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# Critical Appraisal of 'Patent Illegaility' as a Ground for Setting Aside an Arbitral Award in India

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**Abstract**
Arbitration law stands on two plinths: party autonomy and finality of award. If these two plinths are distorted by judicial intervention, arbitration law will fail to realise its ultimate objective and will lose its essence. Indian law on arbitration has evolved from indiscriminate judicial intervention, established in the Colonial Act and the successive 1961 legislation, to a more mature Act based on the Model Law; this signifies the importance of minimal judicial interference.

Public policy, as a general concept and as a ground for setting aside an arbitral award, is difficult to define. Judicial decisions, regarding the scope of the public policy, that permit near limitless judicial review of the arbitral award serve as a lethal blow to international commercial arbitration. This article examines these repercussions and suggests some reforms to the present arbitration law to enable the pillars of arbitration law to remain intact.

**Keywords**
patent illegality, arbitral awards, arbitration law, India, Indian law, international commercial arbitration, dispute settlement, dispute resolution

# CRITICAL APPRAISAL OF 'PATENT ILLEGALITY' AS A GROUND FOR SETTING ASIDE AN ARBITRAL AWARD IN INDIA

GARIMA BUDHIRAJA ARYA* AND TANIA SEBASTIAN**

Arbitration law stands on two plinths: party autonomy and finality of award. If these two plinths are distorted by judicial intervention, arbitration law will fail to realise its ultimate objective and will lose its essence. Indian law on arbitration has evolved from indiscriminate judicial intervention, established in the Colonial Act and the successive 1961 legislation, to a more mature Act based on the Model Law; this signifies the importance of minimal judicial interference.

Public policy, as a general concept and as a ground for setting aside an arbitral award, is difficult to define. Judicial decisions, regarding the scope of the public policy, that permit near limitless judicial review of the arbitral award serve as a lethal blow to international commercial arbitration. This article examines these repercussions and suggests some reforms to the present arbitration law to enable the pillars of arbitration law to remain intact.

## I INTRODUCTION

Arbitration has fulfilled, to a certain extent, the widespread need for a clean and sophisticated dispute settlement mechanism. Arbitration of commercial disputes is all the more pertinent in the contemporary world governed by the ethos of laissez-faire. Some jurisdictions, at both the national and international level, have endorsed initiatives to amend their arbitration laws to minimise the scope of judicial review and judicial intervention; this facilitates the arbitral process and makes it more commercially attractive.[1]

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1 See, eg, the *Arbitration Act 1994* (Brunei). The Arbitration Order 2009 regulates domestic arbitrations and the International Arbitration Order 2009 regulates international arbitration, both of which follow the basic principle that Brunei courts may only support, but not interfere with, the arbitration process. The *Arbitration (Amendment) Ordinance 1996* (Hong Kong) promotes greater party autonomy, vests primary authority in arbitral tribunals and limits the scope of court intervention. The *Malaysian Arbitration Act 2005* (Malaysia) seeks to minimise court intervention and allows for greater party autonomy.

The need to reduce supervisory control of the court is indisputable. The objectives of the *Arbitration and Conciliation Act 1996* (India) ('*1996 Act*') was to allow minimal judicial intervention and the finality of arbitral awards. Given these objectives, it is important to identify the areas of arbitration law which leave a broad scope for judicial review and the setting aside of awards: 'public policy' is one such area.[2] Judicial decisions on public policy have confirmed that it a concept with an elusive nature; the courts have used its flexibility and adaptability to give it various interpretations.

It is axiomatic that arbitration laws in India are being expanded by way of judicial interpretation and it is contrary to legislative intention. In the 2011 decision of *Ramesh Chander Arora v Kashmeer Saree Kendra*,[3] the Court returned the Indian arbitration jurisprudence to the pre-modern law era of the *Arbitration Act 1940* (India) ('*1940 Act*'). The Court's decision, which followed the laws established in the *1940 Act* and not the *1996 Act*, revived the debate as to whether 'patent illegality' could be used to establish the 'public policy' exception.

The scope of this article is limited to an examination whether 'patent illegality' is a siamese twin to 'public policy' and can be used for setting aside arbitral awards. The Indian courts, in light of the objectives of endorsing arbitration and ensuring conformity with the *1996 Act*, have interpreted 'public policy' in a narrow manner. The two landmark judgments which stand at the centre of the controversy are *Renusagar Power Co Ltd v General Electric Co*[4] and *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd*.[5]

*Saw Pipes* reversed the Court's attempt in *Renusagar* to reduce the scope of public policy. This reversal challenges the pillars of arbitration law, minimal judicial intervention and finality of awards. *Saw Pipes*, which demonstrates that a section of the judiciary supports a liberal interpretation of public policy, has opened the floodgates for parties to challenge an award on trivial grounds. The Court, in *Saw Pipes,* re-interpreted s 34(2)(b)(ii), this resulted in a broad interpretation of 'public policy'.[6] This article criticises this judicial overreach. Further, it examines the possible problems that could arise due to the Court's interpretation; special emphasis is placed on the effect this has on the finality of arbitral awards.

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2 See, *1996 Act* s 34.

3 (2011) 1 ARBLR (Delhi) 232.

4 (1994) Supp 1 SCC 644 ('*Renusagar*').

5 (2003) 5 SCC 705 ('*Saw Pipes*').

6 *1996 Act* s 34: Application for setting aside arbitral award: (2)An arbitral award may be set aside by the Court only if : (b) the Court finds that: (ii) the arbitral award is in conflict with the public policy of India.

## II LEGISLATIVE HISTORY: SIX DECADES AND BEYOND

Fali Nariman describes arbitration in India as a never ending war between two irreconcilable principles: the high one that demands justice even if the heavens fall and the lower one which demands an end to litigation.[7] He goes on to state that 'in India, we have our Arbitration Act since 1940—it governs domestic and reaches out to foreign arbitration as well; it is based on the high principle that the losing party never lets a Court forget it!'[8]

### A *Background*

Arbitration is one of the earliest methods of dispute resolution; prior to the establishment of a court system, people resorted to arbitration for resolving disputes.[9] In India, ancient arbitration roots stem from the Panchayati Raj system;[10] this system had the dual characteristics of voluntary submission of disputes to the self-nominated body of panchayats and finality of the decision. Prior to the 1996 Act, the 1940 Act regulated domestic arbitration and, as envisaged in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ('New York *Convention*')[11] the *Foreign Awards (Recognition and Enforcement) Act 1961* (India)[12] regulated the enforcement of foreign awards in India.

