THE DOCTRINE OF PUBLIC POLICY: BACKDOOR STRATEGY TO REVIEW FOREIGN ARBITRAL AWARD OR NECESSARY EVIL?

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ABSTRACT: *Arbitration falls within one of the laws which were initiated with the reason to respect the parties' decision to opt for an alternative course to resolve their disputes outside the courts. International arbitration is usually chosen by the parties for the expertise of the institutions to deliver effectively enforceable decisions. In arbitration, the intention of the parties to pursue an arbitration is given the highest regard. But this intention for arbitration has been tested by the Indian courts on several occasions during the enforcement of such foreign awards. The doctrine of public policy has been discussed and cited as the reason to deny the enforcement of these awards.*

The Indian statutory act determines that it is the duty of the Indian courts to prevent any gross infringement of the basic rights of Indian citizens and hence, the courts possess the power to deny the enforcement of foreign awards. A test has been laid down for the satisfaction of the 'public policy' doctrine which states that the award should not be contrary to the fundamental policy of Indian law, the interests of India, justice or morality, among others as well.

This article aims to study the doctrine of public policy and to determine if it has been developed as a tool to escape the arbitration mechanism, once the decision rendered by the arbitrator has not favored the party approaching the courts. This would include a detailed review of the landmark judgments on the doctrine of public policy to gather the parameters considered while denying the enforcement of foreign awards and discover patterns in other judgments as well as determine the ways other courts have been interpreting such landmark judgments to understand the position of Indian Judiciary on the utilization of the doctrine.

KEYWORDS- *ADR, Arbitral Awards Section 34, Public Policy, Enforcement of Arbitral Awards*

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I. INTRODUCTION

In India nowadays, arbitration is the standard form of dispute settlement for business disputes. In fact, the Indian government acknowledged that improving arbitration and enforcement process efficiency was a way to boost its standing in the World Bank's Doing Business rankings. India's standing for 'Enforcing Contracts' in the World Bank Report on Doing Business 2018 rose multiple ranks, even reaching 163 in 2019. In terms of general ease of doing business, India advanced 23 places in 2019.[1]

However, the implementation of arbitral awards in India has been one of the main worries for parties. The concept of Public Policy in the Arbitration and Conciliation Act of 1996[2] as an exception to the execution of arbitral awards, thereby making arbitration one more stage in the adjudication process in India. Since the party in whose favour an award is passed have to essentially re-litigate the conflicts before an Indian court in order to seek enforcement of such an award, this discussion raises significant concerns in the minds of individuals who have agreed to arbitration provisions as a dispute-resolution tool. Thus, this article aims to discuss the provision of Public Policy at length through the judicial Lens and discuss bad seeds of jurisprudence which can be used by the parties to re-litigate the whole process and escape arbitral awards, which includes the Phulchand fiasco and the re-evaluation of evidence approach.

II. PUBLIC POLICY

Public policy implies a situation involving the common benefit or the common interest. Therefore, any behaviour that has a potential to be nefarious enough to harm the interests of the state or the public is said to be against public policy or the law. What is good for the public, in the public interest, or occasionally damaging or injurious is what is meant by 'public policy'. Its meanings are incredibly broad and all-encompassing. Any action that undermines general agreement is against public policy.

Public policy is not defined in either the Arbitration Act or the Indian Contract Act as it cannot be precisely defined. It depends on shifting social mores, moral standards, and financial circumstances. The notion of public policy is flexible, which theoretically gives judges a

[1] *World Bank's Doing Business Report Bank*, THE WORLD BANK, (Sept 10, 2022) https://pib.gov.in/newsite/PrintRelease.aspx?relid=193994.
[2] Arbitration and Conciliation Act, No. 26, 1996 (India).

justification to void any contract they don't like. In light of this risk, judges have occasionally criticised the concept. The courts' current stance constitutes a compromise between the necessity for clarity in business dealings and the flexibility ingrained in the idea of public policy. The concept has a rather open-textured and flexible nature, and this nature has led to judicial criticism. Two of these come to mind. It first fluctuates with the social and cultural ideals of many countries and within each country from generation to generation. Second, it has been described in a variety of ways by judges and jurists.

Section 34 of the Arbitration and Conciliation Act of 1996[3] specifies grounds for challenging an arbitral award, such as Incapacity of the party, proper notification not provided, inarbitrable subject matter, etc. Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act of 1996[4] states that an arbitral award can be set aside by the court if it is in conflict with the public policy of India.

