Section 28(3) of the Arbitration & Conciliation Act, 2015 and the fate of Arbitral Awards

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The law permits a narrower view on which an arbitral award may be challenged before the court of law. The umbrella provision is public policy, which is often cited to be breached whenever recourse is taken against the arbitral awards. Section 34 jurisprudence is well germinated by the Indian Courts time to time. The purpose is to carry minimal judicial intervention into the arbitral process. The dispute resolution via Arbitration is a private law remedy as compared to the courts which offer a public law remedy.

The 2015 amendment in **section 28 (3)** of the Act, 2015 makes a departure from the earlier law, i.e. 1996 law. The legislative intent (reducing the court intervention in arbitral process) behind that may be traced by a close reading of the aims/object of such amendment which is well-groomed/grounded in the recommendations of the **246 Law Commission Report**. The law in 1996 had mandated that the arbitrator is duty bound to arbitrate the matter strictly into the clutches of the terms of the contract as entered into and agreed upon between the parties. The 2015 law dilutes such stringent requirement while making an award and replaces the word, ***in accordance with*** by ***taking into account.*** Now an arbitrator is given some leverage to decide the matter even beyond the terms of the contract. This amendment is brought into effect to overrule the judicial dictum as propounded in the case of **ONGC v. Saw Pipes Ltd**[1]. This article is an attempt to examine the plausible use/misuse which may occur while resorting to interpretational crisis. The public policy doctrine is already loaded with so many uncertain judicial terms like perversity, arbitrariness, patent illegality, justice, morality so on and so far, which require discretion in decision making and eventually in making of the award and in the background, it is the philosophy of the judge arbitrating the matter actually decides the fate of the matter.

The whole set up and machinery of the arbitral process is germinated because of the seeds of the agreements entered into between the parties to the contract. The contract entered into between the parties is the prime governing charter according to which parties are expected to travel so far the contractual terms, conditions and discharge of contractual obligations are warranted therein. However, as a matter of fact such charter is always founded on the broader principles of law of contract which may be termed as ***Grund Norm*** in the terminology of **Hans Kelson**[2]. In addition to this, customs and usages related to the contemporary trade practices is also included in the bracket of prime governing charter.

The law for taking recourse against the arbitral award is well founded and developed under section 34 of the Act, 2015. Section 34 of the Act, 2015 deals when domestic awards and international commercial awards against which court recourse may to be taken by one of the aggrieved parties to the award. Section 48 of the Act deals with foreign seated awards and gives a check list under which enforcement of a foreign award may be refused. Therefore, section 34 (when an award may be set aside) and section 48 (when enforcement of a foreign seated awards may be refused) are in ***pari matiria***. Now the law is, mere any contravention of the terms of the contract would not render the award to be set aside or incapable of being enforced. To trace

[1] (2003) 5 SCC 705.

[2] An Australian Jurist, legal philosopher who gave the "theory of Pure Law."

the entire trajectory of court intervention in setting aside the domestic arbitral awards including International Commercial Awards as well refusal to enforce the foreign seated awards, it becomes imperative to assail through all these judicial pronouncements.

Jural postulate Public Policy and fate of awards

The term **public policy** is exclusively a means by which a government maintains **public order** and the cloaks of public order are intrinsically ingrained in upholding the utmost **public interest.** All the three terms, public policy, public order and public interest are subject to contemporary interpretations of time, place and philosophy of time. In another words, for two time intervals or place intervals these may not be the same for a single subject matter. That's the reason, they are most open to interpretational crisis.

The term public policy is of **Common Law** origin having social, moral and economic fabric which puts an effort to synchronise a society together and upon which entire legal system actually rests. But **what constitutes public policy** and **what would be contrary to public policy** has been obscure and always been open to manifold interpretations. Each country has its own fundamental law which governs the contract and contractual obligations. However, the common law countries has given it multi-dimensional colour which take assistance of justice, equity, morality, reasonableness as the most basic notions. In famous case of **Moughal Steamship co. v. McGregor**[3] **Lord Bramwell,** said, "***It is a variable quantity, it must vary and does vary with the habits, capacities and opportunities of the public***" **Lord Davy** in case of **Janson v. Driefontein Consolidated Mines Ltd.**[4] expressed that, "**Public Policy is always an unsafe and treacherous ground for legal decision."** Public Policy shifts with the vicissitudes of time & the changing notions of morality & justice. The goal of public policy is to foster public good or say common good of the community. In another important case, **Enderby Town Football club v. Football Association**[5]**, Lord Denning** said, **"With a good man in the saddle, the unruly horse can be kept in control. It can jump over the obstacles."**

Following are the various heads which has been considered as public policy doctrine:

1. Agreements injurious to the state & its relations with other states
2. Agreements tend to abuse the legal process or obstructs the course of justice;
3. Agreements hindering public service;
4. Agreements having nature to create monopolies;
5. Agreements in restraint of trade;
6. Marriage brokerage agreements, champerty and maintenance agreements;
7. Agreements which creates an interest against any duty;
8. Agreements which are contra bonus mores (harmful to the welfare of society) etc.