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7 Fali S Nariman, 'Finality in India: The Impossible Dream' (1994) 10(4) *Arbitration International* 373, 381.

8 Ibid, 373.

9 See generally, Henry P de Vries, 'International Commercial Arbitration: A Contractual Substitute for National Courts' (1982) 57 *Tulane Law Review* 42, 43.

10 Krishna Sarma, Momota Oinam and Angshuman Kaushik, 'Development And Practise Of Arbitration In India – Has It Evolved As An Effective Legal Institution' (Working Paper No 103, Center on Democracy, Development, and The Rule of Law, Freeman Spogli Institute for International Studies, October 2009). The 'Panchayati Raj' system, introduced in India pursuant to Article 40 of the Constitution of India, is a mode of self-governance and decentralization which endows the villages with the power and authority necessary to enable them to work as units of government. This, in turn, allows rural people maximum participation in their own development programmes. The Panchayati Raj is a three-tier system of rural administration, comprising of the District Level (Zilla Parushad), Block Level (Panchayat Samiti) and the Village Level (Gram Panchayat).

11 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958,* opened for signature 10 June 1958, 330 UNTS P3 (entered into force 7 June 1959).

12 The 1961 Act replaced the *Arbitration (Protocol and Convention) Act 1937* (India), which had previously governed the enforcement of foreign awards.

## B *The 1940 Act and the Foreign Awards (Recognition and Enforcement) Act 1961 (India)*

The *1940 Act* required judicial intervention throughout the domestic arbitration process. For instance, judicial action was required to: set arbitral proceedings in motion;[13] to determine the existence of a valid arbitration agreement and arbitral dispute;[14] to extend the period of time permitted for making an award;[15] and to enforce an arbitral tribunal's award.[16]

In 1960, India became a party to the *New York Convention*. The *Foreign Awards (Recognition and Enforcement) Act 1961* (India), which governed foreign arbitration, stated that recognition and enforcement of an arbitral award may be refused if it is contrary to the public policy of that country.[17] What constituted 'public policy' remained a vast gray area. The interpretation of 'public policy' coupled with extensive judicial participation in the arbitral process (whereby the court often reviewed the substantive merits of arbitral decisions) led to 'widespread discontent over excessive judicial intervention in arbitral proceedings with attendant delays and uncertainty'.[18]

Article V of the *New York Convention* outlines the conditions under which recognition and enforcement of an arbitral award may be refused.[19] Some have interpreted the article to mean that if an arbitral award is annulled in one jurisdiction on 'public policy' grounds, the same award may continue to be enforceable in another jurisdiction because 'public policy' is a territorial concept.[20] The justification for this interpretation is that the arbitral award is an agreement between parties and is not based on the geographical location of the arbitration or the arbitrator. Since 'public policy' varies between countries, the annulment of the award on the grounds of being contrary to public policy in a particular jurisdiction might be detrimental to the

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13 *1940 Act* s 20.

14 *1940 Act* s 33.

15 *1940 Act* sch1 Implied Conditions of Arbitration Agreements.

16 *Foreign Awards (Recognition And Enforcement) Act 1961* (India) s 14(2).

17 Ibid s 35(1)(b)(ii).

18 Amelia C Rendeiro, 'Indian Arbitration and Public Policy' (2011) 89 *Texas Law Review* 699, 703.

19 New York Convention art V.

20 For detailed discussion see, P Sanders, 'New York Convention on the Recognition and Enforcement of Arbitral Awards' (1959) 43 *Netherlands International Law Review* 55. Also see generally, Albert Jan van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia - Case Comment on Court of Appeal of Amsterdam, April 28, 2009' (2010) 27 *Journal of International Arbitration* 179.

aggrieved parties.[21] Furthermore, the *New York Convention* outlines the territorial aspect in the case of both non-enforcement and setting aside of the arbitral award. It states that the recognition and enforcement of an arbitral award may be refused if the competent authority in the country, where recognition is sought, finds that the recognition and enforcement of the award would be contrary to the public policy of that country.[22] Thus, non-enforcement and non-recognition of the arbitral award as a result of 'public policy' grounds is confined to the applicable national arbitration law of an individual country and the aggrieved party can seek to have the award enforced in other jurisdictions.

### C *The Need for Change and the Resultant 1996 Act*

The widespread discontent resulting from excessive judicial intervention in arbitral awards paved the way for the *1996 Act*. As Desai J remarked: 'the way in which the proceedings under the [1940] Act are conducted and without an exception challenged in the Courts, has made lawyers laugh and legal philosophers weep'.[23] The *1996 Act* also grew out of the desire to keep pace with global developments. It sought to serve the following purposes: to narrow the basis of challenges of the awards; decrease judicial supervision; ensure finality of awards; and expedite the arbitration process.[24]

Furthermore, with India's shift from a closed-door economic policy towards an increasing international one, a new act was clearly needed.[25] One author specifically stated that 'wealthier litigants have used arbitration to try to circumvent the delays of the courts'.[26] Domestic parties, interested in attracting foreign investment, urged Parliament to modernize the arbitration regime and increase party autonomy. The Indian government, recognizing the importance of modernizing the arbitration system, repealed previous statutes and enacted the *1996 Act* which provided a

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21 Ibid. Some individuals disagree with this approach and argue that after annulment the arbitral award no longer exists under the applicable arbitration law. Many commentators do not consider it feasible to a have before which such an award can be presented and declared enforceable. Sanders was one such commentator.

22 New York Convention, art V(2)(b).

23 *Guru Nanak Foundation v Rattan Singh & Sons* (1981) 4 SCC 634, [1].

24 Promod Nair, 'Surveying a Decade of the 'New' Law of Arbitration in India' (2007) 23 *Arbitration International* 699.

25 Justice D K Jain, 'Arbitration: As A Concept And As A Process' (2007) XLI(4) *Indian Council of Arbitration Quarterly* 1.