III. JUDICIAL CONTRIBUTION TO PUBLIC POLICY

A. AGAINST FUNDAMENTAL POLICY OF THE INDIAN LAW

The Supreme Court of India established the parameters of public policy pertaining to the implementation of a foreign award and used a narrow construction of public policy.[5] The court ruled that the phrase "public policy" in Section 7(1) (b) (ii) of the Foreign Awards Act[6] must necessarily be interpreted in the sense of the theory of public policy as applied in the area of private international law because the Foreign Awards Act is concerned with the recognition and enforcement of foreign awards that are regulated by the principles of private international law. Therefore, enforcing a foreign award may be refused on the grounds that doing so would be against public policy if doing so would violate:

- The fundamental policy of Indian law
- Interest of India
- Justice, or morality.

The Court further clarified ‘fundamental policy of Indian law’ and gave three crucial points of consideration. Firstly, for the award to be rejected enforcement, it must allege more than just a

[3] *Id*, § 34.
[4] *Id*, § 34 (2)(b)(ii).
[5] Renusagar Power Co Ltd v. General Electric Co 1994 Supp (1) SCC 644.
[6] Foreign Awards Act, No. 28, 1961 (India), § 7(1)(b)(ii).

breach of Indian law, secondly, must be a violation of economic interests of India, thirdly, the court's orders must be followed.

B. PATENT ILLEGALITY

The Supreme Court introduced the concept of 'patent illegality' for setting aside domestic awards under the head of public policy.[7] In accordance with Section 34 of the Arbitration and Conciliation Act of 1996[8], domestic arbitral awards made in India were challenged in this instance on the grounds of public policy. A consideration of the merits of the underlying issue was partially required to determine patent illegality. It concluded that, while defining patent illegality, "illegality must go to the source of the matter, and if the illegality is of insignificant nature, it cannot be maintained the award is against public policy." Award may also be revoked if it horrifies the Court's conscience by being so unfair and irrational. Such an award must be declared void since it violates public policy.

C. JUSTICE AND MORALITY

Supreme Court, in the case of Associate Builders v. Delhi Development Associates[9], explored the terms 'Justice and Morality' in interpreting public policy. They ultimately refused to interfere with the arbitral award on the reasons that firstly, only the reasons listed in Section 34 of the Arbitration and Conciliation Act of 1996 may be used to contest an arbitral judgement and held that the merits of the award may only be examined in the general context of public policy.

They discussed all the four elements of public policy, including, fundamental Policy of Indian Law, Interest of India, Justice and morality and patent illegality. Fundamental Policy of Indian law to include certain factors, firstly, disregarding instructions from higher courts, secondly, usage a judicial method instead of an arbitrary approach, thirdly, natural justice principles must be applied and lastly, it must be ensured that an arbitrator's decision is not bizarre and unreasonable in the sense that no sensible person would reach the same conclusion.

The "Interest of India" was defined as relating to India's standing in the international community and its relationships with other countries.

[7] Oil & Natural Gas Corporation Ltd Vs Saw Pipes Ltd (2003) 5 SCC 705.
[8] *Supra* note 3.
[9] Associate Builders v. Delhi Development Associates [2015] AIR 620 SC.

The term ‘against justice and morality’ includes: firstly, the award should not be such that it shocks the conscience of the court, secondly, morality was limited to the scope of sexual immorality only, lastly, with respect to an arbitration, it would be a valid ground when the contract is not illegal but against the moral standards of the society and will only be applicable when it shocks the conscience of the court.

In addition, the Supreme Court ruled that "Patent Illegality" would include: firstly, fraud or corruption, secondly, a violation of substantive law, which gets to the heart of the matter thirdly, an arbitrator's legal error, fourthly, a violation of the Act itself, fifthly, when the arbitrator disregards the terms of the contract and customs of the trade as required by Section 28 (3) of the Arbitration and Conciliation Act of 1996[10], and lastly, if the arbitrator gives an arbitrary decision or the reasoning behind the decision.

The Supreme Court ruled that an arbitrator is the only judge of the quality and quantity of the facts, and as a result, an award cannot be overturned based only on the lack of sufficient evidence or poor quality of the evidence. The Supreme Court also ruled that when a court evaluates an arbitration award using the "public policy" standard, it does not serve as an appeals court and, as a result, "errors of fact" cannot be addressed unless the arbitrator's decision-making process is arbitrary or capricious.