Indian Contract Act 1872 under **section 23** gives recognition to this term public policy. This provision renders any agreement as void if its object or consideration is unlawful and what makes it unlawful if such agreement is vitiated by any immoral object or consideration or if against the public policy.

Indian Courts and Public policy:

[3] [1889] LR 23 QBD 598
[4] [1902] AC 484 England & Wales.
[5] [1971] CD 591.

Banshidhar v. Ajudhiya Prasad[6]**,** it was held that paramount principle of public policy must not be interfere with the freedom to contract. Thus in this case, much significance was not placed on public policy. This said position continued until 1950.

Then in a significant move, in **Gherulal Pareikh v. Mahadev Mahiya**[7]**, Justice Subba Rao,** gave a narrower interpretation to the term public policy and upheld, "**courts can evolve a new head of public policy under exceptional circumstances of a changing world."**

In **Murlidhar Agarwal v. State of UP**[8]**, Justice KK Mathew** broadened and explained the multi-fold dimensions of public policy while narrating its scope. Thereafter, in the most celebrated judgment of **Central Inland Water Transport Corporation v. Brajonath Gangulay**[9]**, in** the said case, the service rule of a govt. company was provided for termination of the services of permanent employees' without assigning them any reason, on giving three months' notice or payment in lieu thereof. The Apex court held that such a provision reflects inequality of bargaining power culminating into an unfair contract between the parties and thus stuck down the offending portion of the service rules as being unconscionable, arbitrary and opposed to public policy.

In **Delhi Transport Corporation v. DTC Mazdoor Congress**[10] this is the constitutional bench judgment where the Apex court opined that the courts must in consonance with public conscience and in keeping with public good and public interest invent new public policy heads and must declare such rules, regulations, practices that are derogatory to the constitution for being the reason to be opposed to the public policy.

Arbitration law and Public Policy:

The law in Indian Arbitration regime where the enforcement of an award may be refused if the subject award is opposed to the public policy in India:

a. Recourse to courts against the domestic awards as well International Commercial Awards under **section 34 of the Act, 2015**;
b. Conditions for enforcement of foreign seated awards falling under New York Convention under **section 48 of the Act, 2015**;
c. Conditions for enforcement of foreign seated awards falling under Geneva Convention **under section 57 of the Act, 2015**;

In famous **Renusagar case**[11] for the very first time the term public policy got judicial attention within the meaning of section 48 of the Act, 2015. It was a foreign seated award, the enforcement of which was refused citing the award as opposed to public policy. Appellant Renu Sagar, an Indian company, engaged in the business of production and sale of electric power. Pursuant to the negotiations, Renu Sagar co. entered into a contract with the respondent company, a US based corporation. It was a foreign seated award governed under New York

[6] AIR 1925 Oudh 120.
[7] [1959] AIR 781.
[8] [1974] AIR 1924.
[9] [1986] AIR 1571.
[10] [1990] SCR Suppl. (1) 142.
[11] Renu Sagar Power Co. Ltd. v. General Electric Co. [(1994) AIR 860].

convention attracting section 48 of the Act, 2015. It was alleged in this case that the said award had contravened the Foreign Exchange Regulation Act (FERA), 1973; it resulted in charging interest and damages on damages; if allowed for enforcement, it would lead to unjust enrichment of the Respondent US based company. In case of foreign seated awards, while interpreting the Public Policy and specifically what is opposed to the public policy the role of **Private International Law cannot be negated.** The public policy exception while looking into the enforcement of a foreign seated award must be interpreted narrowly, restricting it only to the following three limbs:

d. Fundamental policy of Indian Law;
e. Interest of India;
f. Justice and Morality.

Thus Renu Sagar approach was more judicious and had pro-enforcement objective in its approach. In June 1958, India signed **New York Convention (Recognition & Enforcement of foreign Arbitral awards) 1960** and pursuant thereto enacted New **Foreign Awards Act, 1961**. It would not be out of context to mention here that **Article V (2) (b)** of the **New York Convention 1960** read with **section 7** of the **Foreign Awards Act, 1961** provides that a *foreign seated award may not be enforced in India, if the Indian courts are satisfied that enforcement of such foreign awards would be contrary to public policy.*

Then in another significant move, which turned the wheels of jurisprudence of public policy was **ONGC v. Saw Pipes**[12]**.** This was the first case which dealt with the term public policy with reference to domestic awards. In this case, the court interpreted public policy term under section 34(2) (b) (ii) of the Act 2015 by giving an extensive connotation and construction of **section 23**[13] of the Contract Act, 1872. The court added fourth prong, i.e. **patent illegality**. The term patent illegality was again explained by three limbs to it:

a. Contravention of any law in India or;
b. Contravention of any substantive law governing parties;
c. Against the terms of the contract.