26 Nick Robinson, 'Expanding Judiciaries: India and the Rise of the Good Governance Court' (2009) 8 *Washington University Global Studies Law Review* 1, 68.

uniform regime for domestic and international arbitration.[27] In response to increasing pressure to modernise Indian arbitration law, Parliament passed the1996 *Arbitration and Conciliation Act*, which took effect on 25 January 1996.[28]

### D *The Governing Law - The* 1996 Act *and an Understanding of the Legislative Underpinnings*

Parliament's goal was to increase party autonomy and efficiency, while minimising judicial intervention in the arbitration process. Article 19(1) of the *UNCITRAL Model Law on International Commercial Arbitration 1985* ('*Model Law*') states that, '[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.' Furthermore, article 18 reflects the *Model Law's* commitment to minimum judicial interference and party autonomy.[29] These two articles were considered to be the equivalent of the *Magna Carta* for arbitration.[30] The *Model Law*, which was drafted by a United Nations Working group, sought to govern all international arbitration; it was subsequently adopted by UNCITRAL.[31] The *1996 Act* was based on *Model Law*; this served multiple purposes: it was an attempt to harmonise India's arbitration laws with other jurisdictions; it provided for a fair and efficient arbitral process; it consolidated

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27 Harpreet Kaur, 'The 1996 *Arbitration and Conciliation Act*: A Step Toward Improving Arbitration in India' (2010) 6 *Hastings Business Law Journal* 262.

28 The *Act* sought to address complaints by foreign investors that, despite India's wealth of resources, the prospect of dispute settlement was too daunting. The *Arbitration and Conciliation Act 1996* (India) is based upon the *United Nations Commission on International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration*, GA Res 40/72, UNCITRAL, 18th sess. (11th December 1985) and their Model Conciliation Rules. The Model Laws and Rules were already being widely used internationally and thus India joined the international consensus on their use.

29 *Model Law* art 18: 'The Parties shall be treated with equality and each party shall be given full opportunity of presenting his case.' The text of art 18 has been adopted from art 15(1) of the United Nations Commission on International Trade Law, *Arbitration Rules*, 1976, GA Res 31/98, UNCITRAL, 9 sess. (15 December 1976).

30 In the pt II, cl 36 of the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration (as amended in 1985) it is stated: 'In addition to the general provisions of article 19, other provisions in the Model Law recognize Party autonomy and, failing agreement, empower the arbitral tribunal to decide on certain matters.' Clause 35 states: 'Autonomy of the Parties in determining the rules of procedure is of special importance in international cases since it allows the parties to select or tailor the rules according to their specific wishes and needs, unimpeded by traditional and possibly conflicting domestic concepts …'.

31 On 21 June 1985.

previous acts; it minimised the supervisory role of courts;[32] and it provided for enforcement of awards as decrees of the court.[33]

The *1996 Act* is divided into part I and part II. Part I governs domestic arbitrations (ie arbitrations conducted in India, irrespective of the nationalities of the parties). Part II pertains to enforcement of foreign awards. The 1996 reforms were an attempt to 'inspire confidence in the Indian dispute resolution system, attract foreign investments and reassure international investors in the reliability of the Indian legal system to provide an expeditious dispute resolution mechanism.'[34]

The *Model Law,* together with the *New York Convention,* is used as a fundamental reference in both countries that have formally adopted it and those that have not directly done so. In international arbitration, the *Model Law* is a harmonisation tool. The *Model Law* has followed the *New York Convention*; this ensures harmonisation and continuity. Additionally, like the *New York Convention,* the *Model Law* requires written arbitration agreements and has clarified the definition of written form.

The *Model Law* does not formally constitute a basis for interpreting the *New York Convention*; however, it is natural to construe the *New York Convention* in light of the *Model Law*. This represents the development of the line of thought upon which the *Convention* is based. An interpretation of the *Model Law,* is not binding on governments or national judges who are interpreting the *New York Convention.* The interpretation of UNCITRAL might, therefore, be given considerable weight when construing the *New York Convention*; but it remains to be seen whether the instrument of the declaration is sufficient or even adequate to found an interpretation of art II(2) that might differ considerably from the interpretation currently made in some countries.[35]

In India, critics claim that despite Parliament's attempts, judicial intervention and unpredictability still make arbitration an unlikely choice for international and domestic parties.[36] Further, they claim that the inefficient dispute resolution mechanism results in parties opting to contract outside India.[37] However, theoretically, the *1996 Act* improved the arbitration process by restricting judicial

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32 *Model Law* art 5; *1996 Act* s 5.

33 *Model Law* art 35(1); *1996 Act* ss 35, 36, 49.

34 *Guru Nanak Foundation v Rattan Singh & Sons* (1981) 4 SCC 634, 704.

35 Giuditta Cordero Moss, *Risk of Conflict Between the New York Convention and Newer Arbitration-Friendly National Legislation* (2003) University of Oslo <http://folk.uio.no/giudittm/Form%20of%20arbitration%20clause.pdf>.

36 Kaur, above n 27, 263.

37 Ibid.

intervention to grounds specifically mentioned in the *Act*.[38] Judicial intervention could have been further restricted if Parliament had given the arbitral tribunal a larger role in the arbitration process. For instance, instead of parties seeking interim measures directly from the court, all claims can be filed with the arbitral tribunal;[39] the arbitral tribunal would review the claim and determine the need for judicial intervention.[40]

### E *The 2003 Amendment Bill to the 1996 Act*

In 2003, the Law Commission of India prepared a report on the weaknesses of the *1996 Act* and suggested a number of amendments. Based on the Law Commission's report, the *Arbitration and Conciliation (Amendment) Bill 2003* was submitted to Parliament on 22 December 2003. The amendments proposed to insert a section allowing an award to be set aside 'on the additional ground that there is an error which is apparent on the face of the arbitral award giving rise to a substantial question of law'.[41] However, the *Bill* was withdrawn from the Rajya Sabha because it potentially allowed for excessive court intervention in arbitration proceedings.[42]

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38 Such as to resolve ambiguities and interpret Parliament's intent in enacting specific provisions.

39 *1996 Act* s 17.

40 Kaur, above n 27, 279.

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

42 Indian Institute of Arbitration and Mediation, *Proposed Amendments to the Arbitration and Conciliation Act, 1996: Comments and Suggestion on the Consultation Paper* (6 May 2010) Arbitration India <http://www.arbitrationindia.org/pdf/suggestions_arbitrationamendment_2010.pdf>. The Rajya Sabha is the upper house of the Parliament in India, comparable to the Senate in the Australian Parliament. However, the Rajya Sabha comprises of nearly 250 members, unlike the Senate which has a lesser membership. The President of India nominates 12 members among the 250 members based on the contributions made to art, science, literature and social service. Additionally, the members of the Rajya Sabha are not directly elected by the people of India (as the Lok Sabha – the house where representatives are directly elected by the people of India), but are elected by the elected representatives. Members to the Rajya Sabha are elected for a six-year period, with one third of the members retiring every two years.