D. FUNDAMENTAL POLICY OF INDIAN LAW 2.0

The Supreme Court in the decision of Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India[11] provided an in-depth commentary on the situation following the 2015 amendment to the Arbitration and Conciliation Act of 1996. The Court determined that, in light of the 2015 amendment to the Arbitration and Conciliation Act of 1996, the broad interpretation of ‘fundamental policy of Indian law’ advanced in the judgments of Western Geco[12] and Associate Builders[13] would be inappropriate.

The Court used the 246th Law Commission Report in establishing that the interpretation of the subhead ‘Fundamental policy of Indian law’ would henceforth be consistent with Renusagar[14].

[10] Supra note 3, § 28(3).
[11] Ssangyong Engg. and Construction Co. Ltd. v. National Highways Authority of India (2019) 15 SCC 131: 2019 SCC OnLine SC 677.
[12] Oil & Natural Gas Corporation Ltd v. Western Geco International Ltd, (2014) 9 SCC 263.
[13] *Supra* note 9.
[14] *Supra* note 5.

It went on to say that this subhead would now imply that firstly, a decision which opposes a law defending national interests of the country, secondly, a decision that blatantly rejects superior court orders, and thirdly, a decision that egregiously violates principles of natural justice.

Thus, it is clear that the Court has eliminated the ground of non-adoption of a judicial approach, rightly anticipating that this would require an entry into the merits of the decision, which is clearly forbidden by the legislative intervention.

The Court then evaluated distinct aspects of Indian public policy, concluding that the phrase 'interest of India' must not be considered as part Indian jurisprudence. However, in accordance with Associate Builders[15], the head 'justice or morality' was maintained and the reason behind it was that this head would be regarded as a contradiction with the 'most basic notions of morality and justice'. Thus, this ground will only be applied to arbitral rulings that shock the Court's conscience.

The Court subsequently revised the subhead "patent illegality" in light of its statutory recognition through the addition of Section 34 of the Arbitration and Conciliation Act of 1996, establishing that it must appear on the face of the award and must indicate that such an illegality goes to the heart of the problem while eliminating an incorrect application of the law by the Tribunal.

The Court then discussed certain scenarios where patent illegality might apply. Firstly, if an arbitrator does not back the award with suitable logical reasoning then it would be in violation of Section 31(3) of the Arbitration and Conciliation Act of 1996[16]. Secondly, if an arbitrator takes a view so unbelievably impossible to interpret the contract, then it will attract patent illegality. Thirdly, if the arbitrator steps outside his jurisdiction while delivering the award, then it shall be considered as patent illegality. Lastly, if the arbitrator reached an erroneous conclusion based on a lack of evidence, the omission of material evidence, or the use of documents as evidence without properly notifying the parties.

IV. THE PHULCHAND FIASCO

[15] *Supr*a note 9.
[16] *Supra* note 3, § 31(3)

One of the first fiascos with the public policy in the arbitration arena is the 2011 case of Phulchand Exports Ltd. vs. O.O.O. Patriot.[17] There was a disagreement between the appellant, an Indian corporation, and respondent, a Russian business. The Respondent demanded that the Appellant furnish him with a particular quantity of polished rice on a cost, insurance and cargo basis pursuant to a secret arrangement they had created. The respondent placed a rice order with the appellant, but no rice was ever delivered. As a result, the respondent brought an action against the appellant before a Russian arbitral tribunal, seeking payment of the agreed-upon sum. The panel finally rejected the appellant's defence while thinking it was strong. The respondent then requested arbitration from the Bombay High Court. It asked that the Act's award be implemented.

The enforcement of an arbitral decision may be rejected under section 48 (2) of the Arbitration and Conciliation Act of 1996[18], if the Court determines that (a) the dispute cannot be resolved via arbitration under Indian law; or (b) the implementation of the decision would be against Indian public policy. The issue in this case was the enforceability of foreign awards if they were "patently illegitimate" and against Indian public policy.

The court determined that, firstly, with regard to the claim that risk was conveyed to the purchasers, the SC's interpretation of the terms of the Goods Act determined that the risk of loss for the items remained with the seller until the buyer acquired ownership of the goods. However, the caveat to Section 26 of the Indian Sales of Goods Act, 1930[19] expressly specifies that if products are delayed owing to either party's fault, the goods are at the risk of the defaulting party. The Appellant did break the terms of the contract by shipping the goods late and on a vessel without a definite commitment to make Novorossiysk the first port of discharge. As a result, they were responsible for making up the loss in accordance with the rules of the Indian Goods Act, 1930. The Respondent was able to draw on the contractual provisions for compensation.

