Deconstructing Public Policy: International Arbitration Law and the Enforcement of Foreign Awards in India

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International Law and the Enforcement of Foreign Arbitral Awards in India

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DE-CONSTRUCTING PUBLIC POLICY:
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Across jurisdictions, arbitration is recognized as an alternative to the court process and as a corollary calls for the minimum intervention of the Court especially in terms of the
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decisions of the Arbitral tribunal. This often takes more precedence in the field of investor-state arbitrations where in investors feel that their disputes should be dealt by independent bodies and not be over-ruled or set aside by a partisan court on some seemingly frivolous ground or the other. With more than 2500 bilateral investment treaties in place, investors are desperately looking for international protection of their investments and appropriate dispute settlement mechanisms in this regard. Here is where arbitral instruments like the UNCITRAL model law\(^1\), the ICSID convention\(^2\) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards\(^3\) have a major role to play in shaping the national laws so as to better protect investors and parties to international arbitration.

When it comes to India certain issues arise in terms of investment law and arbitration; that it is not a member of the ICSID convention and that even though its laws are pretty much well in place, it is an activist ‘Supreme Court’ and its interpretation on these arbitral statutes that has created a huge lull in the enforcement of arbitral awards. The latter issue is what I propose to be the theme of my paper. In light of this, part I would discuss the international aspects and law on ‘public policy” and then to talk about the legislature’s role in ensuring smooth arbitrations in the making of statues and its coherence to international arbitral principles. Part III would like to discuss that role of the

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\(^3\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 7, 1959, 330 UNTS 38. (Hereinafter New York Convention)
Supreme Court in this area and the impact to two of its decisions on the enforcement of arbitral awards in India. Lastly, part IV would like to explore the consequences of such actions and recommend how best we could solve the anomaly that I shall be putting forth in the preceding parts.

PART I

UNDERSTANDING THE LEGISLATIVE FRAMEWORK: PUBLIC POLICY IN INTERNATIONAL AND NATIONAL CONTEXTS

An International law evaluation of Public Policy

In 1824, an English judge talked of public policy as an ‘unruly horse’. Where in once you get astride it you’ll never know where it will carry you and that it is never argued at all, but when all other points fail.\textsuperscript{4} A reading of the above may lead us to understand that the justification that a court decision is against public policy is to be used in the rarest of circumstances and that we are to look at it as an exception and not a rule. In the mid 20\textsuperscript{th} century, when international arbitration was gaining prominence there was a widespread perception to limit the interference of the Court in terms of enforcement of its decisions and at the same time maintain the sovereignty concerns of the state enforcing the award. These concerns were codified in the 1958 Convention on the Recognition and

Enforcement of Foreign Arbitral Awards\(^5\) also called the ‘New York Convention’. As regards public policy, Article V. 2(b) of the Convention stated;

\[
\text{“Recognition and enforcement of an award may also be refused if the competent authority in the Country where the recognition and enforcement is sought finds that:}
\]

\[
(b) \text{the recognition or enforcement of the award would be contrary to the public policy of that country.”}
\]

Whilst many hail the Convention to be the single most important instrument in International arbitration\(^6\), it was considered by some that the public policy exception would undermine the objectives of the convention.\(^7\) More so, the American delegate stated that it is quite likely that a variety of interpretations would be forthcoming form Court of different nations.\(^8\) In an attempt to then clearly negate the possibility of various interpretations of this term, the Drafting Committee stated that it intended to limit the application of the public policy provision to cases in which recognition and enforcement would be “distinctly contrary to the basic principles of the legal system of the country


8 Ibid.
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where the award is invoked”. By this understanding, ‘public policy’ included fundamental principles of law and justice in substantive as well as procedural aspects and instances such as corruption, bribery, fraud or similar cases. These reports narrowed the scope of public policy and allayed the fears expressed by certain delegates. In time, most countries modeled their national laws to suit the modalities of the Convention.