## III PUBLIC POLICY AS A GROUND FOR JUDICIAL INTERVENTION

Public policy is an ever shifting, vague concept; choosing a combination of words to define public policy is an arduous task. The warning note sounded by Judge Burrough almost two hundred years ago still resonates today, '[public policy is] a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.'[43]According to a recent survey by the International Law Association, 'fifty years on, public policy remains the most significant aspect of the [New York] Convention in respect of which ... discrepancies might still exist.'[44] In the current era of globalisation and international trade, 'Public Policy Rules'[45] cover an expanding range of issues: antitrust regulations; laws against bribery of foreign officials; prohibiting intermediaries in public procurement contracts; trade embargoes; exchange control regulations; investment codes; restrictions on arms trade and weapons technology; protection of trade secrets and cultural heritage; bankruptcy regulations; and, more recently, environmental protection.

### A *Exploring the Limits of Judicial Legislation: The Renusagar and Saw Pipes Judgments*

Some judges have attempted to give structure to the concept of public policy; at this point, it is necessary to analyse the Supreme Court's landmark decisions in *Renusagar* and *Saw Pipes*. These decisions challenged arbitration's objectives, namely: minimal court interference and finality of an arbitral award.

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43 *Richardson v Mellish* [1824] 2 Bligh 229, 242.

44 The *New York Convention's* goal was to provide uniform procedure for enforcing foreign arbitral awards, while minimizing the effect of discrepancies between the laws of different countries. Fifty years on public policy remains the most significant aspect of the *Convention* in respect of which such discrepancies might still exist. The US Supreme Court stated in *Scherk v Alberto-Culver Co* (1974) 417 US 506, 520 n 15 that the overriding purpose of the *Convention* was 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to verify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.' International Law Association, *Committee on International Commercial Arbitration Recommendations 1(c)– Clause 23,* New Delhi Conference (2002), <www.ila-hq.org/BD0F9192-2E98-4B17-8D56FFE03B80B3EA>.

45 Public Policy Rules: Commission Regulation (EC) No. 874/2004 of 28 April 2004 laying down public policy rules concerning the implementation and functions of the European Union Top Level Domain and the principles governing registration. See also, A N Zhilsov, 'Mandatory and Public Policy Rules in International Commercial Arbitration' (1995) 42 *Netherlands International Law Review* 81.

In *Renusagar,* the Supreme Court limited the scope of public policy to three grounds: (i) fundamental policy of Indian law; (ii) the interest of India; or (iii) justice or morality.[46] *Renusagar* was decided prior to 1996 and therefore it dealt with an interpretation of public policy as applied to the enforcement of a foreign award under the repealed *Foreign Awards (Recognition and Enforcement) Act 1961*. Though the precedential effect of *Renusagar* was doubtful, the three grounds established in the case were adopted by the Supreme Court in *Saw Pipes*[47] and later in *McDermott International Inc v Burn Standard Co Ltd.*[48] In addition to the narrower meaning given to the 'public policy', a fourth ground of 'patently illegal' was added.[49] 'Patently illegal' or 'blatant illegality' or 'error on the face of the record' has a few definitions, it can mean: an error of law that goes to the root of the matter; or a violation of the constitution or a statutory provision; or it may be inconsistent with common law.[50]

Adding 'patently illegal' to the existing grounds found under 'public policy' has been described as a lethal blow to the development of the post *1996 Act* arbitration system.[51] *Saw Pipes* broadened the scope of public policy by enhancing the possibility of a near limitless judicial review, contrary to the *1996 Act*'s objective of minimal court interference.[52] Therefore, the *Saw Pipes* decision is a significant blemish on India's arbitration jurisprudence.

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46 (1994) Supp 1 SCC 644, 647.

47 (2003) 5 SCC 709.

48 (2006) 11 SCC 211 ('*McDermott International*').

49 The precedential effect of *Renusagar* is doubtful, because it was based on *Foreign Awards (Recognition and Enforcement) Act 1961* (India), which has been repealed, and also due to the decision being based on enforcement of a foreign award unlike the case of *Saw Pipes,* which involved setting aside of domestic award.

50 O P Malhotra and Indu Malhotra, *Law and Practice of Indian Arbitration and Conciliation* (LexisNexis, 2006) 1175.

51 Rendeiro, above n 18, 711 as cited in Sumeet Kachwaha, 'The Indian Arbitration Law: Towards a New Jurisprudence' (2007) 10 *International Arbitration Law Review* 13, 15 (quoting F. S. Nariman, Speech at the Inaugural Session of "Legal Reforms in Infrastructure" (May 2, 2003)).

52 Some of the objects, as mentioned in the Statement of Objects and Reasons for the *Arbitration and Conciliation Bill 1995* (India) are as follows: a. to minimise supervisory role of courts in the arbitral process; b. to provide that every final arbitral award is enforced in the same manner as if it were the decree of court. In addition to these, the *1996 Act* s 5 also points towards minimum judicial intervention.

In *Saw Pipes*, the Court emphasised that the fourth ground was only applicable to domestic awards.[53] The Law Commission Report[54] and the proposed *Arbitration Act*[55] have also identified the desire to differentiate between international and domestic arbitration when dealing with the ground of 'patently illegal.' In the recent Constitutional Bench Supreme Court decision in *Bharat Aluminium Co v Kaiser Aluminium Technical Service Inc,*[56] the Court held that it could not support the conclusion reached in *Bhatia International v Bulk Trading SA*[57] and *Venture Global Engineering v Satyam Computer Services Ltd*[58] that part I would also apply to international arbitrations.[59] The Court did not accept the Appellant's submission that the omission of the word 'only' from s 2(2) indicates that applicability of part I of the *1996 Act* is not limited to the arbitrations that take place in India.[60] Thus, the Court did not accept the contention that s 2(2) would make part I applicable to arbitrations which take place outside India.[61] However, in its judgment *Ogilvy & Mather Pvt Ltd. v. Union of India,*[62] the Delhi High Court reinforced the dictum established and

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53 In *Renusagar*, the Court construed the scope of public policy in the light of enforcement of a foreign award as against Oil and Natural Gas Corporation (ONGC), which is construed with respect to domestic awards.

