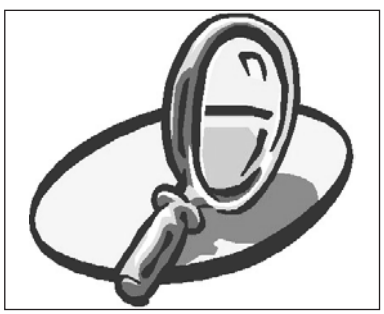
Role of Judiciary in Arbitral Awards

—Uday S. Gandhi

Whenever a reference is made in the form of an arbitration clause in a contract or in a form of a separate agreement or in an exchange of statement of claim and defence in which the existence of the agreement is alleged by one party and not denied by other, arbitrator or arbitrators are appointed as per the provisions of section 11of the arbitration and conciliation Act, 1996 (the Act.).

Arbitrator so appointed has to conduct arbitral proceedings and finally has to make an award that is called as an arbitral award. The reference of an arbitral award is made under the provision of section 31 of the Act. Award means final determination of arbitral proceedings. Under the Act "Arbitral Award" includes an interim award. The form and contents of an arbitral award shall be in writing and signed by an arbitrator and also shall state reasons upon which it is based unless the parties have agreed that no reasons are to be given. It shall also state its date and the place of arbitration in accordance with section 20 of the Act.



The copy of an order shall be delivered to each party.

Now the question arises that if a person is appointed as an arbitrator what and how much care should be taken by him legally or otherwise under the provision of the Act or otherwise? One has to understand thoroughly the answer of this question since arbitral award can be set aside on the grounds enumerated in section 34 of the Act and if an award is made void then the whole exercise of the object of the Act is nullified. However application for setting aside arbitral award should be strictly made within 3 months from the date on which the party making that application had received the arbitral award or if a request had made under section 33, from the date on which that request had been disposed off by the arbitral tribunal provided that if the court is satisfied that applicant was prevented by sufficient cause from making the application within the said period of 3 months it may entertain the application within a further period of 30 days, but not then after. It must be noted that no further extension under any law is permissible other than what is stated above. Hence the award should be challenged timely as per the provision of section 34(3) of the Act.

In view of the above, we must understand at the outset, what are the grounds enumerated in section 34 of the Act for setting aside an award? An arbitral award may be set aside by the court only if:

(a) The party making the application furnishes proof that -
- A party was under incapacity or no notice was served invoking the arbitration clause or agreement.
- The arbitration agreement is not valid under the law for the time being in force.
- The arbitral award deals with the dispute not contemplated by or not falling within the terms of submission of the arbitration.

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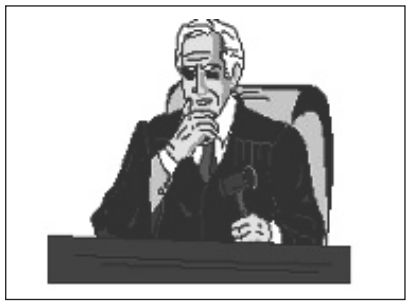
- The award contains decision on matters beyond the scope of the submission to arbitration.
- The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

(b)
- The subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force or
- 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 Sec. 75 or Sec. 81.

Before we go through with various judicial pronouncements of the various courts, we must understand that arbitrator should take the following minimum care or precaution before passing an award;

- Arbitrator should examine every claim minutely on basis of entire records and should give own reasoning and interpretation to every issue. He should refer to independent evidence available on record and should base his finding on entire records available.
- Arbitrator should decide disputes within parameters of terms and conditions of agreement between parties.
- Award should appreciate evidence on record and should be based on appreciation of records.
- Arbitrator should give convincing reason for accepting or rejecting counter claim and his decision should be healthy.



- He should not adjudicate any matter referred under clause, which is not a subject matter of arbitration, arbitration cannot act without jurisdiction and deciding such case is outside the scope of his jurisdiction.
- Award should not be in contradiction to any provisions of general terms and condition of any contract and it should not be outside scope of agreement entered into between parties.
- There should not be error apparent on face of record for e.g. arbitrator ignored the material documentary evidence which was not on record and which evidence was relied upon to record finding on point of limitation.