Later on in 1985, on a Recommendation by the Secretary General that the harmonization of Arbitral Laws and the judicial control of arbitral procedure could better be achieved by the promulgation of a model or uniform law, the UNCITRAL Model Law on Arbitration was adopted in 1985 as a standard that states for the national arbitration laws of nations. The Model Law incorporated Article 34 (2)(b)(ii) that stated that recourse to a court against an arbitral award may be made by an application for setting aside the

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9 Report of the Committee on the Enforcement of International Arbitral Awards, 28th March 1955, UN Doc. E/2704 and E/AC.42/4/Rev.1. See also JF Poudret and Sebastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION, 2nd Ed. 2007 at p. 856. There were a lot of discussion on whether ‘public policy’ as used in the Convention meant ‘International public policy’ but it is submitted that such a view is negated by the usage of the phrase policy of that country’ in the Convention.


award if it is in conflict of the public policy of the State. The Commission then clarified that in as much as public policy includes fundamental principles of law and justice, instances such as bribery and corruption, the phrase ‘the award is in conflict with the public policy of the state’ should not be interpreted as excluding circumstances or events relating to the manner in which it was arrived at. Thus stating clearly that public policy should be interpreted narrowly and not give a lot of levy to the Courts to set aside awards.

Various national systems have now adopted the UNCITRAL Model Law as national legislations thus creating an wide body for understanding how their Courts would interpret them. In Canada for instance, in Attorney General for Canada v. SD Myers Inc. the Court held that public policy includes fundamental notions and principles of justice and criteria such as ‘patently unreasonable’, ‘clearly irrational’ and ‘totally lacking in reality’ and thus restricting its scope. In the United States, in Parsons and

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13 Article 34 of the UNCITRAL Model Law on International Commercial Arbitration, adopted on 21st June 1985, UN Doc. A/40/17 states, Application for setting aside as exclusive recourse against arbitral award

1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article;

(b) the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

14 UN Doc. A/40/17 at para 297.

15 These include Canada, China, Kenya, South Africa etc…


Whitmore\(^1\) the Federal Court held that enforcement of a foreign award may be denied on public policy grounds ‘only where enforcement would violate the forum state’s most basic notions of morality and justice’.\(^1\) A similar perception was following in English law where the Court states that considerations of public policy must be approached with extreme caution and it has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to public good, or possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public.\(^2\)

These narrow interpretations were given to get the idea that arbitration is to be understood as an alternative dispute settlement mechanism to local courts and their interference should be made as minimal as possible.\(^3\) Further on, none of the interpretations mentioned ‘error of law’ as a ground thus negating it as a seemingly appellate provision. In 2002, the International Law Association’s Committee on International Commercial Arbitration\(^4\) conducted a conference on public policy and

\(^1\) Parsons and Whitmore Inc. v. Societe Generale de L’industrie du Papier RAKTA and Bank of America, 508 F.2d 969 (2 Cir., 1974).


adopted the resolution that public policy refers to international public policy of the state and includes;

(i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as “lois de police” or “public policy rules”; and (iii) the duty of the State to respect its obligations towards other States or international organisations.”

Thus, with this understanding of the narrow interpretation given to the term ‘public policy’ we shall now proceed to examine the Indian law on the subject and the judicial decisions in this regard.

National Law on Public Policy: The Legislative Framework

Before the passing of the Arbitration and Conciliation Act of 1996, Arbitration in India was basically covered by two statutes; the Arbitration Act of 1940 and the Foreign Awards (Recognition And Enforcement) Act, 1961. Under the Arbitration Act of 1940, an arbitral award could be set aside in the case of (a) misconduct on the part of the arbitrators, (b) issuance of the arbitral award after commencement of legal proceedings or
(c) the award has been improperly procured or is otherwise invalid. At first glance it can be noticed that there wasn’t a provision of annulment of the award on the ground of public policy but however there was a wider ground of the award being invalid or improperly procured.

After the New York Convention came into force, India, to effectively comply with its obligations as set out in the Convention passed the Foreign Awards (Recognition And Enforcement) Act that as the title suggests, government the enforcement of international arbitral awards in India. Section 7 (1)(b)(ii) of the Act stated that the foreign award may not be enforced if it is contrary to public policy.

As regards the judicial interpretations of this term, initially in Gherulal Parakh v. Mahadeodas Maiya this Court acknowledged that there could be a broad and narrow view of interpreting public policy and favoured the narrow view when it said that though the heads of public policy are not closed and theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the

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23 Section 30, Indian Arbitration Act, 1940.


25 Section 7(1)(b)(ii) of the Foreign Awards (Recognition And Enforcement) Act, 1961 states; Conditions for enforcement of foreign awards.

(1) A foreign award may not been forced under this Act---
(b) If the Court dealing with the case is satisfied that---
(i) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or
(ii) The enforcement of the award will be contrary to public policy;

interest of stability of society not to make any attempt to discover new heads of public policy in these days. In later cases till 1994, the Supreme Court then followed a broader view of public policy stating that his phrase would also include actions and awards that are contrary to law in the opinion of the Court. However, in its landmark decision in Renusagar Power Ltd. v. General Electric, the Supreme Court in deciding the enforcement of an arbitral award passed in New York stated that an award would be contrary to public policy based on the three following grounds: i) fundamental policy of India law, ii) the interests of India; or iii) justice of morality. We may notice that this interpretation of public policy was in line with the various interpretations given by international organizations and decisions of other jurisdictions and thus bringing Indian arbitral law at par with international standards.

