# SETTING ASIDE ARBITRAL AWARD

## INTRODUCTION

### (A) SETTING ASIDE APPLICATION IN INDIA IN A FOREIGN SEATED ARBITRATION

Challenge to an arbitral award is made in India under Section 34 which is placed in Part I of the ACA. Part II deals with enforcement of foreign awards.

In *Bhatia International* v. *Bulk Trading SA*, (2002) 4 SCC 105, a 3-judge bench of the Supreme Court ruled that even in an international commercial arbitration held outside India, Part I compulsorily applied unless excluded by the parties either expressly or impliedly.[1]

The courts were following *Bhatia,* often requested to intervene in foreign seated arbitrations mainly to make an interim measure or in enforcement proceedings. The question would then be: is Part I excluded?

*A 5-judge bench considered Bhatia* in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Services Inc.*, (2012) 9 SCC 552 and overruled on 06 September 2012 but prospectively. *BALCO* discussed the concept of 'seat' and recognized

[1] In *NTPC* v. *Singer* (1992) 3 SCC 551, an interim award made in arbitration seated at London was challenged in Delhi court under the Arbitration Act, 1940. It would be recalled that in 1961 India had enacted the Foreign Awards (Recognition and Enforcement) Act, 1961 (FARE) to implement the New York Convention. But FARE had a *sui generis* provision. Section 9 (b) provided that FARE will not apply to an award made on an arbitration agreement governed by laws of India. That is, such award would be domestic award and be treated under the Arbitration Act, 1940 Act. But the *Singer* court did not base its decision on that provision alone. It went on to hold that courts of seat of arbitration will have jurisdiction in respect of procedural matters concerning the conduct of arbitration but also that that there is an "overriding principle", namely, that courts of country whose substantive law governs the arbitration agreement are the competent courts in respect of all matters under the arbitration agreement, and the jurisdiction exercised by the courts of the seat is merely concurrent and not exclusive and strictly limited to matters of procedure. This is the concurrent jurisdiction theory which was "resurrected" in *Bhatia*.

that the ACA accepted the territorial principle where seat was the center of gravity. Indian courts, it said, had no jurisdiction over a foreign seated arbitration (even in cases where the agreement stated that the ACA applied).

Later, even in cases governed by the *Bhatia* principle, conscious of the BALCO ruling, the courts read exclusion of Part I in many cases because either the seat was outside, or foreign laws governed the arbitration agreement.[2]

### (B) SETTING ASIDE AND PUBLIC POLICY; ENFORCEMENT OF THE AWARD AND PUBLIC POLICY

The public policy defense to an arbitral award either in a set-aside proceedings under Section 34 ACA or under Section 48 when resisting enforcement of a foreign award rankles and interests the most. The defense is set up in almost every application. Its history is summarised in the Law Commission of India's Supplementary to its 246th report[3] on the amendments to the ACA.[4]

Relevant to this context:

1. Section 34 (2) (b) (ii) of the ACA now provides that an arbitral award may be set aside by the court only if the court finds that the arbitral award is in conflict with the public policy of India.

2. Explanation 1 Section 34 (2) (b) (ii) clarifies for the avoidance of any doubt that an award is in conflict with the public policy of India, only if:

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2 These cases do not discuss what matters are governed by the law governing the arbitration agreement or if they had anything to do with the court's jurisdiction on the arbitral process.

3 Law Commission of India's Supplementary to its 246th report, 2015 *available at* http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf

4 Also, see https://www.linkedin.com/pulse/oops-did-again-indian-supreme-courts misadventure-interfering-sen/, Krishnayan Sen, criticising *Vedanta Ltd.* v. *Shenzhen Shandong Nuclear Power Construction Co. Ltd.*, (2019) 11 SCC 465 where the interest awarded by the arbitral tribunal was modified by the 2-judge bench of R.F. Nariman and Indu Malhotra JJ

a. The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

b. Is in contravention with the fundamental policy of Indian law; or

c. It is in conflict with the most basic notions of morality or justice.

3. Explanation 2 clarifies for the avoidance of doubt that 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 a dispute.

The public policy defense for resisting enforcement of an arbitral award is textually almost the same under Section 48 (2) (b).

The ground that an arbitral award may also be set aside for "patent illegality", which for long was Part of the public policy defense, has been made an additional ground in cases of awards arising out of arbitrations other than international commercial arbitrations (therefore awards like a domestic award involving domestic parties). A proviso cautions that "an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence".

**(C) THE 2019 CASES**

*Ssangyong Engineering & Construction Co. Ltd.* v. *National Highway Authority of India,* 2019 SCC OnLine SC 677 contains the history, assessment, and current state of the law on public policy defense to both setting aside and enforcement proceedings.

It also contains an assessment of ground contained in Section 34 (2) (a) (iii) and Section 34 (2) (a) (iv) as well as the meaning of the expression "most basic notions of morality or justice", which again is part of the public policy defense.

*National Highways Authority of India & Another* v. *Subhash Bindlish & Others*, Special Leave Petition (Civil) Diary No(s). 17812/2019, 2-judge bench decision of the Supreme Court considered the time limitation to apply to set aside. It notes that the period is a maximum of 120 days, which is a bit erroneous. The period is three months plus thirty days. This may or not be 120 days in a given case (see the chapter on time limitations).

Again, *Oriental Insurance Co. Ltd.* v. *M/s Tejparas Associates & Exports Pvt. Ltd.*, 2019 SCC OnLine SC 1281, another 2-judge bench of the Supreme Court is on time-limitation and discussed in that Chapter.

*Hindustan Petroleum Corporation Ltd.* v. *M3nergy Sdn. Bhd.*, 2019 SCC OnLine Bom 2915, a Bombay High Court case, discussed what standard of review applies in a set aside proceeding while determining the question of lack of jurisdiction of the arbitral tribunal.

*The State of Jharkhand and others* v. *M/s HSS Integrated SDN and another*, Special Leave to Appeal (sic Special Leave Petition) (C) No. 13117 of 2019, discussed standards for setting aside the award and emphasized that the grounds under Section 34 are not attracted if the tribunal's findings are plausible, neither perverse nor contrary to evidence.

*Dyna Technologies Pvt. Ltd.* v. *Crompton Greaves Ltd.*, 2019 SCC OnLine SC 1656, discussed in detail the facets of a reasoned award. *Ssangyong* also had held that not giving reasons attracts the 'patent illegality' ground.