However, as a matter of caution, a suffix was added to the newly invented term patent illegality. The caution was, such alleged illegality, **must go into the roots** of **the matter** and **must shock the judicial conscience**, **and illegality which is trivial in nature would not vitiate the award on the ground of being in conflict with public policy.** Thus Saw Pipes by adding this interpretation opened the flood gates of court interventions in arbitral awards and thus somehow diluted the aims and objects as well noble notions of the law on Arbitration, i.e. to ensure finality of awards. Thereafter, from 2003 to 2014, ONGC Saw pipes was followed and set a troublesome regime of arbitral awards. ONGC Saw pipes was followed in **Hindustan Zinc Ltd. v. Friends Coal Carbonisation case**[14]**, Delhi Development Authority v. R. S. Sharma case**[15]**, J. G. Engineers' v. Union of India**[16]**, Union of India v. Col. LSN Murthy**[17]**,**

[12] (2003) 5 SCC 705.
[13] If the objects or consideration of an agreement is immoral or opposed to the public policy then such agreements are void.
[14] Appeal (Civil) 3134/2002, decided on. 04.04.2006, Bench of Justice Arun Kumar & R V Raveendran JJ.
[15] (2008) 13 SCC 80.
[16] (2011) 5 SCC 758.
[17] (2012) 1 SCC 718.

Centrotode Minerals and Metals v. Hindustan Copper Ltd[18]. Mcdermott International Inc. v. Burn Standard Co.[19] cases.

In the case of **Phool Chand Export Ltd. v. OOO Patriot** [20] the apex court set a disturbing precedent by upholding that the newly invented prong patent illegality in public policy doctrine in ONGC Saw Pipes case shall be applicable to foreign seated awards too. Thus, Phoolchand gave green signal to the most controversial ONGC Saw pipes findings to be applied in foreign seated awards too and thus each court sitting under **section 34, 48 or 57 of the Act 2015** acted as an Appellate court and started re-examining each fact and evidence as decided by the Arbitrator in the alleged arbitral process.

Sh. Lal Mahal v. Progeto Grano[21] it was held that Renu Sagar is applicable to foreign awards and ONGC saw pipes is applicable to domestic and International commercial Awards. Thus Lal Mahal overruled Phool chand case and turned the wheels of public policy jurisprudence in favour of foreign seated awards. In Lal Mahal, the court expressed **pro-enforcement approach** towards the foreign seated awards. In Lal Mahal case, a dispute arose between the Indian supplier and an Italian buyer in a contract for supply of wheat of a particular quality. The seller relied on the report as given by certifying authority (CA) at the port of loading in India and argued that the quality of the wheat supplied was of the requisite quality as agreed to deliver under the contract. But the buyer objected to this and relied upon numerous other reports which were contrary to the report submitted by the seller. The tribunal as well as the board of appeal under London arbitration rules seated in London decided the matter in favour of Italian buyer. Indian supplier filed an application before the Chief Justice of High court in London under **section 68** of the **English Arbitration Act, 1996** which was also rejected. The buyer filed enforcement application before Delhi High court to enforce the award. The seller opposed enforcement, contending that the arbitral tribunal had placed greater reliance on quality certificates prepared by non-contractual agencies than on the quality certificate prepared by the agency nominated under the contract. Delhi High court refused to entertain the matter upholding that this court cannot re-open the matter and re-look into the evidences as examined by the Arbitrator. Then, the buyer approached before the Apex Court relying upon the ONGC saw pipes case. **Justice R. M. Lodha** in the instant case made it crystal clear that ONGC Saw pipes judgment has no application in foreign seated awards and thus overruled the dictum of Phoolchand case. The pro-arbitration and pro-enforcement approach to foreign seated awards was reinforced in another significant ruling of the Apex court in **World Sports group case**.[22] The apex court while referring the matter to the arbitration under **section 45** of the Act, 2015 held that the court is duty bound to examine and consider whether or not an arbitration agreement is covered by New York Convention for enforcement of foreign awards, whether the agreement is null and void or incapable of being enforced. The facts of the case are such, where BCCI (Board of Cricket Control of India) following a tender process awarded media rights for broadcasting of cricket tournament to MSM satellite for some years. After a year, BCCI terminated the contract with MSM and entered into a new contract with **WSG (World Sports Group).** WSG entered into a facilitation deed with MSM for Rs. 1.25 billion and agreed