In 1996, it was decided by the Government to scrap the Arbitration Act of 1940 and frame a new Act in consonance with the UNCITRAL Model Law of 1985. The result was the Indian Arbitration and Conciliation Act of 1996 that in its statement of objects and reasons put forth its main objective as “to minimizing the supervisory role of the 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.” The Act contained Sections 34 and

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30 Section 34, Arbitration and Conciliation Act of India, 1996, states; Application for setting aside as exclusive recourse against arbitral award
36 similar to the Model Law. However, the legislators added an explanation\textsuperscript{31} stating that an award would be contrary to public policy if it was induced by fraud or corruption thus further restricting its scope and bringing it in consonance with international standards. Now the Act also contained a specific Part (Part I for national arbitral awards and Part II for foreign awards) on the enforcement and recognition of foreign arbitral awards and in this sense it was a special legislation. Sections 48 (1)\textsuperscript{32} and (2) governed the enforcement of these awards and contained similar public policy criteria.

The anomaly however lies in this fact that in as much as the legislature sought to maintain a distinction as regards foreign and national arbitral awards by putting them under separate heads, the Supreme Court in \textit{Bhatia International v. Bulk Trading S.A.}\textsuperscript{33} stated that Part I applies to foreign awards as well thus judicially blurring the distinction that the legislature sought to create. The reason the Hon’ble judges sought to decide this way was to allow the domestic courts to hear and award interim measures; a measure that was not provided for in the part dealing with foreign awards. However, the Court did not

\begin{quote}
\textit{1. Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article; (b) the court finds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the award is in conflict with the public policy of this State.}

\textit{Explanation: Without prejudice to the generality of sub clause(ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced by fraud or corruption or was otherwise in violation of Section 75 or Section 81.}
\end{quote}

\textsuperscript{31} Ibid.

\textsuperscript{32} Section 48, Arbitration and Conciliation Act of India, 1996.

restrict its judgment to such measures only and as a result, the distinction that the legislature sought to create between Parts I and II in the Act have been blurred.

A reading of the provisions of enforcement of awards in the Act tells us that a Court hearing an application to set aside an award precluded from reviewing – even indirectly - the merits of the award since one cannot set aside it on errors of law or fact\textsuperscript{34} but only that public policy shall include fundamental policy of India law, the interests of India, justice of morality, fraud and corruption as laid down in the case of *Renusagar Power Ltd. v. General Electric*\textsuperscript{35}, and the explanation to Section 34 of the Act. It is also crucial to understand that Section 34 of the Arbitration Act and the Model Law are not to be understood as provisions for appeal but merely as an ‘application to set aside’ the award, thus restricting the scope and manner of setting aside.

\section*{PART II}

\textbf{THE LIMITS OF JUDICIAL REVIEW: THE SUPREME COURT AND INTERNATIONAL ARBITRATION}


\textsuperscript{35} *Renusagar Power Ltd. v. General Electric*, 1994 SCC Supl. (1) 644.
The Arbitration and Conciliation Act of India, 1996, had the minimization of the supervisory role of the Courts as one of its main objectives. In this regard, the Act contemplates only three situations where the judiciary may intervene in an arbitral process; 1) matters regarding the appointment of arbitrators, 2) deciding on whether the mandate of the arbitrator stands terminated owing to his incapacity and inability to perform his functions and 3) invalidating an award when it contravenes the provisions relating to its enforcement as stated in the Act. With an understanding of this legislation and internationally recognized principles of judicial intervention it can be inferred then that the Courts have no power to get into the merits of an arbitral dispute. This proposition was put to a challenge by the Supreme Court of India in the case of *Oil and Natural Gas Corpn v. Saw Pipes* (hereinafter the SAW Pipes case) which we shall discuss below.

*The SAW Pipes Case*

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36 Supra n. 26.

