

THE PUBLIC POLICY EXCEPTION – A COMPARISON OF THE INDIAN AND SWISS  
PERSPECTIVES

*Pierre Tercier\* & Dilber Devitre†*

**Abstract**

*The ‘public policy’ concept is a ground for setting aside arbitral awards in both Indian and Swiss legislation. The apex courts in both countries have, however, taken drastically different approaches to the interpretation and application of this concept, with the Swiss Federal Tribunal adopting a narrow approach and the Indian Supreme Court taking a broader view. This article demonstrates and contrasts the jurisprudence of the Indian Supreme Court with that of the Swiss Federal Tribunal when applying the concept of public policy to the setting aside of arbitral awards. The authors conclude that a middle ground approach that strikes a balance between finality and justice best serves the purposes of the arbitration community.*

**I. Introduction**

Arbitration in India has recently undergone a profound change with the adoption of the Indian Arbitration & Conciliation (Amendment) Act, 2015 [the “**2015 Amendment Act**”]. This amendment partially touches the very foundation of arbitration, an institution that has a vital role to play in international commerce. Indeed, arbitration is progressively taking over the role that national courts previously played in this regard. Therefore, its growing popularity directly impacts the exercise of justice at an international level. This statement directly concerns India, a country whose ever-increasing importance in the international business arena has not gone unnoticed.

It is, therefore, interesting to study the new provisions of the Indian arbitration law in light of the approaches adopted in other countries, where international arbitration has traditionally occupied an important place. In this respect, Swiss law has held a privileged position on the international arbitration scene for decades. For reasons oft-cited, parties frequently choose Geneva or Zurich as the seat of their arbitration. This automatically leads to the application of Swiss arbitral law as the *lex arbitri*. Over the years, the popularity of Switzerland as a destination for international arbitration has contributed to the formation of a robust law on arbitration, applied by arbitration friendly-courts.

One of the key aspects of arbitration resides in the control that State courts can exercise over arbitral awards rendered by arbitrators, above all, in the international domain. This control is

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\* Independent arbitrator, Fribourg (Switzerland), Professor Emeritus, University of Fribourg, Honorary President of the International Chamber of Commerce (ICC, Paris).

† *Avocat au Barreau de Paris*, Associate at Homburger (Switzerland).

largely exercised through the notion of '*public policy*', a concept found in most national legislations on arbitration;<sup>1</sup> an award rendered in violation of public policy justifies that it be set aside or refused enforcement. Both India and Switzerland have adopted the public policy exception in their respective national laws on arbitration.

It is with this perspective in mind that the authors consider it interesting to compare the solutions adopted by Indian and Swiss courts when exercising their control over arbitral awards through the public policy exception- not with the optic that any one of the approaches should be imposed on the other, but only to reflect upon the different approaches possible. The two authors considered it interesting to confront and contrast their ideas given their different levels of experience and backgrounds: the first author is of Swiss nationality and has several years of experience in the field of international arbitration; the second author is Indian and belongs to the younger generation of new arbitration practitioners.

Before tackling the core issues of how Indian and Swiss Courts have applied the public policy exception through case law examples in classic situations where this exception has been invoked (below Section III), the Indian and Swiss legal systems with respect to arbitration will briefly be presented (below Section I). On this basis, the legal foundations and the role of public policy in both the Indian and Swiss legal systems will be described (below Section II).

## II. A Brief Description of the Systems

Since this article intends to compare the approach of Indian and Swiss Courts to the public policy exception, it is necessary to begin with a brief description of the statutory provisions of both these countries governing international and domestic arbitrations.

### A. Indian Law on Arbitration

India follows the common law tradition. Arbitration in India in the modern era is governed by the Arbitration and Conciliation Act of 1996 [the "**1996 Act**"]. The 1996 Act repealed and replaced the earlier Arbitration Act of 1940 [the "**1940 Act**"]. The 1940 Act proved to be unfavorable to arbitration in India, largely due to the wide extent of court intervention it condoned, leading to Justice Desai's oft-cited remark on how it "*made lawyers laugh and legal philosophers weep*".<sup>2</sup> The 1940 Act also dealt only with domestic arbitrations. There were two other Acts dealing separately with foreign awards - Arbitration (Protocol and Convention) Act, 1937

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<sup>1</sup> See United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration, 1985*, art. 34(2)(b)(ii) U.N. Doc. A/40/17, Annex I, U.N.Doc. A/61/17 (Dec. 11, 1985) [hereinafter "*UNCITRAL Model Law*"].