[18] (2006) 11 SCC 245.
[19] (2006) 11 SCC 181.
[20] (2011) 10 SCC 300.
[21] (2014) 2 SCC 433.
[22] World Sports Group (Mauritius) v. MSM Satellite Singapore (2014) 11 SCC 639.

to relinquish its media rights and to facilitate such media rights of broadcasting from BCCI. Later it was alleged by MSM that WSG by purporting to fraudulent misrepresentation that it had media rights made a false representation and thus induced MSM to enter into such deed. Therefore, a fraud was alleged by WSG against MSM. MSM filed a suit in Bombay High court to decide the facilitation deed as illegal, meanwhile WSG relying upon the arbitration clause in the facilitation deed before Singapore International Arbitration Centre (SIAC) and thus MSM prayed from Bombay high court to grant injunction against the WSG for the invocation of the arbitration as the matter alleged therein involves fraud and as per the **Radhakrishnan**[23] judgment, disputes involving fraud and misrepresentation is not subject matter of arbitration because to determine and adjudicate upon fraud, detailed examination of documents and examination of witnesses' is essential for which courts are more competent to fix the matter rather than the Arbitral Tribunals. Division Bench of Bombay high Court relying upon the Radhakrishnan case, granted injunction against WSG for invoking arbitration. When the matter was appealed by the WSG in the Apex Court against the ruling of the Bombay High court, the Court made it emphatically clear that the precedent set out in Radhakrishnan case is not applicable in foreign seated arbitration awards. Thus, this case too set pro-arbitration and pro-enforcement stage in the arbitration regime of India.

Law Commission Report 246 and the Public Policy

The Law Commission Report 246 in the year 2014 took note of all the judicial developments in the Public Policy doctrine with respect to domestic awards, international commercial awards as well the foreign seated awards and the judicial uncertainty in the possible interpretation of the term public policy actually put the Indian Arbitration regime and ease of doing business in India to the back burner. Globally this uncertainty projected India as less attractive for global business and entrepreneurship community. Thus Law Commission in its 246 Report suggested some amendments into it to make India an attractive destination for global business community. In its report following two was recommended:

1. The awards under section 34, 48 or 57 of the Act, 2015 could be annulled on Public policy ground only and only if it is opposed to the:

a. Fundamental Policy of Indian Law; or

b. If it is in conflict with the most basic notions of justice and morality.

The third prong of Public Policy, i.e. Interest of India as suggested in Renu Sagar case was dropped. The Commission was of the considered opinion for omission of the third prong that such term being vague in nature may be capable of interpretational misuse.

2. The Commission recommended a new ground to be added under section 34(2)(b) of the Act, 2015 named patent illegality as invented in famous ONGC Saw Pipes case, with special and exclusive reference with domestic awards and international commercial awards and not for foreign seated awards. The commission further recommended a proviso to the section 34(2)(b) of the Act, 2015 making it crystal clear that an award under **section 34** could not be set aside merely on the ground of:

i. Erroneous application of law;

[23] N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72.

ii. Re-appreciation of evidence;

In another significant ruling, in **ONGC v. Western GECO**[24] for the very first time, three judges bench of the Apex Court interpreted the term Fundamental Policy of Indian Law, the first prong of Public Policy as invented in Renu Sagar Case expansively. In this case, the court gave another three distinct but non-exhaustive juristic principles:

a. Duty to adopt a judicial approach;
b. Compliance with the canons of natural justice, comprising :
   1. Application of judicial mind;
   2. Recording reasons;
c. Perversity, i.e. Wednesbury principle of reasonableness.

ONGC Western GECO judgment was criticized vehemently for adding ground of Wednesbury principle. Because this again set the Indian arbitration regime at the back burner. In the case of **Associate Builders' v. DDA**[25] **, Justice R. F. Nariman** explained ONGC western GECO case in more illustrative way by simplifying the heads of Public Policy. The term perversity or irrationality was given a threefold test to fix it:

i. An award is perverse, if the finding is based on no evidence;
ii. Something irrelevant was taken into account to deduce and arrive at decision as to the award;
iii. **Findings of the arbitrator as to award is based on negation/overlooking of some vital piece of evidence**.

Further, the court went on ahead explaining that the court acting under section 34, 48 or 57 of the Act, 2015 cannot sit as a court of appeal and rectify or re-appreciate the facts and evidences as adduced before the Arbitrator during arbitral process. The court made it emphatically clear, that the findings of the Arbitrator on facts are final, tribunal is the sole judge of the facts, and evidences adduced before it, and be it the question of its quality or quantity or both. The court further said that if a possible view is taken by the tribunal keeping into account the factual as well legal matrix of the matter, then court cannot take the other view contrary to the arbitrator.

