

**Implications of Section 34 under the Arbitration and Conciliation (Amendment) Ordinance, 2015****BARE ACT****Section 34 under the Arbitration and Conciliation Act, 1996**

*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 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, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or*

*(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Part from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Part; or*

*(b) the Court finds that—*

*(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or*

*(ii) the arbitral award is in conflict with the public policy of India.*

*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 or affected by fraud or corruption or was in violation of section 75 or section 81.*

*(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral tribunal: Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.*

*(4) On receipt of an application under sub-section (1), the Court may, where it is appropriate and it is so requested by a party, adjourn the proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the opinion of arbitral tribunal will eliminate the grounds for setting aside the arbitral award.*

**Section 34 under the Arbitration and Conciliation (Amendment) Ordinance, 2015**

*In Section 34 of the principal act,-*

*(I) in sub-section (2), in clause (b), for the Explanation, the following Explanations shall be substituted, namely:-*

*“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 corruption or was in violation of section 75 or section 81; or*
- (ii) it is in contravention with the fundamental policy of Indian law; or*
- (iii) it is in conflict with the basic notions of morality 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 entail a review on the merits of the dispute”;*

*(II) after sub-section (2), the following sub-section shall be inserted, namely:-*

*“(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds 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”;*

*(III) after sub-section (4), the following sub-sections shall be inserted, namely:-*

*“(5) An application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement.*

*(6) An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice referred to in sub-section (5) is served upon the other party.”*

**Introduction:**

Arbitration is a consensual adjudication process. This implies that parties have agreed to accept the award given by the arbitrator as long as proper process are followed by him. Generally speaking, whenever an arbitral award goes against one of the parties to the dispute, he seeks ways of setting it aside. An award can be set aside only on the grounds mentioned in Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter the “Act”). The purpose of setting aside is to modify the award in some way, either in part or wholly.

**How is the ambit of setting aside an award been broadened under the amended Section 34?**

Section 34 of the Act was based on Article 34 of the UNCITRAL Model Law and the scope of the provisions for setting aside the award was kept far less than it was under the Sections 30 or 33 of the 1940 Act. In *Municipal Corp. of Greater Mumbai v. Prestress Products (India)*<sup>1</sup>, the court held that the new Act was brought into being with the express Parliamentary objective of curtailing judicial intervention. Hence, Section 34 significantly reduced the extent of possible challenge to an award<sup>2</sup>.

<sup>1</sup> (2003) 4 RAJ 363 (Bom)

<sup>2</sup> <http://www.lawctopus.com/academike/arbitral-award-setting-aside/>

However, the above objective was not successfully fulfilled and arbitration in India continued to be ad hoc, costly, long drawn and often suffered from excessive court intervention. Hence, in view of the same, some fresh provisions have been introduced under the new Arbitration and Conciliation (Amendment) Ordinance, 2015 (hereinafter the “**Ordinance**”). The Ordinance seeks to restrict the challenge to an award on the ground of public policy only to the following:-

- making of an award was induced/ affected by fraud or corruption or was in violation of Section 75 or Section 81 of the Act;
- where an award is in conflict with the fundamental policy of Indian Law; or
- where an award is in conflict with the most basic notions of morality or justice.
- The award can also be set aside if the court finds that the award is vitiated by patent illegality appearing on the face of the award.

Similar amendments have also been introduced in Sections 48 and 57 making the test of conflict with public policy a uniform one for domestic and foreign awards.

### **When is an award said to be in conflict with the public policy of India under this section?**

The amendment seeks to restrict the challenge to the award on the basis of public policy only to a few grounds. Section 34 (2B) inter alia provides that the Arbitral Award may be set aside by Court if the Arbitral Award is in conflict with the public policy of India. Explanation to 34 (2B) has now been substituted. The newly incorporated Explanation 1 has clarified that an Award would be considered in conflict with public policy of India only if (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or (ii) it is in contravention with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice. Explanation (2A) is also inserted to provide that an arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the court, if the court finds that the award is vitiated by patent illegality appearing on the face of the award provided it shall not be set aside merely on the ground of an erroneous application of law or by re-appreciation of evidence. Similar changes are also made in Section 48 of the Act<sup>3</sup>. Thus, Explanation 2 clarifies that the test as to whether the award is in contravention with the fundamental policy of Indian Law shall not entail a review on the merits of the dispute<sup>4</sup>.

### **What is the procedure of filing an application under this section?**

An Application under Section 34 can be filed on the grounds specified above. The amendment lays down that an application under this section shall be filed by a party only after issuing a prior notice to the other party and such application shall be accompanied by an affidavit by the applicant endorsing compliance with the said requirement. An application under this section shall be disposed of expeditiously, and in any event, within a period of one year from the date on which the notice is served upon the other party.

### **How much time does the Court have for disposing of an application filed under this section?**

The amendment to Section 34 requires a court to decide a challenge to a domestic award within a one year timeframe. However, quite inexplicably, the Ordinance has not specified a corresponding timeline for the enforcement of foreign arbitral awards.

<sup>3</sup> <http://blog.sconline.com/post/2015/10/27/the-arbitration-and-conciliation-amendment-ordinance-2015/>

<sup>4</sup> <http://lawstreetindia.com/experts/column?sid=139>

Against the backdrop of the *White Industries* decision<sup>5</sup> (where India was held to be in breach of its BIT obligations for the failure of its courts to enforce a foreign arbitration award within a reasonable timeframe), this omission is indeed baffling and requires to be corrected urgently<sup>6</sup>.

**CONCLUSION:**

Therefore, the ambit of setting aside an award for being in conflict with public policy under Section 34 has been broadened to include not only contravention with Section 75 or Section 81, but also if it is in contravention with the “fundamental policy of Indian law” or if it is in conflict with the “most basic notions of morality or justice”. It is yet to be seen how much the Ordinance is likely to radically overhaul the arbitration landscape in India. However, it is expected that the amendment as introduced by the Ordinance will ensure that the arbitration remains a cost effective, reliable and swift mechanism to resolve contractual and commercial disputes, which is essential to promote the perception that India is becoming an easier place to do business.

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<sup>5</sup> *White Industries v. Republic of India*, Final Award, November 30<sup>th</sup>, 2011

<sup>6</sup> <http://barandbench.com/when-good-intentions-are-not-good-enough-the-arbitration-ordinance-in-india/>