Knowledge Consortium of Gujarat
Department of Higher Education , Government of Gujarat
JOURNAL OF MULTI-DISCIPLINARY
ISSN : 2279-0268

Continuous issue-8 | January-June 2014

An Analytical studyon Judicial Review of Awards of Arbitration in India

The Indian economy has rapidly transformed into a global destination forinternational business. It is imperative for India to have an atmosphereconducive to foreign corporations seeking to invest in India. Efficientdispute resolution machinery is therefore paramount.

A benefit of conducting arbitration in India is that the scope ofenforcing a foreign award is wider than enforcing a judgment of aforeign court. India has more reciprocal arrangements with othercountries for the enforcement of foreign arbitration awards than forforeign judgments.

In order to reduce the burden on courts and provide an alternative tolitigation, /The Arbitration and Conciliation Act/ was enacted in 1996.The Act was intended to create a pro-arbitration legal regime with

minimal judicial intervention. Section 5 of the Act provides:

"Notwithstanding anything contained in any other law for the time beingin force, in matters governed by this Part, no judicial authority shallintervene except where so provided in this Part." The intention of the legislature is clear – a judicial authority will only intervene asprovided by the Act. As per the provisions contained in the Act, ajudicial authority can intervene in (1) the event the parties cannotreach a consensus on appointment of arbitrators, (2) where a party movesan application for interim measures of protection or (3) when a partyseeks to enforce or set aside an arbitral award. The extent to whichsuch judicial protection is available is also defined in the Act.However, the manner in which the Act has been interpreted in some of thelandmark judgments has expanded the extent of judicial intervention.

Where the courts have gone beyond the statutory scope of review and have attempted to either review or set aside arbitral awards on non-statutory standards such as the "manifest disregard of the law" in the United States or "error of law" in India. In this thesis, an attempt has been made to analyze the judicial decisions by various national courts in the United States and India (updated until September 2007) so as to highlight the latest trend in judicial review of arbitral awards. The scope of the 'public policy' defense employed in the United States for setting aside arbitral awards has been first discussed, following which the general trend of the national courts going beyond the scope of the statutory grounds in reviewing arbitral awards under the "manifest disregard of law".

WHY THE NEED FOR ARBITRATION?

The act of 1996 has defined arbitration in the following ,manner "Arbitration means any arbitration whether or not administered by permanent arbitral institution".

A fair, just and quick process of resolution of disputes is indispensable in any democratic society becoming increasingly aware of their human and legal rights. The human and material resources in Courts are inadequate to meet the ever growing demands, resulting in backlog of cases and delay in the administration of justice. Our justice delivery system is bursting at the seams and unless timely measures are adopted, for the quick disposal of cases, particularly at the grass-roots it will lead to very dire consequences.

In certain disputes like financial matters involving the individuals, firms and even multinational companies, they do not want to submit to the jurisdiction of the courts of obvious reasons of delay, rigid procedural rules and provisions of appeals and revisions. The simple logic is that both the parties are not interested in getting a proposition of law on any point laid down but they are interested to settle their money matters and for that purpose they can even give up certain claims which they are otherwise entitled to. One such method of dispute resolution is arbitration governed in

India by the Arbitration and Conciliation Act 1996.

ADVANTAGES OF ARBITRATION

I. Finality of Decisions
The decision (i.e. award) of arbitral tribunal is final and binding on the parties. A final and enforceable decision by amicable settlement can generally be obtained only by recourse to arbitration because arbitral tribunals are not subject to appeal. Arbitral awards may be challenged only on a very few limited grounds.

II. International Recognition
Arbitral awards enjoy much greater international recognition than judgments of national Courts. The New York Convention facilitates enforcement of awards in all contracting states.

III. Unbiased Jurisdiction
Neutrality and mutuality are perhaps the most redeeming features of arbitration process. At least in matters such as:

(a). place of arbitration
(b). language to be used procedure or rules to be applied
(c). nationality of arbitration
(d). legal representation and
(e). that the parties can place themselves on equal footing

IV. Choice of Judges
Arbitration offers parties a unique opportunity to designate persons of their choice as arbitrators, which is not possible in case of courts. This enables the parties to have their disputes resolved by people who have specialized competence and expertise in the relevant field. Another important factor is the lack of specialized judges and Courts; this can be an impediment both in terms of time taken and also in terms of injustice being done due to lacunae in knowledge. Arbitration helps in overcoming this.