In addition to what is stated above, the Supreme Court has made various judicial pronouncements with regard to qualification of arbitral award and the same are enumerated as under:

- In the case of Olympus Superstructure Pvt. Ltd. Vs. Meena Vijay Khetan, AIR 1999 SC 2102=1999(2) Arb. LR 695 (SC), it was held that under sub clauses 2 (a)(iv) to Section 34 Arbitral Award may be set aside by the Court if the Award deals with the dispute not contemplated by or not falling within the terms of the submission to Arbitrator.
- In case of Food Corporation of India Vs. Surendra, Devendra and Mahendra Transport Co., 2003 AIR SCW 845=2003(1) Arb, LR 505 (SC) it was held that raising of claim before the Arbitrator regarding transit loss, demurrage and wharfage charges if barred under the agreement and adjudication of such claim by the Arbitrator amount to exceeding jurisdiction. The matters, which were excluded from the reference to the Arbitrator, therefore, should not be referred to or decided by the Arbitrator.
- In case of M/s. Sikkim Subba Associates Vs. State of Sikkim, AIR 2001 SC 2062=2001(2) Arb. LR 17 (SC) it was held that "it is also, by now, well settled that an Arbitrator is not a Conciliator and his duty is to decide the disputes submitted to him according to the legal rights of the parties and not according to what he may consider it to be fair and reasonable." Arbitrator was held not entitled to ignore the law or misapply it and cannot also act arbitrally, irrationally, capriciously or independently of the contract (See Rajasthan State Mines and Minerals Ltd. Vs. Eastern Engineering Enterprises, 1999 (9)SCC 283=1999(3) Arb. LR 350 (SC). It was further held that courts of law have a duty and obligation to maintain purity of standards and preserve fully faith and credit as well as to inspire confidence in alternate dispute redressed method of Arbitration, when on the face of the Award it is shown to be based upon a proposition of law which is unsound or findings recorded which are absurd or so

unreasonable and irrational that no reasonable or right thinking person or authority could have reasonably come to such a conclusion on the basis of the materials on record or the governing position of law to interfere.

- The learned judge referred to the judgment in Hindustan Petroleum Corporation Ltd. Vs. Batliboi Environmental Engineers Ltd., decided on 4th December,2000 reported in 2001 (Suppl. 2) Bom. CR 547. In that judgment, after addressing the law, this Court took the view that the expression 'public policy' can be found from the constitutional principles and more so the trinity of the Constitution viz., preamble, fundamental rights and the directive principles. Under the circumstances, it would be possible to confine the public policy to those heads, which a writ Court could exercise while exercising the extra ordinary jurisdiction under Article 227 of the constitution of India. A writ Court exercises jurisdiction in a case where an order is without jurisdiction an order is in excess of jurisdiction or the orders suffer from an error of law apparent on the face of record and not a mere error of law and must shock the conscience of the Court.
- Now highly controversial judgment given in case of Oil and Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd., (2003) 2 CLT 242=2003(2) Arb. LR 5 (SC) their Lordships of the Supreme Court interpreted the provisions of Section 34(2)(b) and observed: "Therefore, in our view, the phrase public policy of India used in Section 34 in text is required to be given a wider meaning. It can be stated that the concept of public policy denotes some matter, which concerns public and the public interest. What is for public or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the Award, which is, on the fact of it, patently in violation of statutory provisions cannot be said to be in public interest. Such Award/judgment decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'Public Policy' in **Renusagar's** (supra), it is required to be held that the Award could set aside, if it is patently illegal. Result would be Award could be set aside if it is contrary to :

(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.

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that Award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such Award is opposed to public policy and is required to be adjudged void."

In view of the above judgment in case of ONGC Vs. SAW Pipes Ltd., it is quiet probable that the litigant will get chance to challenge an award under section 34 of the Act. This anomaly may multiply court litigation instead of minimizing it since the meaning of the words ***"only if "*** referred in section 34(2) has lost its importance and now it is open to the litigant to make his case under section 34 (2) (b) (ii). However it is learnt that the larger bench of Supreme Court is going to take up the issue and will find its practical solution, which will minimize litigation and that, might mitigate the wider meaning of the judgments. The same will protect the interest of public and also may protect the very base and object of the Act itself. However till that time we have to wait and watch that how many arbitral awards are going to be challenged in the higher courts in the time to come. In spite of this, the silver line of the thunder cannot be ignored and the recent attitude of the chief justice of India and the high court judges to promote and implement A.D.R. (Alternative Dispute Resolution) cannot be overlooked. We all should be positive to bring the best possible resolutions by adopting different mechanisms of A.D.R. and our attempt should be to make India a peaceful country. ■