<sup>2</sup> *Guru Nanak Foundation v. Rattan Singh*, (1981) 4 S.C.C. 634 (Justice D.A. Desai's opinion) (India).

which dealt with awards under the Convention on the Execution of Foreign Arbitral Awards, 1927 [the “**Geneva Convention**”] and the Foreign Awards (Recognition and Enforcement) Act, 1961 which dealt with awards under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards [the “**New York Convention**”]. The 1996 Act repealed these Acts as well and unified the law relating to domestic and foreign arbitrations into one composite statute. A need was felt to introduce a more modern arbitration legislation, which took shape with the 1996 Act. The objectives of the 1996 Act were, *inter alia*, to provide minimal juridical intervention and to ensure the finality of arbitral awards.<sup>3</sup> In January 2016, the 1996 Act was revamped through the adoption of the 2015 Amendment Act, which came into force with effect from October 23, 2015.

The 1996 Act is based upon the UNCITRAL Model Law on International Commercial Arbitration,<sup>4</sup> albeit with minor modifications.<sup>5</sup> It is divided into two parts- Part I applies to all arbitrations where the seat of arbitration is in India (Section 2 (2)), and Part II deals with the recognition and enforcement of foreign arbitral awards under the New York Convention (Chapter 1) or under the Geneva Convention (Chapter 2). The underlying distinction found in the 1996 Act is, therefore, not between domestic and international arbitrations, but between Indian seated arbitrations or foreign-seated arbitrations.

Part I of the 1996 Act (which applies where the seat of the arbitration is in India) covers both international and domestic arbitration. An arbitration is international if at least one of the parties to the dispute is not Indian or does not habitually reside in India.<sup>6</sup> Reciprocally, an arbitration is domestic if it is between two Indian parties. The criteria used by the 1996 Act to determine whether an award is domestic or international is, therefore, based on the nationality and residence of the parties.

<sup>3</sup> See The Arbitration and Conciliation Bill, 1995, Objects and Reasons (India).

<sup>4</sup> UNCITRAL Model Law, *supra* note 1.

<sup>5</sup> LAW COMMISSION OF INDIA, REPORT NO. 246- AMENDMENTS TO THE ARBITRATION AND CONCILIATION ACT, 1996, ¶8 (2014), available at <http://lawcommissionofindia.nic.in/reports/Report246.pdf> [hereinafter “246<sup>th</sup> Report of the Law Commission of India”]; The Arbitration and Conciliation Act, No. 26 of 1996, Preamble (“*An Act to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation and for matters connected therewith or incidental thereto. WHEREAS the United Nations Commission on International Trade Law (UNCITRAL) has adopted the UNCITRAL Model Law on International Commercial Arbitration in 1985: [...] AND WHEREAS it is expedient to make law respecting arbitration and conciliation, taking into account the aforesaid Model Law*”).

<sup>6</sup> The Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016, § 2(1)(f) (India) (“*An arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is- (i) an individual who is a national of, or habitually resident in, any country other than India; or (ii) a body corporate which is incorporated in any country other than India; or (iii) a company or an association or a body of individuals whose central management and control is exercised in any country other than India; or (iv) the Government of a foreign country*”).

However, Part I of the 1996 Act does provide for certain distinct rules depending on whether the arbitration is a domestic arbitration or an international commercial arbitration held in India.

For example, in domestic arbitrations, requests for the appointment of an arbitrator pursuant to Section 11 of the 1996 Act (as amended by the 2015 Amendment Act) have to be made to the competent High Court (Section 11(12)(b)), whereas in international commercial arbitrations the request must be addressed to the Supreme Court of India (Section 11(12)(a)).

Similarly, Section 28(1)(a) stipulates that for domestic arbitrations seated in India, the arbitral tribunal must decide the dispute in accordance with Indian substantive law. In international commercial arbitrations, the parties are free to agree upon another law as the applicable substantive law (Section 28(1)(b)).