54 Law Commission of India, Report on the Arbitration and Conciliation (Amendment) Bill, 2001, Report No 176 (2001).

55 Arbitration and Conciliation (Amendment) Bill 2003 (India) s 34A.

56 Civil Appeal No 7019 of 2005 ('*Bharat Aluminium*').

57 *Bhatia International v Bulk Trading SA* (2002) 4 SCC 105 ('*Bhatia International*').

58 *Venture Global Engineering v Satyam Computer Services Ltd* (2008) 4 SCC 190 ('*Venture Global*').

59 *Bharat Aluminium,* Civil Appeal No 7019 of 2005, [76].

60 *1996 Act* s 2(2): 'This Part shall apply where the place of arbitration is in India.'

61 *Bharat Aluminium*, Civil Appeal No 7019 of 2005, [60], [75]. Also the Court held that: 'The omission of the word "only" is not an instance of "casus omissus". It clearly indicates that the model law has not been bodily adopted by the *Arbitration Act 1996*. But that cannot mean that the territorial principle has not been accepted … it is not the function of the court to supply to supposed omission, which can only be done by the Parliament.' Further the Court held at [75] that: 'the omission of the word only in section 2(2) of the *Arbitration Act 1996* does not detract from the territorial scope of its application as embodied in article 1(2) of the Model Law. The article merely states that arbitration law as enacted in a given state shall apply if the arbitration is in the territory of that State. The absence of the word "only" which is found in article 1(2) of the Model Law, from section 2(2) of the *Arbitration Act 1996* does not change the content/import of section 2(2) as limiting the application of Part I of the *Arbitration Act 1996* to arbitrations where the place/seat is in India.'

62 *Ogilvy and Mather Pvt Ltd v Union of India* [2012] INDHC 3924.

interpreted by *Bhatia International* and *Venture Global* Engineering that Part I will apply to international arbitrations as well.

### B *Patently Illegal: Is a Separate Ground Necessary?*

The *1996 Act* attempts to support both domestic and international arbitration as a final, fast and impartial means of dispute settlement. Inclusion of additional grounds in 'public policy' arguments makes arbitration more susceptible to judicial review; this defeats the very objective of arbitration as a dispute settlement procedure.

In *Saw Pipes*, the Supreme Court interpreted 'public policy' in light of principles underlying *1996 Act*, *Indian Contract Act 1872* (India) and Constitutional provisions.[63] The Court found that public policy concerns public good and public interest matters and not the policies of a particular government.[64] After discussing the transitory character of the concept, the Supreme Court added 'patently illegal' to the three other grounds of public policy that were enunciated in *Renusagar*.[65] This meant that if the award was contrary to a substantive provision of law, the Act or against the terms of the contract, it could be set aside as being 'patently illegal'.[66] It was held that s 34, read conjointly with other provisions of the *Act*, indicates that the legislative intent could not be that if the award is in contravention of the provisions of the *Act*, it could still not be set aside by the court.[67] The Court also concluded that it was unnecessary to give the term 'public policy in India' a narrower definition;[68] in fact, the Court concluded that a wider meaning was necessary so that the 'patently illegal'

63 *Saw Pipes* (2003) 5 SCC 705, 719.

64 Ibid.

65 *Central Inland Water Transport Ltd v Brojo Nath Ganguly* (1986) 3 SCC 217, [92] the Supreme Court observed: 'The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well recognised head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy.' Similarly, in *Murlidhar Aggarwal v State of U P* (1974) 2 SCC 482, [31]-[32] while dealing with the concept of public policy observed: 'Public policy does not remain static in any given community. It may vary from generation to generation and even in the same generation. Public policy would be almost useless if it were to remain in fixed moulds for all time.'

66 *Saw Pipes* (2003) 5 SCC 705, 708.

67 Ibid.

68 Ibid.

arbitration award could be set aside (and some provisions of the *1996 Act* do not become redundant).[69]

Despite significant criticism of the *Saw Pipes* decision, Justice Sinha, of the Division Bench of the Supreme Court, followed it in the decision in *McDermott International*.[70] The 'patent illegality' ground has, to a considerable extent, diluted the spirit of the *1996 Act*. It is the same as retaining the grounds for challenge that were already available under s 30 of the *1940 Act*.[71] In addition, a careful analysis of the *1996 Act* shows that the two conditions for setting aside the award, contrary to the express provisions of the contract or substantive law, are already arguably available under ss 34(2)(a)(iv) and 34(2)(a)(v) respectively.[72] Section 34(2)(a)(iv) relates to the setting aside of the arbitral award if it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration. Also, s 34(2)(a)(v) deals with the setting aside of the award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties. Therefore, to include illegalities under a new head of public policy is, arguably, unnecessary.

Another criticism of *Saw Pipes* is that the judiciary failed to adhere to the principle of the separation of powers and did not pay heed to the Parliamentary intention behind the *1996 Act*, in general, and s 34(2)(b)(ii) in particular. When enacting the *1996 Act*, Parliament followed *Model Law* in an attempt to reduce the supervisory role of the court in the arbitral process and to give more powers to the arbitrators. These aims are clearly defeated by introducing a new ground under public policy which increases the scope for judicial intervention.

Will the Indian judiciary, which is already plagued by suits, be able to sustain such a wide interpretation of public policy? When the trend at the international level is towards narrowing the extent of public policy, can a developing economy like India

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69 Ibid. Examples can be drawn from the *1996 Act* ss 24, 28(2)-(3), which may become redundant if 'public policy' is interpreted narrowly.

70 *McDermott International* (2006) 11 SCC 211, [62]. Justice Sinha stated: 'that the correctness or otherwise of the *Saw Pipes* decision is not in question before us. ….We, therefore, would proceed on the basis that *Saw Pipes* lays down the correct principles of law.'

71 *1940 Act* s 30 enumerates the grounds for setting aside the award. An award shall not be set aside except on one or more following grounds, namely: (a) that an arbitrator or umpire has misconducted himself or the proceedings; (b) that an award has been made after the issue of an order by the Court superseding the arbitration or after arbitration proceedings have become invalid under section 35; (c) that an award has been improperly procured or is otherwise invalid.