V. Faster & Less Expensive
Arbitration is faster and less expensive than litigation in courts. Where the arbitral proceedings can often score over judicial methods is in the duration of time taken- the latter tends to be lengthy for a variety of reasons which includes the enormous pendency of existing caseloads as well as the various levels of original and appellate jurisdiction which need to be completed before a final solution is arrived at.

VI. Confidential
The element of confidentiality, which is wanting in judicial proceedings in an attribute of arbitration system. Arbitration hearings are not public and only the parties receive the copies of the arbitral award.

VII. Specialised Judges
The undisputed advantage of arbitration lies in the fact that the judges themselves can be unbiased experts in the field within which the issues being arbitrated fall. While the efficacy of the existing judiciary is undoubted, certain fields demand specialized knowledge not easily acquired by a regular judge. Intellectual property disputes- to take just one example- demand a high degree of technical skill and knowledge and even lawyers handling such disputes are required to possess the same. Given that arbitrators can be (and often are) experts in their arenas, the need for expert witnesses can be eliminated- saving both much time and much money as well as potentially ensuring a fairer results for the disputants.

VIII. Amicable and Mutual
The method of arbitration creates understanding between disputants as it resolves the disputes through compromise and co-operation without leaving an intolerable trial of bitterness behind.

MAIN OBJECTIVES OF ARBITRATION AND CONCILIATION ACT, 1996

The main objectives of the Arbitration and Conciliation Act, 1996 may be summarized as follows:

1. To cover within its fold International commercial arbitration and conciliation as also the domestic arbitration and conciliation.
2. To make provision for an efficient and effective procedure to meet the requirements and needs of specific arbitration.
3. To ensure that arbitral tribunals functions within the framework of the Act.
4. To minimize supervisory role of courts in the arbitral process and thus ensure minimal judicial intervention.
5. To encourage amicable settlement of disputes between parties using arbitration as an alternative disputes resolution mechanism.
6. To ensure making of an award on settled terms of the parties.
7. To provide that every final award is enforced in the same manner as if it were a decree of the Court and thus eliminate the necessity of approaching a law court to make a decree of the Court.
8. Last but not least, to provide conditions and procedure for the purpose of enforcement of foreign awards under New York and Geneva Conventions

Recognition and Enforcement of Arbitral Awards

The recognition and enforcement of an award has always been understood to be separate from the making of the award itself, the reason being, the award is given by an arbitrator whose authority is based on the contract between the parties and who does not possess the authority of the State. Further, the international treaties that govern the enforcement of an arbitral award, such as the New York Convention; have much greater acceptance internationally than treaties for the reciprocal enforcement of court judgments.

Indeed, the United States, which is a party to the New York Convention, "is not a party to a single treaty providing for enforcement of foreignjudgments." Article V of the New York Convention lays down the provisions under which the recognition and enforcement of an arbitral award may be refused under the Convention, which are set out hereunder.

New York Convention - Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
(e) The award has not yet become binding, on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made. 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:

2. The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
3. The recognition or enforcement of the award would be contrary to the public policy of that country.
Arbitral Awards in India – Statutory ProvisionsInternational Commercial Arbitration in India – Finality and Enforcement:

India has always held a deep-rooted commitment to the philosophy of arbitration in general. Mahatma Gandhi, in 1927 wrote, "Differences we shall always have but we must settle them all, whether

religious or other, by arbitration." Foreign arbitral awards have always been treated as final on merits in India for the purposes of enforcement with limited or no scope for judicial review except strictly under the statute. India became a party to the New York Convention with effect from October 11, 1960 In order to implement its obligations under this Convention, India enacted the Foreign Awards (Recognition and Enforcement) Act, 1961. The 1961 Act has since been repealed and replaced by the new Indian Arbitration and Conciliation Act, 1996. The focus of the 1996 Act is the minimization of court intervention in the process and enforcement of foreign arbitral awards.