37 Section 11, Arbitration and Conciliation Act, 1996.

38 Section 12, Arbitration and Conciliation Act, 1996.


40 Ibid.

A contract between the two parties contemplated that liquidated damages are to be provided in case there be any delay in the delivery of certain instruments and machinery by the Respondent Saw Pipes Ltd. to the appellant O.N.G.C. Saw Pipes Ltd. then delayed in the delivery of the shipment but however refused to pay the damages as a result of which the dispute went to arbitration. The arbitrator held that since the plaintiff/appellant O.N.G.C had not suffered any damage, no money needed to be paid. The appellant then took this matter to Court on the argument that the Arbitrator had based his decision on a wrong application of the law as the existence of a damage need not be proved in a contract providing for liquidated damages\(^{42}\). The appellant contended that the award should be annulled and that the ground of ‘public policy’ stated in Section 34 2(b)(ii) of the Arbitration and Conciliation Act, 1996 provided for this.

The Supreme Court attempted to answer this question by looking into ‘public policy’\(^{43}\) as under contract law and the past precedents on the issue. While criticizing Burrough J.’s idea of stating public policy to be an ‘unruly horse’, the Court quoted from common law authorities\(^{44}\) and the Halsbury’s Laws of England to state that the scope of public policy

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\(^{42}\) Section 74 of the Indian Contract Act, 1872 provides that a Contract may provide for liquidated damages based on written consent by both the parties based on the performance or non performance of a certain condition.

\(^{43}\) The Indian Contract Act under Section 23 provides that the consideration in a contract would be illegal if it is contrary to ‘public policy’.

must be expanded to suit the needs of the modern society. Sir William Holdsworth in his "History of English Law"\textsuperscript{45}, was quoted saying;

\textit{“In fact, a body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them.”}

What the Court essentially did was to equate the idea of ‘public policy’ as used in common law and contracts to that given in the Arbitration and Conciliation Act, 1996. The Hon’ble Court then used the blurring of the comparison as a justification to create new heads of public policy.

The one obstacle to the Court in the creation of the ‘new heads’ was the precedent set in the case of \textit{Renusagar Power Ltd. v. General Electric}\textsuperscript{46}, stating that public policy shall include: i) fundamental policy of India law, ii) the interests of India; or iii) justice of morality. After reading this precedent the Court stated that upon an award becoming ‘final’ the conditions for its annulment become quite narrow, but however that an award is not deemed final the moment it is passed by the Arbitrator but only once it passes the standards set in Section 34 of the Act, It further stated;

\textsuperscript{45} Sir William Holdsworth, "History of English Law", Volume III, page 55

\textsuperscript{46} Renusagar Power Ltd. v. General Electric, 1994 SCC Supl. (1) 644.
“in a case where the judgment and decree is challenged before the Appellate Court or 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 a new head of public policy was created; where the award is ‘patently illegal’. Even if this was not clear in the above paragraph the Court went on the explicitly state that public policy shall now include;

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if it is patently illegal.

Now in international arbitration illegality in arbitration would’ve included issues such as facilitation and promotion of drug trafficking, terrorism, subversion, prostitution, child
abuse, slavery and other forms of human rights violations. However, in the SAW pipes case, the Court declared that ‘patent illegality’ as a result would mean that if the award is contrary to the substantive provisions of law or the provisions of the 1996 Arbitration Act or against the terms of the contract. Thus, ‘error of law’ was now included as a ground to set aside the award, thus making the provisions of Section 34 of the Arbitration and Conciliation Act, 1996 an appellate provision rather than one to be used an application to set aside the award.

Another point where in the Court distinguished the precedent set in Renusagar Power Ltd. v. General Electric with the present facts was that in the Renusagar case, the award under question was a foreign award which according to the Court could be challenged only in the Country in which the award is made and that only when it is made final in that Country could it be executed in India. The Court distinguished this then by stating that in the present circumstances the award is a domestic award and thus the ‘error of law’ could be provided as a ground for setting it aside. By an understanding of this reasoning then, it can be assumed that the Court did not intend Section 34 to apply to International

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Arbitral award and the separate provision provided in the Act, i.e. Section 48 was to apply in these circumstances. However, in subsequent case law, this was not the case.

_Digging the grave: Venture Global Engineering and International Arbitration_

I say above that ‘this was not the case’ because in later cases that were to follow, the Court interpreted otherwise and held that Section 34 and the ground of ‘patent illegality’ also applied to international arbitral awards. The case in point is that of _Venture Global Engineering v. Satyam Computer Services Ltd._52 (hereinafter Venture Global case), which I say dug the grave for those seeking to enforce international arbitral awards in India. However, before I proceed to give an account of the judgment in the case, I shall attempt to direct the reader to the law on the point.