Within the perspective of this article, the public policy ground for the annulment of an award is found at Section 34 of the 1996 Act, which reads as follows:

*“An arbitral award may be set aside by the Court only if—*

*(a) the party making the application furnishes proof that—*

*(i) a party was under some incapacity, or*

*(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law for the time being in force; or*

*(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or*

*(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration [...]*

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

*(b) the Court finds that—*

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

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

Section 34 of the 1996 Act contains the same grounds for annulment as found at Article 34 of the UNCITRAL Model Law. With regard to foreign arbitral awards, the public policy exception

is found in Section 48(2)(b), at Part II of the 1996 Act that reads as follows: “*Enforcement of an arbitral award may also be refused if the Court finds that [...] the enforcement of the award would be contrary to the public policy of India*”.

In an attempt to narrow down the expansive interpretation of public policy adopted by the Indian Courts, the 2015 Amendment Act added an explanation to Section 34 that clarified that “*an award is in conflict with the public policy of India, only if,*

*(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or*

*(ii) it is in contravention with the fundamental policy of Indian law; or*

*(iii) it is in conflict with the most basic notions of morality or justice.”*

Before the introduction of the 2015 Amendment Act, the grounds for annulment found at Section 34 of the 1996 Act applied indiscriminately to international commercial arbitrations and domestic arbitrations seated in India. The 2015 Amendment Act has added a new paragraph at Section 34(2)(A) according to which, “[a]n arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award”. Patent illegality is, therefore, no longer a ground to set aside an award in an international commercial arbitration in India, but it is still a relevant consideration in the matter of setting aside awards in domestic arbitrations.

The 2015 Amendment Act also blurred the sacrosanct distinction between Indian-seated arbitrations and foreign-seated arbitrations<sup>7</sup> by adding a proviso to Section 2(2) under which certain provisions of Part I of the 1996 Act also apply to international commercial arbitrations, even if the place of arbitration is outside India. This is, however, subject to party autonomy; the parties can expressly opt out of their applicability. These provisions are: Section 9 concerning the Court's authority to order interim measures, Section 27 which concerns the Court's assistance in

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<sup>7</sup> This issue was at the core of the *Bhatia International v. Bulk Trading SA* (2002 4 S.C.C. 105) and *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc* (2012 9 S.C.C. 552) decisions. In *Bhatia International*, the Court had allowed parties to an international commercial arbitration outside India to approach Indian courts for interim relief even though Section 9 (on interim relief) fell within Part I of the 1996 Act. This decision had been reversed by the Supreme Court in *BALCO* that had been hailed at that time as a welcome pro-arbitration move, but had the adverse effect of blocking access of parties involved in foreign seated arbitrations to Indian courts for matters such as interim relief that could prove useful if a party's assets were located in India. The 2015 Amendment Act has rectified this by stating that certain provisions of Part I of the 1996 Act (including Section 9 on interim relief) are also applicable to foreign-seated arbitrations.

the taking of evidence, Section 37(1)(b)<sup>8</sup> which deals with appeals from orders granting or refusing interim measures by Courts and Section 37(3) which disallows second appeals other than to the Supreme Court.

### B. Swiss Law on Arbitration

Switzerland, a civil law country, has adopted the dualist regime as far as arbitration is concerned. A clear distinction is made between international arbitrations and domestic arbitrations, which are governed by distinct laws. International arbitrations in Switzerland are governed by Articles 176 to 194 of the Swiss Private International Law Act of 1987 [the “PILA”], while domestic arbitrations fall under the Swiss Code of Civil Procedure of December 19, 2008 [the “CCP”], that replaced the former Concordat on Arbitration (an agreement concluded between the different Swiss cantons on the subject).

The distinguishing criteria between domestic and international arbitration in Switzerland can be found at Article 176 (1) of the PILA that stipulates that “[t]he provisions of [Chapter 12 of the PILA] apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time when the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its habitual residence in Switzerland”. These criteria are similar to the ones found at Section 2(1)(f) of the 1996 Act, but while Swiss law limits itself to the domicile and habitual residence of the parties, Indian law also takes into consideration their nationality, place of incorporation as well as place of central management and control in case of a body of individuals.