In another important case, **M/s Dyna Technologies Pvt. Ltd. v. M/s Crompton Greaves Ltd.**[26] delivered by **Justice Ramanna**. It's a land mark judgment and trend-setter for the quality of the awards. **Section 31(3)** of the Act, 2015 provides that an award under the Act must be **a reasoned award**. The law on that front is crystal clear that for each finding and decision thereon, there must be separate reason. The Appellant, Dyna Technologies and the respondent, Crompton Greaves entered into a contract in 1994 for Dyna Technologies to set up an aquaculture unit. After the issuance of work order and commencement of work, Crompton Greaves terminated the contract. Consequently, Dyna Technologies sought compensation for premature termination and the dispute was referred to Arbitration. One of the claims was

[24] (2014) 9 SCC 263.
[25] (2015) 3 SCC 49.
[26] (2019) SCC Online 1656.

damages to the unproductive use of machineries. The Tribunal allowed the claim under this head but without any reasoning of calculation as to how it arrived at that particular reasoning. The said award was set aside being devoid of a sound reasoning. The court upheld, "**We need to be cognizant of the fact that arbitral awards should not be interfered within a casual and cavalier manner, unless the court comes to a conclusion that the perversity of the award goes to the root of the matter, without there being a possibility of alternative interpretation. The courts needs to be cautious and should defer to the view taken by the tribunal even if the reasoning provided in the award is implied unless such award portrays perversity unpardonable under section 34 of the Act, 1996."** In another words to put it precisely, the award passed by the Tribunal must be **proper, intelligible and adequate**.

SSangyong Engineering and Construction Co. Ltd. v. NHAI[27], a bench of **R.F. Nariman and Vineet Saran JJ** gave detailed clarification on the possible and plausible interpretations and constructions of the term public policy for domestic awards, international commercial awards and foreign seated awards. A contract was awarded by NHAI, the respondent for construction of four lane Highway in Madhya Pradesh to Ssangyong, the Appellant. The contract had a provisioning to compensate the appellant monthly for the inflation in the prices of construction materials following the Whole sale price Index year 1993-94 as base year. Later, the respondent NHAI issued a policy circular which in consequence reduced the price adjustment available to the appellant under the contract. The respondent applied this circular in the subject contract which was challenged by the appellant before the Madhya Pradesh High court challenging the validity of the circular. However, it was in circular itself that it would be apply only and only parties are consented to it otherwise not. Despite the fact, SSyangong never consented to it, NHAI applied this circular which was dismissed. As per the contract, the dispute was referred to Dispute adjudication board (DAB) which upheld the validity of the circular in applying the subject contract. When the matter was challenged before the Delhi High Court, NHAI, was restrained from doing so during the pendency of the arbitration. An appeal was filed before the three member tribunal against the award of DAB wherein the majority allowed such revision in the contract, at the same time minority said that such revision actually de-hors the contract. When the matter was challenged under section 34 of the Act, 2015 Delhi High Court while agreeing with the minority view, upheld the majority view taken being as one plausible view which cannot be interfered with. And thus the matter was appealed before the Apex Court. In May 2019, the Apex Court re-calculated the quantity of public policy doctrine to be applied while setting side awards or refusing the enforcements of the awards under **section 34 or 48 of the Act, 2015** with specific observations of Arbitration & Conciliation (Amendment) Act, 2015 and opined as below:

a. The expression fundamental policy of Indian law as a prong of Public Policy as propounded in Renusagar would be reduced to a **narrow view**;
b. It would not be necessary to have judicial approach as one of the sub-heads of Fundamental Policy of Indian Law as invented in ONGC Western GECO case and non-availability of such approach while deciding a matter would not be a sole ground to interfere with the award being opposed to the Public Policy;
c. However, non-adherence to **Principles of Natural justice (PNJ)** would continue to operate as a ground to be interfere with for section 34 of the Act, 2015 being opposed to public policy;

[27] AIR (2019) SC 5041.

d. **Interest of India would no longer be a ground** citing which awards could be interfered with;
e. **Justice and morality** would now be reduced and read as the **most basic notions of justice** and **morality** meaning thereby only those awards are liable to be set aside which shocks the judicial conscience;
f. By adding Explanation 2 of section 34(b)(ii) of the Act, 2015 the legislative intent was made pretty clear that **test of reasonableness** (**Wednesbury principle**) as laid down in ONGC Western GECO as one of the subheads of fundamental policy of Indian law would no longer be a touchstone on which the testimony of the arbitral award is to be tested;
g. With reference to domestic awards (other than international commercial awards), the ground of **patent illegality would continue to operate**, but as a matter of utmost caution, the legislative intent makes it crystal clear, that mere violation of any statue or erroneous application of law would not amount to patent illegality unless it is of public interest having public importance;
h. The **amendment in section 28 (3) of the Act, 2015** whereby the arbitrator deciding the matter is the final authority to interpret and construct the terms of the contract and cannot be a ground to set aside an award unless the view/stand taken by the arbitrator is not the one which is impossible view;
i. **In Ssyongang case**, the court made it emphatically clear, that the ground of **perversity** would no longer be a ground under direct head of Public Policy doctrine but its limited application would continue to operate under patent illegality clause, where the arbitrator arrives at a conclusion while making an award but rejected the application of test of reasonableness citing the reason that allowing the test of reasonableness to examine the validity of the award would entail review of the whole award which will nullify the whole objective of the Arbitration law, i.e. finality of the award;
j. Thus it may be inferred that perversity continue to operate as ground under patent illegality but not fundamental policy of Indian law and it can also be inferred that though test of reasonableness has been done away but its essence and fragrance still exist where reasonableness of the interpretation and construction of the terms of the contract is desired;