Indian Arbitration and Conciliation Act, 1996

The Indian Arbitration and Conciliation Act, 1996, is a unification statute in the sense that it was intended to give effect to multiple international commitments undertaken by India, namely the UNCITRAL Model Law on International Commercial Arbitration, 1985, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 and the Geneva Protocol on Arbitration Clauses, 1923.The Act seeks not only to consolidate, but also to unify Indian law both on domestic and international arbitration. In other words, under the Act, Indian law would be same for both domestic and international arbitrations that take place within the Indian territory.

The 1996 Act is divided into four parts: Part I is concerned with domestic arbitrations; Part II deals with the enforcement of New York Convention awards and European Convention on International Commercial Arbitration ("Geneva Convention") awards; Part III makes legislative provisions for conciliation based on the 1980 UNCITRAL Conciliation Rules and finally, Part IV adds supplementary provisions.

A foreign award in India is enforceable either under the New York Convention, the Geneva Convention or under common law as applicable in India.Indian Arbitration and Conciliation Act, 1996 The Indian Arbitration and Conciliation Act, 1996, is a unification statute in the sense that it was intended to give effect to multiple international commitments undertaken by India, namely the UNCITRAL Model Law on International Commercial Arbitration, 1985, the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958, the Geneva Convention on Execution of Foreign Arbitral Awards, 1927 and the Geneva Protocol on Arbitration Clauses, 1923.Before the 1996 Act, the Indian Arbitration Act 1940 (which was repealed by the 1996 Act) did not make any reference to international arbitrations taking place in Indian territory.

Since the 1940 Act was to be applied to all arbitrations taking place within Indian territory, international arbitrations were also ipso facto covered by the enactment. The new enactment, however, makes a special reference to international commercial arbitrations and has defined the same under Section 2(f) of the 1996 Act.

Recourse against Arbitral Awards

Section 34 under Part I of the 1996 Act lays down the provisions under which applications could be filed to set aside arbitral awards. Section 48, Part II of the 1996 Act provides the conditions for enforcement of foreign awards. Section 34 and 48 of the 1996 Act essentially mirror each other in terms of their provisions, although an application challenging an arbitral award is filed under section 34 of the Act. In relation to the enforcement of foreign awards, the Indian Supreme Court in Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., held that there is no need for separate proceedings in order to enable the court to decide the enforceability of an award or to make it binding as a order or decree and to execute the award.

The Supreme Court made the following observations: Part II of the Act relates to enforcement of certain foreign awards. Chapter I of this Part deals with New York Conventions Awards. Section 46 of the Act speaks as to when a foreign award is binding. Section 47 states what evidence the party applying for the enforcement of a foreign award should produce before the Court. Section 48 states the conditions for enforcement of foreign awards. According to Section 49, if the Court is conscience satisfied that a foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court and that Court has to proceed further to execute the foreign award as a decree of that Court. Specifically, a court hearing an application to set aside an award under the 1996 Act is, on the face of the wording of the 1996 Act, precluded from reviewing--even indirectly--the merits of the award since setting-aside is no longer possible for errors of law or fact.

Section 34 of the 1996 reads as follows:

Application for setting aside arbitral award. –
(1) Recourse to a court against an arbitral award may be made only by an application for setting aside such award in accordance with sub-section (2) and sub-section (3).
(2) An arbitral award may be set aside by the court only if-
(a) The party making the application furnishes proof that-
(i) A party was under some incapacity, or
(ii) The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or
(iii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
(iv) The arbitral award deals with a dispute not contemplated by or not falling within theterms of the submission to arbitration, or it contains decisions on matters beyond thescope of the submission to arbitration: Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
(b) The court finds that-
(i) The subject-matter of the dispute is not capable of settlement by arbitration under thelaw for the time being in force, or
(ii) The arbitral award is in conflict with the public policy of India.

Meaning and scope of "Public Policy" according to the 1996 Act

The explanatory notes which follow Sections 34(2)(b)(ii) and 48(2)(b) of the 1996 Act make clear that a party seeking to set aside or resist recognition and enforcement of an arbitral award on grounds of public policy faces a very high threshold. Essentially, in order to be contrary to the public policy of India, the award must rise to the level of having been induced by fraud or corruption. Furthermore, the explanation to Section 34(2)(b)(ii) also specifies that a violation of public policy arises where there is a breach of the confidentiality provisions contained in Section 75 of the 1996 Act, or where evidence obtained in conciliation proceedings has been adduced in the arbitration.