These rules found in the Swiss PILA are however subject to the parties’ agreement. It is possible for parties to an international arbitration to subject their arbitration to the CCP and *vice versa*, parties to a domestic arbitration can agree to apply the provisions of the PILA.<sup>9</sup>

As far as *international arbitrations* are concerned, the regime adopted by the Swiss legislator is extremely liberal. Even though the PILA is not directly inspired by the UNCITRAL Model Law, it follows the same general course of ideas. Party autonomy occupies a central place; indeed, the parties remain free to model their arbitration as they wish and very few provisions of the PILA are truly mandatory.

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<sup>8</sup> The 2015 Amendment Act erroneously refers to Section 37(1)(a) (which deals with appeals from orders of Court refusing to refer parties to arbitration), while the intent of the legislature was clearly to refer to appeals from orders of Court granting or refusing interim relief, which is found at Section 37(1)(b) of the 1996 Act. The authors have, therefore, opted to refer to the correct section, i.e., Section 37(1)(b) in the present article.

<sup>9</sup> See Private International Law Act, 1987, art. 176 (2); Code of Civil Procedure, 2008, art. 353(2).

One of the most interesting characteristics of Swiss Arbitral Law is that, in principle, there is only one instance before which any grievances against an arbitral award may be made – the Swiss Federal Supreme Court, the highest instance court in Switzerland.<sup>10</sup> It is worth noting that India has also made a step in this direction by amending Section 2(1)(e) of the 1996 Act to refer only to the High Courts in the context of international commercial arbitrations. Parties to an international commercial arbitration seated in India can therefore directly approach the competent High Court at the seat of arbitration and completely avoid the lower courts in the Indian judicial hierarchy.

The grounds for annulment in international arbitration are set out at Article 190(2) of the PILA. They are as follows:

*“Proceedings for setting aside the award may only be initiated:*

- a. where the sole arbitrator has been improperly appointed or where the arbitral tribunal has been improperly constituted;*
- b. where the arbitral tribunal has wrongly accepted or denied jurisdiction;*
- c. where the arbitral tribunal has ruled beyond the claims submitted to it, or failed to decide one of the claims;*
- d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure has not been observed;*
- e. where the award is incompatible with public policy.”<sup>11</sup>*

The first four grounds for annulment are directly concerned with the very basis of the arbitral procedure and the most elementary rules that must be followed. Certain grounds are similar to those found in the 1996 Act, for example, Article 190(2)(a), PILA reflects Section 34(2)(v) of the 1996 Act which sanctions the award due to irregularities in the composition of the tribunal. Similarly, both Article 190(2)(c), PILA and Section 34(2)(iv) of the 1996 Act deal with awards that are *infra* or *ultra petita*.

The last ground contains a direct reference to public policy which will be the core of the present contribution.

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<sup>10</sup> Article 191, PILA: *“Setting aside proceedings may only be brought before the Federal Supreme Court. The procedure is governed by Article 77 of the Law of 17 June 2005 on the Federal Supreme Court”*.

<sup>11</sup> Private International Law Act, art. 190, ¶ 2 (as translated in COMMENTAIRE ROMAND, LOI SUR LE DROIT INTERNATIONAL PRIVÉ, CONVENTION DE LUGANO (Andreas Bucher ed., 2011).

As opposed to the 1996 Act, where no parallel provision is found, Swiss law permits the parties to renounce their right to have the award set aside. This is found at Article 192(1), PILA which stipulates:

*“Where none of the parties has its domicile, its habitual residence, or a place of business in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed in Article 190, paragraph 2”.*

Foreign parties that choose to arbitrate in Switzerland can, therefore, expressly provide in their arbitration agreement, or in a subsequent agreement, that they cannot approach the Swiss Federal Tribunal to have the award set aside or that the award may not be set aside even if it were found to be in violation of public policy. This shows the extremely liberal stance adopted by the Swiss legislator where none of the parties to the arbitration are domiciled or are residents of Switzerland.

As far as *domestic arbitrations* are concerned, the CCP also contains a fairly liberal regime, even though a certain number of supplementary precautions to protect the parties to domestic arbitrations have been added. These arbitrations are governed by Articles 353 to 396 of the CCP.

Appeals against the award are also in principle to be directed to the Swiss Federal Supreme Court (Article 389, CCP), unless the parties have expressly agreed that the award can be challenged before the competent cantonal authority (Article 390(1), CCP).

