applicable only on arbitrations that commenced before October 23, 2015 in respect of arbitration agreements entered into between March 13, 2002 and September 6, 2012. Also, merits of the award cannot be reviewed on the ground of fundamental policy of India consequent to the A&C Amendment, 2015 overruling *Western Geco* (but see *Silver Resorts Hotel India Pvt. Ltd.*), in both, domestic award arising out of non-international commercial arbitrations and domestic award arising out of international commercial arbitrations. With respect to foreign awards, merits of the award cannot be reviewed on the ground of fundamental policy of India pursuant to A&C Amendment, 2015, which confirmed the principle laid in *Renusagar*.

While the aforementioned summary encapsulates the concerted corrections made by the judiciary and legislature, it also prompts us to think about the numerous mistakes that were made in the first place and further, the erratic

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97 A&C Act, proviso to section 34 (2A).

nature in which these mistakes were committed. These judicial errors cannot the compartmentalised into a span of the whack-a-mole. Every time the ground of patent illegality or an aspect of it was satisfactorily dealt with, another aspect of public policy such as fundamental policy of India was treated in the same careless manner. This indicates that legislative amendments in isolation would not suffice until attitudinal amendments are made by the judiciary, the legislature and all other stakeholders. The picture presented by this paper is not perfect. Domestic awards can still be reviewed on merits since not enough stakeholder support could be gathered for a complete overruling of *Saw Pipes* by legislation. Further, the complicated interplay of *BALCO*, *Satyam* and the A&C Amendment means that a certain set of foreign awards and agreements are not immune from the *Saw Pipes* standard and they require special attention. Despite the detailed and specific proscriptions provided in the A&C Amendment, the final word on finality of arbital awards is still with the judiciary which acts as the good man in the saddle [98] to tame the unruly horse [99] that is public policy.

98 *Enderby Town Football Club Ltd.* v. *Football Assn. Ltd.* (1971) Ch. 592.

99 *Richardson* v. *Mellish* (1824) Bing 229, per Burrough, J.