72 Viplav Sharma, 'Enforceability of Arbitral Awards in India: Public Policy as Ground for Setting Aside the Award' (2008) 1(1) *Gujarat Law Review* 22.

afford to broaden the concept and still aspire to foreign investment and growth? The *Saw Pipes* judgment has clearly impinged upon arbitration as an effective method of dispute resolution and has undermined certain benefits of arbitration, namely those of speed and efficiency and the finality of award.[73] However, there is a historic pattern whereby the mainstream courts feel threatened by the loss of the 'best business' to private and highly paid arbitrators.

An analogy can be drawn from United States, United Kingdom and French laws where the grounds under public policy are narrow and court intervention is kept to a minimum. The grounds of public policy have been restricted in order to favour arbitration as a desirable form of dispute resolution. The *Arbitration Act 1979* (UK) repealed the provision that allowed for appeal to the High Court for 'errors of fact or law on the face of the record'.[74] Furthermore, English courts have been reluctant to refuse the enforcement of an award that is contrary to public policy.[75] English courts have embraced the principle of international public policy by giving a restrictive interpretation of the public policy exception.[76] The French courts consider that recognition of an award must only be refused if violation of public policy is 'blatant, effective and concrete.'[77] If these conditions are not fulfilled, the court will not

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73 D S Chopra, 'Supreme Court's Role *Vis-à-Vis* Indian *Arbitration and Conciliation Act, 1996*' (December 2008) <http://works.bepress.com/dev_chopra/1>.

74 *Arbitration Act 1979* (UK) c 42, s 1(1) provided that an appeal should not lie to the High Courts for 'errors of fact or law on the face of the record'. A right of appeal on any question of law was granted under section 1(4), but was subject to the court being satisfied that, having regard to all the circumstances, the determination of the point of law could substantially affect the rights of one of the parties.

75 Obinna Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency' <www.dunde.ac.uk/cepmlp/gateway/files.php?file=cepmlp_car13_8_127246631.pdf>.

76 In *Westacre Investment Inc v Jugoimport – SDRP Holding Co Ltd* (1999) 3 All ER 864, the Appeal Court held that the contract involving buying of influence would only be contrary to English domestic public policy if the contract will contravene the domestic public policy of the country where it is to be performed. In *Soleimany v Soleimany* (1998) 3 WLR 811, the Court of Appeal declined to enforce an award on public policy grounds holding that the enforcement of the award would tarnish the honour of the English judicial system. Enforcement was refused because the alleged public policy bordered on criminality. (Smuggling of carpets was illegal in Iran).

77 The *Cour de Cassation* (France's highest court) has ruled that, in order to justify a refusal of recognition, or an annulment of an award, the violation of public policy must have been 'blatant, effective and concrete'. *Liquidateurs of Sté Jean Lion v. Sté International Company for Commercial Exchange Income*, rendered on May 6, 2009, Civ. 1ère, May 6, 2009, n°08-10.281, JCP Ed. Gen. 2009, n°20, May 13, 2009, act. 135.

disallow the arbitrators' decision on the merits or conduct a re-examination of contractual provisions.[78] Similar to the French, the Italian and Swedish courts also follow the narrow interpretation.[79] A United States' decision held that enforcement of an arbitration award could only be found contrary to public policy if 'it would violate our most basic notions of morality and justice.'[80] Only in extreme cases would the foreign award be set aside on public policy considerations.[81] This approach has been echoed in an unreported German decision *Oberlandesgericht Bremen*.[82] In *Camera di Esecuzione e Fallimenti Canton Tessin*,[83] the Swiss public policy argument defence had a more restricted application when foreign arbitral awards were being considered.

The Supreme Court of Korea also gave a narrow interpretation to the public policy principle in *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp.*[84] Construing the narrow interpretation of the exception in art V(2) of the *New York Convention*, it was held that 'only when the concrete outcome of recognising such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused.'[85]

The Supreme Court, as a result of the heavy criticisms of *Saw Pipes*, has, in some instances, read the case down or acknowledged that it needs to be referred to a larger bench for re-examination.[86] A few High Court decisions have also given a narrow interpretation of *Saw Pipes*; a liberal interpretation would enable limitless challenges

78 *Linde AG v Halvourgiki AE*, Cour d'appel Paris, 08/21022, 22 October 2009.

79 See, Pierre Mayer, 'Symposium: Arbitration and National Courts: Conflicts and Cooperation: The Second Look Doctrine: The European Perspective' (2010) 21 *American Review International Arbitration* 204.

80 See *Seven Seas Shipping (UK) Ltd v Tondo Limitada,* XXV YBCA 987, 989 (2000).

81 Julian D M Lew, Loukas A Mistelis, et al, *Comparative International Commercial Arbitration* (Springer, 2003) 729.

82 *Oberlandesgericht Bremen* 2 Sch 4/99, September 1999, unreported. See Stefan Kroll, 'Germany: Setting Aside an Award' (2001) 4(4) *International Arbitration Law Review* N 26.

83 *Camera di Esecuzione e Fallimenti Canton Tessin,* Canton Tessin 19 June 1990, held that a procedural defect in the course of foreign arbitration does not lead necessarily to refusing enforcement even if the same defect would have resulted in the annulment of a Swiss award (with the obvious exception of the violation of fundamental principles of the Swiss legal system).

84 *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp* XXI YBCA 612 (1996).

85 Ibid [9].

86 Ozumba, above n 75, 218.

of the award and alter court's statutory limits to interfere with arbitration awards.[87] Although, these decisions are a welcome step, *Saw Pipes* created doubts about arbitration as a dispute settlement measure in India. It is essential for the judiciary to show substantial faith in the arbitration process as a parallel means of dispute settlement, especially in commercial matters.

### C *Differentiating International Arbitration from Domestic Arbitration: Will it Actually Help?*

Although public policy as a concept cannot be separated into watertight compartments of international and national arbitration, some authors have tried to experiment with varied connotations of the concept. While national public policy can be envisaged as being the fundamental notions of morality and justice determined by a national government applying to purely domestic disputes within its jurisdiction, international public policy refers to the laws and standards by which states govern arbitration of international character. To ensure consistency in international commerce and unified economic systems, states have a liberal approach while drafting rules pertaining to international arbitration as compared to domestic arbitration. International arbitration therefore requires minimal exposure of international players to potentially biased national courts. Notions of a narrow international public policy definition have been advocated at various international forums; however, it still remains a territorial affair and states are free to use their discretion to apply truly international public policy considerations, as opposed to their own national notions of public policy.