Position of conflicting laws of two co-equal benches Vijay Karia & NAFED judgments

In the case of **Vijay Karia & others v. Prysmian Cavi Sistemi SRL**[28] on 13.02.2020 a bench of three Judges' of the Hon'ble Supreme Court, comprising **R. F. Nariman, Aniruddha Bose and V. Ramasubramanian** gave some guiding reflections while dealing with the enforcement of foreign awards under section 48 of the Act, 2015 which may be summarised as below:

a. The law on recognition and enforcement of foreign seated awards, be it section 48 (governed by New York Convention, 1958) or section 57 (Governed by Geneva Convention, 1937) under the Arbitration and Conciliation Act, 2015 is pretty much clear with a loaded objective that the enforcement of such awards should be allowed barring **the limited and narrower scope of public policy exception**;

[28] (2020) SCC online 177.

b. The **pro-enforcement bias** of the New York convention 1958 is very well recognised and duly adopted as well ingrained in the philosophy of section 48 of the Act, courts while refusing the enforcement must carry this principle in their minds;
c. The "fundamental policy of Indian law", as has been held in Renusagar, must amount to a **breach of either a legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised.**
d. Mere violation or non-compliance of any of the provisions of any law would not attract violation of Fundamental Policy of Indian law per se;
e. Interference and denial of enforcement on the ground that the award offends the most basic notions of justice is an award that either shocks the conscience of the court or is illegal given the prevailing mores of the day. It will be attracted in exceptional circumstances.

The Hon'ble Apex Court in **NAFED case**[29] refused the enforcement of a foreign seated arbitration award as being opposed to public policy of India under **section 7 (1) (b) (ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961.** This judgment again puts the quicker journey of the Indian Arbitration regime at the back burner and poses two very baffling questions before us:

a. The jurisdiction of the courts while refusing to enforce foreign awards on the grounds as being opposed to Public Policy and acting as a court of appeal and examining the whole matter again on merits?
b. The colour and shape of public policy exception citing which enforcement of foreign seated awards is denied.

A three Judges' bench comprising of **Arun Mishra, M. R. Shah** & **B. R. Gavai** of the Hon'ble Supreme Court on 22.4.2020 gave this ruling. The facts of the case are, in the year 1980, NAFED and Alimenta entered into a contract, accordingly NAFED would supply a fixed quantity of groundnuts to Alimenta. Clause 11 of the contract had detail terms and conditions of the contract and **clause 14** of the contract, in the event of **the prohibition of the exports** by any **executive order or law**, **the contract would stand cancelled**. NAFED was only able to supply a part of the quantity as agreed under the contract, this culminated into adding two addendums to the existing contract, which allowed NAFED to supply the remaining quantity to the subsequent years.

However, NAFED could not supply the outstanding quantity because it had no permission under the Indian government's Export Control Order- to carry forward the exports from the 1979 -80 season to the subsequent year due to a restriction on exports under a quota system. Alimenta treated this as a default and initiated arbitration proceedings before FOSFA, London. FOSFA passed an award in 1989 directing NAFED to pay $4,681,000 as damages (along with interest), to Alimenta. This award was upheld by the FOSFA Board of Appeal in 1990.
In 1993, when Alimenta filed a petition to enforce the award before the Delhi High Court, NAFED raised objections on the ground that the award is opposed to the Indian government's export policy and consequently, to the public policy of India. **In 2000**, a single judge of the High Court rejected NAFED's contentions and held that the award

[29] National Agricultural Co-operative Marketing Federation of India v. Alimenta (2020) SCC Online SC 381.

is executable as a decree of the court. NAFED filed an application for review against this decision, which was dismissed. Thereafter, it filed an appeal before the division bench of the Delhi High Court, which was **dismissed in 2010**. Against this dismissal, NAFED filed an appeal before the Apex Court.