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Section 48\(^53\) of the Arbitration and Conciliation Act, 1996 governs the enforcement and execution of foreign arbitral awards. It is crucial to note that unless the award is in contradiction with sub-section (2) of Section 48 that governs public policy and the

\(^53\) Section 48 of the Arbitration and Conciliation Act, 1996 states; **Conditions for enforcement of foreign awards**–

(1) Enforcement of a foreign award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the court proof that-

(a) The parties to the agreement referred to in section 44 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 arbitral 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 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.

(2) Enforcement of an arbitral award may also be refused if the court finds that-

(a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

(b) The enforcement of the award would be contrary to the public policy of India.

**Explanation.** - Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

(3) If an application for the setting aside or suspension of the award has been made to a competent authority referred to in clause (e) of sub-section (1) the court may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.
subject matter of the dispute, any other ground is always subject to the law of the Country where the award is made. The phrase "the country...under the law of which, that award was made" used in Section 48 refers to the country of the curial law of arbitration, and in the extremely rare situation where the parties choose a curial law other than the law of the country, the seat of arbitration\textsuperscript{54}. Thus, a challenge to the finality of the award would lie only to the competent Court of the country in which the foreign award was made and the Country wherein it is sought to be enforced cannot act as an appellate body and set aside the award\textsuperscript{55}.

In the Venture Global case, the appellant Venture Global sought to annul the enforcement of an award made by the Arbitrator in London stating that it was contrary to the Foreign Exchange Management Act\textsuperscript{56} (FEMA). While the lower Courts stated that they had no authority to do so as part I of the Arbitration Act was not applicable to international awards, thus escaping the scrutiny of public policy as laid down in Saw Pipes’ case; the Supreme Court held otherwise. The Court stated that said that by not specifically providing that the provisions of Part I apply to international commercial arbitrations held out of India, the intention of the legislature appears to be to allow parties to provide by agreement that Part I or any provision therein will not apply. This according to the Court


\textsuperscript{55} Alan Redfern, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 3\textsuperscript{rd} ed. 1999, p. 81.

\textsuperscript{56} Foreign Exchange Management Act of India, 1999.
would then have been in consonance with its own judgment in *Bhatia International v. SA Bulk Trading*\(^{57}\) that I have mentioned earlier. The Court then applied the same standard of public policy as decided in *Saw Pipes*’ case\(^{58}\) and allowed an international award to be challenged on the ground that it was patently illegal and thus against public policy. The new procedure as evolved from the case is that a person seeking the enforcement of a foreign arbitral award in India has not only to file an application for enforcement under Section 48 of the Act, but also has to meet the conditions set out in Section 34 so as to negate an application to set aside the award. The new ground is that not only must the award pass the New York Convention\(^{59}\) grounds incorporated in Section 48, it must pass the expanded ‘public policy’ ground created under Section 34 of the Arbitration and Conciliation Act, 1996.\(^{60}\)

In terms of International Commercial Arbitration, this idea gives rise to two serious flaws. The first is that as a principle of international arbitration, it is the Courts of the country of the seat of arbitration that have the jurisdiction to hear any application and objection to the award passed within its jurisdiction\(^{61}\). This has to be in accordance with

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\(^{59}\) Supra n. 3.

\(^{60}\) Tanuj Hazari, “‘India’s Commitment and challenge to the International Arbitration’: A setback for arbitration and investors or the Neo Dimension to the International Arbitration”, available at http://students.indlaw.com/display.aspx?4315 (last visited 10\(^{th}\) October 2008).

\(^{61}\) Andrew Tweeddale and Keren Tweeddale, *ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW OF PRACTICE*, 1\(^{st}\) ed. 2005, p. 240. See also *Harbour Assurance Co. (UK) v. Kansa*
the laws of that country itself. Once the award passes that scrutiny in the Court of the seat of arbitration, it is to be merely enforced and executed in another jurisdiction in accordance with the New York Convention guidelines.\(^{62}\) These, as I have mentioned earlier are extremely narrow and restricted\(^ {63}\) and no enforcing court can act as a appellate body in this regard. By now acting as an appellate body by annulling an award on the ground of patent illegality and error of law, the Indian Courts are defying this very principle of international arbitration.

The second, and another related ground takes me back to the judgment of the Court in the *Saw Pipes case*. In that judgment, the Court in distinguishing itself from its precedent in *Renusagar Power Ltd. v. General Electric*\(^ {64}\) stated that under Section 34 of the Indian Arbitration and Conciliation Act an award is not yet final in nature until it passes the test and conditions laid down in that provision. However, when it comes to the enforcement of foreign awards, they become final the moment they are passed in the Country of the arbitration and that thus the grounds for refusal are much narrower\(^ {65}\) and that the decision in *Renusagar’s case* was right in this regard. Once we accept this distinction, it is hard to

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\(^{63}\) See Supra n 4-9.