In India, under the *1996 Act*, the grounds for setting aside an award on the basis of public policy are common to both international[88] and domestic[89] arbitration. It has been suggested that the principle of least court interference of the award may be suitable for international awards, but that court interference in domestic arbitrations should not be as restricted. It has also been advocated that states ought to apply more control over arbitrations involving their own citizens than in international

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87 *Indian Oil Corporation Ltd v Langkawi Shipping Ltd* (2004) 3 ARBLR 568. The Supreme Court in *Renusagar* held that the parties are not entitled to impeach the foreign award on merits. The dictum was followed in *Austbulk Shipping SDN BHD v PEC Ltd* (2005) 2 ARBLR (Delhi) 6.

88 *1996 Act* s 48(2)(b).

89 *1996 Act* s 34(2)(b)(ii).

arbitrations (which takes place within the state's territory because of geographical convenience).[90]

Another argument in favour of separating international and national public policy is the differences in sensibilities of states across the globe. The nebulous nature of the concept poses the risk of one state setting aside an award which is considered valid in other states.[91] To minimise such a risk, some jurisdictions have adopted the concept of 'international public policy' in their statutes.[92] A workable definition of 'international public policy,' through a consensual effort of all countries, may provide an effective way of setting aside an award in an international arbitration and minimise inappropriate judicial review of the merits of the dispute.[93] The International Law Association's Committee on International Commercial Arbitration has attempted to provide a definition and has adopted a resolution that public policy refers to international public policy of the state and includes:

> (i) fundamental principles, pertaining to justice and morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential; political, social or economic interests of the State, these being known as '*lois de police*' or 'public policy rules'; and (iii) the duty of the State to respect its obligation towards other States or international organisations.[94]

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90 Law Commission of India, Report on the Arbitration and Conciliation (Amendment) Bill, 2001, Report No 176 (2001) 9.

91 See, Alan Redfern and Martin Hunter with Nigel Blackaby and Constantine Partisides, *Law and Practice of International Commercial Arbitration* (Sweet and Maxwell, 4th ed, 2004) 420.

92 An example is the *Code de procédure civile* [Code of Civil Procedure] (France). It recognizes the existence of two levels of public policy: the national level, which may be affected by purely domestic considerations, and the international level, which is less restrictive in its approach. Portugal has a similar provision in the *Code of Civil Procedure* art 1096(f), which refers to the principles of 'Portuguese international public policy'.

93 Law Commission of India, *Report on the Arbitration and Conciliation (Amendment) Bill, 2001*, Report No 176 (2001) 420. The Committee on International Commercial Arbitration of the International Law Association reviewed the development of the concept of public policy in its Interim Report. It observed that beyond purely domestic public policy, there exists a narrower category of international public policy, which is confined to the violation of really fundamental conceptions of the legal order in the country concerned. See *infra* note 93.

94 International Commercial Arbitration Committee, International Law Association, Conference Report New Delhi Conference (2002) 6, Recommendation 1(d) <http://www.ila-hq.org/en/committees/index.cfm/cid/19>.

The terms annulment and non-enforcement are often confused and combined. While annulment is a national concept, non-enforcement has international undertones. Annulment of an international arbitral award by a national court of one jurisdiction does not restrict the parties to get the award enforced in another jurisdiction. However, there have been cases where annulment proceedings were a 'universal notion of public policy' that included the 'legal and moral principles recognised by all civilised nations.'[95]

But arbitration, be it domestic or international, is based on the ethos of party autonomy. The parties choose the seat, the applicable laws and the arbitrators; therefore, the least amount of court interference is arguably appropriate for both domestic and international arbitrations. The Supreme Court's decision in *Saw Pipes* to construe the provision under s 34(2)(b)(ii) liberally, but to confine this wide interpretation only to domestic awards without extending the same to foreign awards under s 48(2)(b) is contentious, as the language used in both the provisions are identical. This interpretation has indeed led to dilution of the legislative intent of the two provisions with the same language.[96] Fortunately, on 6 September 2012, a five judge Constitutional Bench of the Supreme Court of India, unanimously overruled *Bhatia International* in its decision in *Bharat Aluminium.* The Court held that part I of the *1996 Act* (relating to domestic arbitration) has no application to international commercial arbitration proceedings conducted outside India and that it was applicable only to all the arbitrations which take place within the territory of India.[97]

The Supreme Court held that there is no overlapping of the provisions of part I and part II; nor are the provisions of part II supplementary to part I. Rather there is complete segregation between the two parts.[98] The Court concluded that part I of the *1996 Act* shall apply only to arbitrations which take place within India and have no application to international commercial arbitration held outside India.[99]

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95 See generally James D Fry, 'Désordre Public International under the New York Convention: Wither Truly International Public Policy' (2009) 8(1) *Chinese Journal of International Law* 81. He outlines five types of public policy: national, international, transnational, regional and truly international public policy.

96 See generally Justice D R Dhanuka, '"Public Policy" Plea for Consideration by Larger Bench of Supreme Court' (2003) XLVIII *Indian Council of Arbitration Quarterly* 23.

97 *Bharat Aluminium*, Civil Appeal No 7019 of 2005, [200].

98 Ibid [125].

99 Ibid [198].

## IV CONCLUSION AND RECOMMENDATIONS

Arbitration in India has no doubt travelled a long way from 1940, with its objectives being significantly altered and improved in the *1996 Act*; but recent court interpretations of public policy have pushed Indian law backwards. The presence of concurrent grounds for setting aside an arbitral award is a mischief which was committed first by draftsmen in 1940 and then repeated by draftsmen of the *1996 Act*. Under the scheme of the *1940 Act*, the award could be set aside either under s 30(a) or s 30(c).[100] Similarly, although there was substantial policy change under the *1996 Act*, there still exists scope for the award to be challenged on concurrent grounds. For example, where the arbitral award is challenged for bias, such a challenge could be brought either on the basis of s 13(5) or by virtue of s 34(2)(a)(iii).[101] The *Saw Pipes* judgment reinforced the existence of concurrent grounds in the *1996 Act.* The *Saw Pipes* judgment can be interpreted as an 'error of law' being challenged under s 34(2)(a)(v) or under s 34(2)(b)(ii). The ambit of public policy is so wide that other grounds of challenge come within it; thus, widening the scope for challenge to the award. Liberal interpretation of the grounds of challenge of an award by the judiciary is harmful for the parties and makes India arbitration unfriendly.