The argument that the aforementioned contractual condition is invalid and punitive in character is similarly unsupportable since the Contract Act's provisions do not in any way make it illegal to award liquidated damages. The contract's reimbursement clause is not in the type of a penalty or an in terrorem clause, therefore it cannot be seen as damages. Depending on how the

[17] Phulchand Exports Ltd. v. O.O.O. Patriot, (2011) 10 SCC 300
[18] *Supra* note 3, § 48(2).
[19] Sale of Goods Act, No. 3, 1930 (India), § 26.

transaction is structured, public policy can be determined in a contract. Due to the fact that the object/consideration is neither unlawful, dishonest, immoral, nor contrary to public policy, the aforementioned provision cannot be deemed invalid under Section 23 of the Contract Act, 1872[20]. As the condition for reimbursement or payback is not irrational nor unfair, and the Respondent was only compelled to pay for half of the sum paid, the judgement in this instance is not patently illegal or against Indian public policy.

The Supreme Court cited the Saw Pipes Ltd.[21] decision in holding that the award could be overturned "if it is patently illegal" and that the phrase "public policy of India" used in Section 48 (2)(b) of the Arbitration and Conciliation Act of 1996[22] must be given a wider interpretation.

A. CRITICISM

The Phulchand case is said to have opened the floodgates for the rejection of enforcement of arbitral awards applications. The wider interpretation given to the phase of Public Policy was heavily criticized. This increased the chances of judicial intervention in international commercial arbitration, which has time and again been frowned upon by the Indian Supreme Court themselves. But wisely, this case was shortly overturned through the Shri Lal Mahal judgment[23].

B. REDEMPTION

The questions considered in the case of Shri Lal Mahal[24] of whether the enforcement of the awards could be refused on the grounds asserted by the Appellant arose regarding the meaning and interpretation of the term "public policy," which is provided as a cause to refuse enforcement of a foreign award under section 48 (2) (b) of the Arbitration and Conciliation Act of 1996. Another question was whether "public policy" had the same definition and intent under Sections 34 (2) (b) (ii) and 48 (2) (b) of the Arbitration and Conciliation Act of 1996.

In overturning the Phulchand ruling, the Supreme Court ruled that section 48 of the Arbitration and Conciliation Act of 1996 definition of "public policy" was more limited than section 34 of

[20] Indian Contract Act, No. 9, 1872 (India), § 23.
[21] *Supra* note 7.
[22] *Supra* note 3, § 48(2)(b).
[23] Shri Lal Mahal Ltd v Progetto Grano Spa (2014) 2 SCC 433.
[24] *Id.*

the Arbitration and Conciliation Act of 1996. The Court, citing Renusagar[25], made the crucial point that there is a small line between applying the rule of public policy in a situation covered by domestic laws and one that involves a conflict of laws, as is the case in the majority of international commercial arbitrations. In cases involving conflicts of laws and proceedings with a foreign element, such as an arbitration with a foreign seat, the court noted that the theory of public policy's applicability is rather limited and that courts would not be naturally inclined to rely on it.

The court additionally noted that ONGC dealt with an instance where an application to withhold implementation of a judgement under section 48 of the Arbitration and Conciliation Act of 1996 was made as contrasted to one where the arbitral award was being challenged under section 34 of the Arbitration and Conciliation Act of 1996. According to a statement made, the phrase "public policy of India" under section 34 of the Arbitration and Conciliation Act of 1996 must be understood in the context of the court's jurisdiction where the legitimacy of the judgement is contested before it becomes final and executable, as opposed to when the award is enforced after it becomes final. Thus, it became clear that any "patent illegality" for putting aside the verdict would fall under the definition of public policy under Section 34 of the Arbitration and Conciliation Act of 1996.

The court determined that Section 48(2)(b) of the Arbitration and Conciliation Act of 1996 only provided for the suspension of implementation of a foreign award if doing so would go against the fundamental principles of Indian law, national interests, justice, or morality. When an objection is made to the enforcement of the foreign award under Section 48(2)(b) of the Arbitration and Conciliation Act of 1996, the more wider definition of "public policy of India" found in Saw Pipes'[26] Section 34(2)(b)(ii) of the Arbitration and Conciliation Act of 1996 does not apply.