The Supreme Court extensively reviewed the award on its merits and held that without government's permission, it was not possible for NAFED to carry out its contractual obligations and both the parties knew that the contract would be cancelled in such an exigency for non-supply in quantity. The Apex court then scrutinized whether the award was contrary to the public policy of India. However, the Court concluded that the enforcement of the award would contravene the public policy of India relating to export for which permission of the Indian government was necessary. Thus, enforcement of the award was refused as being opposed to the fundamental policy of Indian law and basic concepts of justice.

NAFED judgment was pronounced after the Vijay Karia. But we do not find any mentioning of the Vijay Karia case in NAFED. Actually NAFED judgment was reserved much before Vijay Karia pronounced and that may be one the reasons NAFED ignored ruling of Vijay Karia.

In another significant ruling by the Hon'ble Apex court on **11.05.2020 in** the matter of **SEAMEC Ltd. v. OIL India Ltd.**[30] propounded a very important observation regarding the recognition and enforcement of arbitral award. The dispute between SEAMEC and OIL arose out of a contract for drilling oil wells in the State of Assam, and specifically, the 'change in law' clause contained therein. This clause which was reflected as **clause 23** in the contract provided that OIL would be required to reimburse any additional financial costs that SEAMEC would have to incur owing to a change in law. During the lifetime of the contract, the price of High-Speed Diesel (**HSD**) was increased. Given that HSD was an essential component in carrying out drilling operations, SEAMEC claimed that this change triggered Clause 23 of the contract. Accordingly, it invoked the arbitration clause and claimed that OIL was liable to repay them. The Tribunal agreed with their argument and issued an award in SEAMEC's favour. In doing so, it observed that while the increase in HSD's price through a circular issued by the State or the Union is not law in literal sense but it must have force of law. Essentially, what had to be determined was whether the Tribunal's interpretation was a possible one. Before delving into this issue, the SC acknowledged the permissible scope of interference in an arbitral tribunal's award as invented in Dyna Technologies case. In doing so, they recognized that where there are two possible views, the court should defer to the view taken by the arbitral tribunal even if the reasoning provided in the award is implied, unless such award portrays perversity unpardonable under Section 34 of the Act, 2015.

However, on a perusal of the contract in the instant case, the SC determined that the Tribunal's interpretation of **Clause 23** was not reasonably possible. It observed that **Clause 23** could not have been interpreted so broadly as to bring within its scope a price increase – one that was effected by a means other than a change in law. It also noted that there was no evidence to suggest that the parties intended for the clause to have a broad meaning. Accordingly, the SC dismissed SEAMEC's appeal and thus declined to interfere with the findings of the High Court of Guwahati.

[30] Civil Appeal 673/2012 decided on 11.05.2020.

Setting Aside of an Award v. Refusal to enforce an award, anything yet to be fixed?

Hon'ble Justice Indu Malhotra of the Apex Court on **16.09.2020** in another significant ruling of **Government of India Ltd. v. Vedanta limited and others**[31] marked an important point to be underlined and thought of. The Court made an observation that this is some-how an established fact that the exposition as propounded in Renu Sagar case of public policy is having different applications of degree when it comes under section 34 and section 48 of the Act, 2015. The application of Public Policy of India doctrine is observed in a limited and narrower sense for the purposes of **section 48 (2) (b)** of the **Act, 2015** in comparison to domestic arbitral awards. The distinction was made between two on the ground that section 34 Court is bestowed with the power of setting aside the awards however, section 48 court do not possess such powers. Enforcement courts are just having the power to refuse the enforcement of such awards on the grounds as mentioned under section 48 of the Act. There are total seven (7) grounds out of which five (5) grounds may be taken by the party against whom the subject award is to be enforced and rest two grounds, i.e., **non-arbitrablity** of the dispute and **being opposed to public policy** can be taken by the enforcement courts while refusing the enforcement of subject awards. In this case, it was pleaded by one of the parties that in cases where the dispute arose from any production sharing contracts (PSC) and the contract is for exploration and development of natural resources of India, the domain, meets and bounds, length and breadth to examine the public policy of India doctrine, even in cases of foreign seated awards, should be examined broadly. Thus, the Hon'ble Apex court allowed the recognition & enforcement of the subject award. In this case, The International Council for Commercial Arbitration, guide to interpretation of New York Convention, 1958 was quoted, "*While considering the grounds for refusal of enforcement of a foreign award, the court must be guided by the following principles:*

1. ***No review on merits;***
2. ***Narrow interpretation of the grounds of refusal;***
3. ***Exercise of limited discretionary power."***