There is no doubt that the mistake committed in *Saw Pipes* needs to be immediately redressed. There have been demands to refer the decision to the larger bench to rectify the original judgment of the Supreme Court.[102] The Supreme Court has often held, in arbitration suits, that the award is final both on facts as well as law and its merits cannot be the subject matter of judicial review before a court of law.[103] In the

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100 *1940 Act* s 30 (An award cannot be set aside except on one or more of the following grounds, namely: 30(a) that an arbitrator or umpire has misconducted himself or the proceedings; … 30(c) that an award has been improperly procured or is otherwise invalid.

101 *1996 Act* s 13(5) states where an arbitral award is made under sub-s 13(4), the party challenging the arbitrator may make an application for setting aside such an arbitral award in accordance with s 34. (Section 13(4) states that if a challenge under any procedure agreed upon by the parties or under the procedure under sub-s (2) is not successful, the arbitral tribunal shall continue the arbitral proceedings and make an arbitral award.) Section 34(2)(a)(ii) states that an arbitral award may be set aside by the court only if: (ii) 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.

102 Udita Kanwar, *ONGC v. Saw Pipes*, (10 March 2011) Legal Services India <http://www.legalservicesindia.com/article/article/ongc-v-saw-pipes-584-1.html>.

103 Maharashtra State Electricity Board v Sterlite Industries (India) (2001) 8 SCC 482.

recent Delhi High Court Judgment of *Ogilvy & Mather Pvt Ltd v Union of India*,[104] the award of the sole arbitrator was remitted on the ground that the arbitrator did not consider the existing pleadings, evidence and documents forming part of the arbitral record.[105] What is of interest in this case is the fact that the Court found it just to deviate from the earlier established view that interference with an arbitral award is patently illegal based in *error of law* and has percolated it to an *error of fact*. Interestingly, the Court has not based its decision on any authority or precedent. It is unknown as to what kind of award the court expects the arbitrator to pass! Is this approach not contrary to the concept of minimal intervention as envisaged in art 5 of the *Model Laws*?

An inspiration lies in the *1940 Act* where an award could not be set aside on the ground of error of law apparent on the face of the record if a specific reference on a question of law was made to the arbitral tribunal. This implies that it was not necessary that the award must be set aside in all cases where it was shown to be contrary to law.[106] In case of such specific references, challenge to the award on the ground of error of law apparent on the face of the award was totally barred.[107] In other words, it was open for the parties to agree that the decision of the arbitrator on the question of law in a specific reference would bind the parties and the same could not be challenged before a court of law.[108]

Also, forming arbitration specialised benches is a viable solution to prevent errors like *Saw Pipes*.[109] Such benches would consist of a panel of judges who would review only petitions related to arbitration. This would help in the speedy disposal of cases and the development of clear jurisprudence regarding interpretation of public policy under the *1996 Act*. This can further help in sorting the ambiguity created by previous judgments.

Another recommendation is the need for a supervisory body to regulate the practice of arbitration. Also, the need for trained and professional arbitrators and mediators, including non-lawyers, cannot be over-emphasised. Once this aim is achieved, the 'need for standardisation and accreditation' will arise, 'for which professional agencies have to be set up under the law, perhaps distinct from the Bar Council.'[110]

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104 [2012] INDHC 3924.

105 Ibid [31].

106 Dhanuka, above n 96, 24.

107 Ibid.

108 See *English Arbitration Act 1996* (UK) s 69.

109 Rendeiro, above n 18, 724.

110 N R Madhava Menon, 'Reforming the Legal Profession: Some Ideas', *The Hindu* (online), 20 February 2008 <http://www.hindu.com/2008/02/20/stories/2008022052621000.htm>.

There should be unified rules for the arbitrators drafted by the supervisory body; arbitrators must be accountable to this body. This body must have power to discipline arbitrators for misconduct or violation of unified rules. Further, the supervising body must be neutral and impartial to arbitrators and the body must enforce its standards.

The finality of the arbitral award as one of the principles of arbitration has been put to test in the *Saw Pipes* judgment, encouraging reckless challenges to the arbitral awards, lacking any proper basis for the challenge. Regulation of the number of petitions for setting aside awards is one way of preventing the trend. Additionally, courts should impose costs in cases of frivolous petitions more regularly; costs have been imposed in arbitral cases, but only under exceptional circumstances.[111]

Fee shifting is a concept used in both the United States and the United Kingdom to limit the number of petitions. There also exist fee shifting models which are pro-plaintiff or pro-defendant. In the pro-plaintiff fee shifting model the winning plaintiff is compensated by the losing defendant for the reasonable litigation fee incurred but the winning defendant is not so compensated. In pro-defendant fee shifting the winning defendant is compensated for the cost of litigation while the plaintiff is not. Hence fee shifting has the potential to become a potent device in reducing the number of reckless challenges of arbitral awards.[112]

'Public policy', being a malleable concept, will always be open to varied judicial interpretations. The concept, as it relates to arbitration, needs to be balanced with the associated principles of minimal judicial intervention and court supervision. The balance between standards of morality, norms of justice and equity, which are the essence of public policy, should be adequately struck so as not to affect the efficiency of arbitration as a dispute settlement mechanism. The judiciary should always attempt to exercise restraint and avoid triggering the serious consequences to Indian law and commerce as set out in this article.

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111 Cases where petition for setting aside was levied but no costs were imposed: *Delhi Jal Board v Reliance Diesel Engineering* (2005) 3 ARBLR (Delhi) 602; *Avinash Bawa v State of Himachal Pradesh* (2005) Suppl ARBLR (HP) 185; *Ennore Port Trust v Hindustan Construction Co* (2005) Suppl ARBLR (Mad DB) 129; *Union of India v Pradeep Vinod Construction Co* (2005) Suppl ARBLR (Delhi) 33.

112 See generally Badrinath Srinivasan, 'Public Policy and Setting Aside Patently Illegal Arbitral Awards in India' (Working Paper, Bharat Heavy Electricals Limited, 27 March 2008) <http://ssrn.com/abstract=1958201>.