In short, pursuant to the examples specified in the explanatory notes included in the 1996 Act, only a serious violation of due process will amount to a violation of Indian public policy. Thus, the explanatory notes provided in the 1996 Act are clearly in line with the interpretation given to the corresponding provisions in the UNCITRAL Model Law. Indeed, according to the UNCITRAL Model Law Commission Report, the term "public policy" comprises: fundamental notions and principles of justice. . . . 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. Based on the foregoing, the public policy standard set by the 1996 Act is--consistent with the intention underlying the corresponding UNCITRAL Model Law provision--intended to be high.

Accordingly, the 1996 Act provides that only where an award is based on a serious violation of due process can the public policy ground be successfully invoked to set aside or resist enforcement of such an award. As regards the recognition and enforcement of foreign arbitral awards, the Indian Act embodies the New York Convention. However one of the main problems that arose in the application of the New York Convention was the interpretation of the meaning and scope of "public policy" by the National Courts. Indian courts tended to equate the term "public policy" with the term "law" as they were conditioned by section 13(f) of the Code of Civil Procedure of India 1908, which provided that a foreign judgment may be refused recognition and enforcement in India if it sustains a claim founded on a breach of any law in force in India.

The repercussions of such an approach are self-evident any foreign arbitral award that is not in conformance with the provisions of any of the laws in India could be struck down by adopting this view. The meaning of "public policy" when used in enforcement of foreign awards. The Court said the terms should not be equated with the law of India: "Something more than the violation of the law of India must be established." By applying this criterion, the enforcement of foreign awards would be refused, if such enforcement would be contrary to:

(i) the fundamental policy of Indian law; or

(ii) the interests of India; or
(iii) justice or morality

This decision set an extremely high standard for Indian courts to refuse to enforce a foreign arbitral award. The Supreme Court of India has recognized that international arbitral awards are enforceable internationally, and therefore should be international in their validity and effect.

Section 12(f) reads: "A foreign judgment shall be conclusive as to any matter directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except when it sustains a claim founded on a breach of any law in force in India recognized the pro-enforcement bias of the New York Convention, and thus held that a court in India should restrict itself to the grounds outlined in Section 48 of the Act. Those grounds, moreover, do not enable party to challenge an arbitral award on its merits.

The High Court of Delhi recognized in Ludwig Wunsche & Co. v. Raunaq International Ltd. that under Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (the implementation legislation of the 1958 New York Convention), the "Court has no power to set aside the award, the Court can only refuse enforcement of the award." The provisions of the New York Convention have greatly influenced the UNCITRAL Model law, and since the 1996 Act has adopted the Model law, there is no reason why Indian courts will not apply this reasoning to awards under the new Act.

Review of Arbitral Awards in India – Scope Broadened

Scope of Judicial Intervention Broadened The efficacy of any legislation must be judged by its implementation rather than its intentions. Unfortunately, in practice, the Indian courts have vastly enlarged the scope of challenge of awards to much more than what is available under the 1996 Act. In Oil & Natural Gas Corp. Ltd. v. SAW Pipes Ltd. the Supreme Court of India adopted a broad interpretation of the term "public policy" by essentially including "error of law" as a new ground for setting aside an arbitral award. This "error of law" ground was not provided for under the 1996 Act. The Court then effectively used this new ground as a basis to review the merits of the case. While the Saw Pipes decision is, at first glance, only relevant to proceedings to set aside awards with seat of arbitration in India, the ramifications of this decision may potentially extend to recognition and enforcement proceedings of foreign awards in India.

New standard – "Patent Illegality"

The Supreme Court of India has also introduced a new ground for setting aside an award called "patent illegality". The basis for the same has been explained as follows: "In our view, reading section 34 conjointly with other provisions of the 1996 Act, it appears that the legislative intent could not be that if the award is in contravention of the provisions of the 1996 Act, still however, it couldn't be set aside by the Court."

The Court then analyzed whether the award could be set-aside on public policy grounds. The Court regarded the standard of public policy laid down in Renusagar as "narrow" meaning of public policy and held in Saw Pipes as follows: . . . in a case where the judgment . . . is challenged before the . . . court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term 'public policy of India.' On the contrary, wider meaning is required to be given so that the 'patently illegal award' passed by the Arbitral Tribunal could be set aside. Thus, the Supreme Court lowered the threshold of the public policy ground for setting-aside arbitral awards. It ruled that, certainly in cases of set-aside proceedings in India, an award can be set aside on public policy grounds, not only if the award is contrary to one of the three public policy grounds enumerated in Renusagar, but also if it is "patently illegal."