\(^{64}\) *Renusagar Power Ltd. v. General Electric*, 1994 SCC Supl. (1) 644.

\(^{65}\) See supra n. 46 and discussion on the discussion between the cases of *ONGC v. Saw Pipes* and *Renusagar Power Ltd. v. General Electric*. 
comprehend an international award still having to pass the scrutiny of ‘patent illegality’ which as I have mentioned earlier defies all sound conceptions and theory of international arbitration.

PART III

AFTERMATH: THE CONSEQUENCES AND CONCLUSION

As a result of such a strenuous evaluation of international arbitral awards, one would imagine as to why should he or she invest in India and proceed to settle a dispute by arbitration. In theory, an arbitration; whether international or national, has become the duplication of a Court process that even provides for appeals. Added to the fact that India is not yet a party to the ICSID Convention\textsuperscript{66}, truly there is little to cheer for a foreign investor seeking to invest in India. The rulings in the Saw Pipes and Venture Global cases clearly make it unfruitful to any investor or individual seeking to arbitrate in India.

Thankfully, the Legislators realized this folly and are making an attempt to clear it. The result is a Bill tabled in the Parliament in 2003 that makes ‘an error of law’ a ground for the annulment of an arbitral award. However, the Legislature expressly excludes

\textsuperscript{66} Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18\textsuperscript{th} March 1965, 575 U.N.T.S 159.
International arbitral awards from such scrutiny. The text of the proposed amendment reads;

**Section 34A.** (1) In the case of an arbitral award made in an arbitration other than an international arbitration (whether commercial or not), recourse to a court against an arbitral award on the additional ground that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law can be had in an application for setting aside an award referred to in sub-section (1) of section 34

However, it’s been five years since the Bill was tabled and we are yet to see the legislature taking any action on it. For the time being then, the decision in *Venture Global Engineering*’s case holds good and international investors have little to cheer. There are nevertheless, some minor reasons for an investor to be happy about when investing in India and with an aim to resolve as dispute. I have mentioned earlier that one of the main concerns in Investor- state arbitrations is the possibility of a partial court system that favours state action. To mitigate that concern it must be stated that the Indian Supreme Court is reckoned to be highly impartial and independent in its working. An instance in

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this regard is the Enron investment in the Dhabol Power Project that resulted in a dispute with the Government of the state of Maharashtra. The Supreme Court in a preliminary hearing stated that the Maharashtra Government’s actions seemed unjust and that the parties negotiate and reach a proper settlement as to the amount of compensation that is to be paid.\textsuperscript{69}

Another consolation to the investor are the Supreme Court’s decisions\textsuperscript{70} on the right to property where in it has held that just and reasonable compensation should be provided in light of the market value of the property in case of acquisitions by the state. This is in consonance with the fair and equitable standard in international investment law and thus assures the same protection to the investor as expected in International law.

Finally, as regards the standard of treatment of aliens, the guarantee of protection and security is adequately provided in statutes and articulated through constitutional law decisions thus assuring the investor of the safety of his investment.

Now while, the interpretation of ‘public policy’ clearly complicates the dispute settlement process for an investor incase he wishes to proceed by arbitration, in substantive law there are reasons for him to cheer in terms of the protections and rights offered. While I

\textsuperscript{69} Dhabol Power Corp. v. State of Maharashtra, Writ Petition 1205 of 2001, Bombay High Court. This judgment went on appeal to the Supreme Court; the decision of which is unreported and available on the Supreme Court of India’s website http://supremecourtofindia.nic.in (Last visited 2\textsuperscript{nd} Oct. 2008).

\textsuperscript{70} This has been designated as a Consitutional right under Article 399 of the Constitution of India. See also, Bihar v. Kameshwar Singh, AIR1952 SC 252 : K Kochhuni v. State of Madras, AIR 1960 SC 1080 : Sajjan Singh v. State of Rajasthan, AIR 1965 SC 845. This has now also been codified as an amendment to the Land Acquisition Act, 1894 under Section 30.
choose not to comment on India’s signature and ratification of the ICSID, it is certainly hoped that the Bill tabled in Parliament to exclude international awards from Court scrutiny on illegality grounds gets passed so as to bring arbitration in India in consonance with International standards.

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