The court additionally stated that section 48 of the Arbitration and Conciliation Act of 1996 does not provide a reassessment at the foreign award during the enforcement stage. The court reaffirmed that section 48 of the Arbitration and Conciliation Act of 1996 does not provide for a reconsideration of the merits of the judgement and that procedural flaws during a foreign arbitration do not automatically render the result invalid.

[25] *Supra* note 5.
[26] *Supra* note 7.

V. THE EVIDENCE ON RECORD APPROACH: THE SUBTLE INTERFERENCE

A. NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA (NAFED) V. ALIMENTA[27]

NAFED, the appellant, was an Indian government authorised canalising agency and made a deal with the respondent, Alimenta S.A., for the season's supply of Indian groundnut. However, NAFED was unable to provide the agreed upon amount due to crop damage. As a result, both sides agreed to two revisions to provide the remaining amount in the following year. NAFED contacted the Government to request authorization to carry forward the export obligations from the prior year, but this request was denied due to material changes in the commodity's price. Alimenta characterized NAFED's disclosure of its impossibility due to the Government's prohibition as a breach of contract and thereafter referred the matter to arbitration. After a round of litigation over the suspension of the arbitration, the arbitral tribunal issued its decision ordering NAFED to compensate Alimenta for damages.

The Supreme Court refused to enforce the award, ruling that in the absence of the Government's consent, NAFED was justified in not supplying the item and so could not be ordered to pay any damages to Alimenta. In reaching its decision, the Court relied on clause 14 of the contract and determined that section 32 of the Indian Contract Act, 1872 applied because the contract between the parties was dependent on the Government's export policy. Additionally, the Court ruled that the contract was null and void and carried no further duties as the government declined to issue the approval. The Court came to the conclusion that allowing the enforcement of the arbitral award amounted to ordering NAFED to perform an impractical act, which would have violated India's public policy as defined in section 7 of the Foreign Awards Act, 1961.

B. SOUTH EAST ASIA MARINE ENGINEERING AND CONSTRUCTIONS LTD. V. OIL INDIA LIMITED[28]

For the aim of well drilling in Assam, SEAMEC Ltd. came into a contract with Oil India based on a tender document. Although the contract's term limit was initially set at two years, the parties later agreed to two additional extensions of one year each. But, High Speed Diesel, a crucial raw material for drilling, has seen a significant price hike since the deal was signed.

[27] **National Agricultural Cooperative Marketing Federation of India (NAFED) v. Alimenta** (2020) SCC OnLine SC 381.
[28] **South East Asia Marine Engineering and Constructions Ltd. v. Oil India Limited** (2020) SCC OnLine SC 451.

Later, clause 23 of the contract was triggered as SEAMEC demanded the stated price from Oil India, which was rejected and led SEAMEC Ltd. to invoke the arbitration clause.

The central issue considered in this judgment was whether the Tribunal's interpretation of the contract, in the award, was reasonable and fair according to the Section 34 of the Arbitration and Conciliation Act of 1996. The Court then examined the said interpretation of the contract and questioned if such interpretation could have been reasonably adopted by the tribunal. But, they ended up subjecting a wider test of reasonability to the arbitral award.

There were different approaches taken by the tribunal and High court, where Clause 23 of the contract was interpreted liberally by the tribunal, and it was decided that change in prices will come under the scope of 'change in law' and on the other hand, the High Court defined the 'Change in Law' clause as a case of force majeure. Disagreeing with both the interpretations, SC claimed that Tribunal failed to interpret clause 23 in its entirety while considering all the clauses of the contract. Ultimately, the Supreme Court ruled, based on evidence and contentions, that arbitral tribunal had unreasonably interpreted the contract and was perverse.

C. MMTC V. M/S VEDANTA LTD[29]

Invoking the arbitration provision in the contract between M/s Vedanta Ltd. (Respondent) and MMTC Ltd. (Appellant), the Respondent demanded payment for products it had sold to Hindustan Transmission Products Ltd. through the Appellant. The Arbitral Tribunal ordered the Appellant to pay the Respondent's claims in full, plus interest.

The Supreme Court re-examined the pre-existing legal position regarding the scope of interference with an arbitral award in India under Sections 34 and 37 of the Arbitration and Conciliation (Amendment) Act, 2015 when examining the issue of the arbitrability of the disputes between the Appellant and the Respondent. The Supreme Court concluded that judicial meddling cannot go beyond the parameters outlined in Section 34 after examining the extent to which courts can replace the decision reached by the arbitral tribunal with their own conclusion. It was made clear that in order to exercise its authority under Section 37, the Court need only confirm that the High Court had not gone beyond the bounds of the law by exercising its authority under Section 34. Therefore, it was determined that the Court is unable to conduct a fair evaluation of the award's merits.