Thus, merits of arbitral awards are not open to review. Accordingly errors of judgment are not sufficient grounds for refusing enforcement of foreign awards. At the same time, in the entire arbitral process, fair and equal treatment to the parties is a non-derogable and mandatory provision and the crystal clear reflection of ***audi alteram partem*** principle is section 18 of the Arbitration & Conciliation Act, 2015 which says, "***The parties shall be treated with equality and each party shall be given a full opportunity to present his case***." And it is a ground for challenge the arbitral award if this provision is breached in terms of section 34 (2) (a) (iii) of the Act, 2015. But if the interpretation of the contract taken by the Arbitrator is such, **which amount to re-writing of the contract**, then such an interpretation is not liable to be recognised as well enforced in

[31] Civil Appeal 3185 of 2020 decided on 16.09.2020.

law. The fundamental principle of interpretation, "***the terms of the contract must be read as a whole and not in parts***" shall be equally applicable in award making by the arbitrator and if this rule of interpretation is not complied with, award is liable to set aside or may be refused for enforcement. Recently Division bench of **Madras High court** in the matter of **Hindustan Petroleum Corporation Ltd. v. Banu constructions & other**[32] made some very relevant observations on the reasoned award aspect. To quote para 10 of the judgment, "***While it is not necessary for an arbitral award to justify every paisa or a rupee awarded to the claimant, the broad premise on which the quantum is founded has to be discernible from award itself for the award to be meaningful or even intelligible in legal terms. In short, the award impugned before the Arbitration Court in this case was the classical example of what an arbitral award could never be.***"

To quote para 15 of the said judgment is again relevant here, "…….***The Complete lack of reasons cannot be glossed over in the matter it has been in the judgment & order impugned. The exercise undertaken to re-write the arbitration award by ascribing reasons in support of the claims allowed and quantum awarded is not the business of the arbitration court and such an exercise could not have been undertaken in this jurisdiction or within the limited arena of operation permitted by section 34 of the Act, 1996. The judgment & order impugned go against the most rudimentary tenets of the governing law and the jurisprudential philosophy established in this branch over the years."***

Conclusion:

Now the moot question which leaves the legal fraternity into lurch is, An Arbitrator who himself is the creation of the agreement entered into between the parties to contract is not bound by the terms and conditions of the contract in the light of 2015 Amendment in section 28(3) of the Act? If in terms of this amendment, it is now legally permissible for the arbitrator to travel beyond the terms and conditions of the contract while adjudicating the claims between the parties, then what is that permissible degree and limit of the deviation from the agreed terms and conditions of the contract. Another very significant bearing of this 2015 amendment is on **section 28 (2)** of the Act, 2015. **Section 28 (2)** of the Act, 2015 says, "The Arbitral tribunal **shall** decide ***ex aeqo et bono*** or as ***amiable compositeur*** only if parties have expressly authorised." What if the natural equity demands deviation from the clutches of law and now the amended law under **section 28 (3)** of the Act, 2015 permits too but parties to the contract have not given this liberty to the arbitrator to travel beyond the terms of the contract, while adjudicating upon the claims between the parties. Finality of awards to make India a hub for arbitration and thus attracting more and more foreign reserve is on the one hand and the quality of the awards which is well balanced at the touchstone of all the statutory and legally devised prongs of public policy, justice, morality and equity on the other hand is something which will always require a fair judicial mind to fix the dispute among the parties to it in a just, fair and equitable manner. Another bewildering sphere is which injects uncertainty as to the recognition and enforcement of arbitral awards is the judicially evolved concept of Fundamental Policy of Indian Law in Renu Sagar case. Now we have two conflicting and confusing rulings of two co-ordinated benches

[32] OSA 270/2020 & CMP 13352/2020 decided on 09.02.2021.

of the Hon'ble Supreme court, NAFED and Vijay Karia. What are the legislations which will constitute the Fundamental Policy of India and what are excluded from the list? Is there any parameter or test to determine that a separate set of legislations essentially forms the fundamental policy of Indian Law? This interpretational crisis of the term fundamental policy of Indian law is always **susceptible** to judicial scrutiny and thus brings uncertainty as to the fate of the recognition and enforcement of arbitral awards. In addition to this, in case of recognition and enforcement of foreign seated awards **Explanation 1** of **section 48 (2)** of the Act, 2015, if making of the arbitral award is induced by **fraud** or **corruption** or is in violation of **section 75**[33] **or 81**[34] of the Act, 2015 then the enforcement of such foreign seated award may be refused on the ground of being in conflict with public policy of India. Therefore, the quest to make India an attractive hub for arbitration and thus an honest effort of the Indian govt. to attract foreign exchange is dependant and solely rest as to the interpretation of the term Public Policy of India. Thus, whether 2015 amendment and judicial pronouncements in this connection is going to make Indian arbitration regime stronger and successful or a flop show will depend how the courts interpret the term public policy. Whether the view taken by the arbitrator is a possible view or not will depend what interpretation and principles of interpretation which is adopted by the arbitrator while making the award.

[33] Confidentiality of arbitral proceedings.

[34] Admissibility of evidence in other proceedings.