First, the Court stated that there is no definition of "public policy" for the purposes of Section 34(2)(b)(ii) of the 1996 Act: The phrase 'Public Policy of India' is not defined under the 1996 Act. Hence, the said term is required to be given meaning in context and also considering the purpose of the section and scheme of the 1996 Act. . . . Hence, the concept 'public policy' is considered to be vague, susceptible to narrow or wider meaning depending upon the context in which it is used.

Second, since the Court concluded that there was no definition of public policy at hand, it decided that--in apparent disregard of the high threshold for public policy provided for in the explanatory

note to Section 34(2)(b)(ii)--it would adopt a broader meaning of "public policy."

Finally, the Court set forth its definition of "patent illegality." It held that an award was "patently illegal" if the Arbitral Tribunal had committed an error of law. By interpreting the concept of "public policy" to include "error of law," the Supreme Court went beyond the scope of the 1996 Act.

Indeed, the 1996 Act did not mention error of law as a ground for setting aside an award based on public policy. In short, the Supreme Court effectively used the public policy ground as means to conduct a review of the merits of the case and to "substitute its own view for the view taken by the Arbitrators. . ." The Court's interpretation of public policy is so broad that it potentially opens the floodgates to more and more challenges of arbitral awards before the Indian courts.

Judicial Intervention on the grounds of error of fact or law

The 1996 Act was brought into existence mainly to achieve, among other objectives, the minimization of the supervisory role of courts in the arbitral process and to provide that every final arbitral award is enforced in the same manner as if it were a decree of the court. Courts in India have given varied opinions from time to time as regards judicial intervention and review of arbitral awards. The courts have held that, "as the parties choose their own arbitrator, they cannot, when the award is good on the face of it, object to the decision either on law or on facts and the award will neither be remitted nor set aside.'" The mere fact that the arbitrators have erred in law or facts can be no ground for interference by the court and the award will be binding on the parties. However, courts have not been always consistent in their views with regard to reviewing of arbitral awards.

The Supreme Court, in one case, observed, "when an arbitrator instead of giving effect to the statutory formula contained in the contract, coined one of his own which he thought was just and reasonable, the arbitrator committed jurisdictional error and the award could not be sustained."The court should not substitute its own reasons for that of the arbitrator as long as the arbitrator's reasons do not suffer from an error apparent on the face of the record or that is otherwise unreasonable and based on surmises and conjectures. In Maharashtra State Electricity Board v. Sterlite Industries (India), the Supreme Court stated that, "An error in law on the face of the award means, that you can find in the award or document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal propositions which is the basis of the award and which you can then say is erroneous."

There, the Court stated, Where the error of finding of fact having a bearing on the award is patent and is easily demonstrable without the necessity of carefully weighing the various possible view points, the interference in the award based on erroneous finding of fact is permissible and similarly, if an award is based by applying a principle of law which is patently erroneous, and but for such erroneous application of legal principle, the award could not have been made, such award is liable to be set aside by holding that there has been a legal misconduct on the part of the arbitrator.

Conclusion

Judicial review of the merits of arbitral awards by national courts whether in the United States or India, clearly runs the risk of impinging upon arbitration as an effective method of dispute resolution. The trend has been such that the, parties to an arbitration agreement can no longer be confident that an arbitral award, once rendered, is final. If disputes are anyway going to end up in courts, there is very less incentive for parties to arbitrate in the first instance. In sum, it is clear that judicial standards of review, like judicial precedents, are not the property of private litigants. Arbitration's goals are unquestionably best served by ensuring the finality of arbitration awards This is consistent with the bargain the parties have made, and the remedy for any flaws in the system of arbitration should be for having the parties to choose better arbitrators, not to appeal arbitration awards. However on a positive note, at least one commentator has argued that the frequency of judicial review of awards has not sapped

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Mr. Gaurang A. Thaker
(Assistant Professor)
Shree K. A. Pandhi English Medium Law College,
Chaudhary High School Campus,
Kasturba Road,
Rajkot - 360001