[29] MMTC Ltd. v. Vedanta Ltd., (2019) 4 SCC 163

The Supreme Court further noted that it must proceed with extreme caution and take its time to overturn findings that have already been made in an appeal under Section 37 after an arbitral award has been upheld under Section 34. The Award was determined to be a reasonable view based on a rational construction of the Agreement and after taking into account the material on record regarding the issue of the arbitrability of the disputes. The Supreme Court decided against interfering with the Award as a result.

D. ANALYSIS

The tendency of the Supreme Court of judicial overarching is visible through the judgments discussed above. In the instances of Public Policy exception, the court goes ahead and start analysing the evidence presented in the case and interpretation of documents as if they are acting as the court of facts and not acting in the appellate jurisdiction or the court of law.

Unfavourable opinions to the courts can exist on an arbitral tribunal. Simply holding an opinion that differs from the courts cannot be regarded as shocking the court's conscience. In the case of NAFED[30], we can observe that court states does not state the reason of how the arbitrator was unjustified in ruling in favour of Alimenta. It just states that economically NAFED could not deliver the supply and the export policy of government. There was no conduct on the part of Arbitrator or the award that shocked the conscious of the court or was delivered without a logical explanation. The court even delves further into contractual provisions and investigated the dispute's factual components to reach the conclusion that the government's approval was appropriate to deliver their final verdict. Additionally, this judgment also broadened, the otherwise narrow, scope of ‘public policy’ while refusing enforcement of the foreign award.

In the case of South East Asia Marine Engineering and Constructions Ltd. v. Oil India Limited[31], the judgement made by the tribunal was based on a perverse reading of the contract, according to the Court, which reinterpreted the contract in question and applied a broader definition of what is reasonable. In order to properly interpret clause 23, it has also relied on the evidence to determine the parties' intentions when they entered into the contract. But this was the ultimate fallacy made on the part of the court. They went ahead and stepped in the shoes of the tribunal and made judgment as if their nature was of a factual court and not an appellant court. The role of the Supreme Court is just to observe and make sure a gross injustice

[30] *Supra* note 27.
[31] *Supra* note 28.

has not been committed on the part of the tribunal and not to examine evidences and make remarks about the interpretations taken into account by the tribunal.

In the *MMTC case*[32], contract interpretation may not need the analysis of any evidence to determine the parties' intentions. Although the Supreme Court's ruling may be supported by reasons, it is unclear if the narrow parameters of Section 34 of the Arbitration and Conciliation Act of 1996 are exceeded by such a thorough investigation of the contract in order to determine that an interpretation is irrational.

These judgments have towed away from the 'pro-enforcement' approach of the courts and the overall arc of discouraging re-evaluation of merits or errors, of fact or law at the stage of enforcement of foreign award, made by the arbitrator.

VI. CONCLUDING REMARKS

The public policy test has a long history. In arbitration law, Indian courts have, with the few notable exceptions, been slowly narrowing the scope of public policy. While the Judgments like ssa Pipe, Renusagar, etc. have given us great and precise precedents detailing possible aspects for enforcement and exceptional instances to restrain such enforcement in the interest of Public Policy, we have also encountered bad precedents such as Phulchand case, NAFAED case, MMTC case, etc. where scrutiny of arbitral awards have been much more than required, therefore, giving parties additional opportunities to turn the outcomes in their favour. This not only is a harmful practice for the opposing parties but for the arbitration jurisprudence as well.

But as talked about through the course of this article, there have been many incidents of bad precedents which leaves loopholes, some overruled and some still valid and applicable. This can assist many parties as a tool to escape arbitration and misuse the judicial recourses for personal benefits. The practice of stepping into shoes of an arbitrator to evaluate the evidence or minute details of commercial transaction or giving a wider interpretation to the recourse exception of public policy can become fatal for the parties, and set bad precedents.

The public policy test has to be applied with more rigour. It must be emphasised that an award must always be upheld unless extraordinary circumstances call for a different course of action. Courts must be extremely cautious when voiding or declining to uphold an award. To reduce

[32] *Supra* note 29.

any "play in the joints," it is necessary to tighten and increase the objectivity of the public policy exam. This is especially true for awards resulting from international commercial arbitration, whether it is sitting in India or abroad.