The grounds for annulment are found at Article 393, CCP. The first four grounds are identical to the grounds found for the setting aside of international awards. A sixth ground found in the domestic arbitration regime concerns the fact that *“the costs and fees of the arbitrators fixed by the arbitral tribunal are manifestly excessive”*.

The public policy exception, the fifth ground for annulment, has been expressed differently by Article 393(e) of the CCP. An appeal is possible if *“the award is arbitrary in its result because it is based on statements manifestly contrary to the facts as per the case file or because it constitutes a manifest violation of law or equity”*. It is also not possible for the parties to renounce their right to have the award set aside in Swiss domestic arbitrations.

Seen from this angle, it is clear that the Swiss domestic arbitration regime provides stronger protection and greater control over the award than under the international regime.

The dualist regime in Switzerland is based on a long tradition and it addresses the legislator's concern of better protecting procedures implicating Swiss parties. The same concern motivated the Indian legislator to preserve, at the newly added Section 34(2)(A), the ground of patent illegality as a ground to set aside a purely domestic award (i.e., an award made in India between Indian parties).

One can discern, in this dualist approach, a hint of wariness towards the institution of arbitration. This wariness is, however, no longer warranted when all the parties, with no other link to a country, merely decide to arbitrate there by fixing the seat of their arbitration in that country. This was echoed by the Law Commission of India in the justification it offered for maintaining a stricter control over domestic arbitral awards: “[t]he legitimacy of judicial intervention in the case of a purely domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration”.<sup>12</sup>

### III. The Legal Foundations of Public Policy

Since public policy directly limits party autonomy, one of the keystones of arbitration (Section A, below), it is important to see how the Indian and Swiss Courts have defined this concept (Section B, below).

#### A. Party Autonomy and Public Policy

The institution of arbitration rests upon the principle of party autonomy. Since disputes subject to arbitration concern rights that parties can freely dispose of, nothing stops them from renouncing State courts and choosing to have their dispute decided by a person of their choice. This freedom of choice permits the parties to choose a person they trust to resolve their dispute. It is not necessary here to demonstrate the utility of the institution, which is subject to no dispute, especially in international relations. Arbitration enables the parties to choose a “neutral” judge, thus eclipsing the entire problem of having a dispute judged by a State court that could have closer links to one of the parties.

This possibility offered to the parties to choose their “judges” takes on an even greater significance because under the applicable arbitral law, an arbitral award can be enforced as easily as, or sometime even easier than, a judgment by a State court. The stakes of the parties' liberty to have recourse to a private mode of justice, unfettered at the beginning, increase drastically once an award has been handed down. This is because the parties are under the obligation to willingly

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<sup>12</sup> 246<sup>th</sup> Report of the Law Commission of India, *supra* note 5, ¶ 34.

enforce the decision of their chosen arbitrators. If not, the winning party can obtain legal enforcement of the award on the basis of the New York Convention or the applicable national law on the enforcement of domestic awards.

However, arbitration cannot function in a legal vacuum without any intervention from State courts. The latter are often called to intervene at several stages such as the appointment of arbitrators, the ordering of interim measures, but their intervention is the most crucial to the service of justice when they are called upon to intervene in the annulment or enforcement of the award.

Party autonomy in international arbitration is, therefore, not without any limits. Arbitration can only be an effective alternative mode of dispute resolution, if one can consider that an arbitral award is equivalent in its purpose to a State court decision, *i.e.*, it furthers the aim of justice. This cannot be the case where the most basic fundamental principles of law or right to the access of justice of the parties have been denied. The parties' right to have their dispute decided by an independent judge therefore finds its limits where a fundamental legal principle has been violated. Enforcing the award in this case would be unconstitutional or, in any case, contrary to human rights.

One manner of controlling arbitral awards is found in the "public policy exception" under which an arbitral award can be set aside or denied recognition or enforcement by the State courts if it is contrary to the public policy of the requested State. If one sets aside, for the time being, situations in which there has been a violation of procedural public policy, it is the general reference to public policy that allows the courts to control awards handed down by arbitral tribunals. Public policy thus becomes the determinative criterion to judge if an award is admissible or not. It is the outer limit within which any private means of dispute resolution must function in a State abiding by the rule of law.

#### B. Public Policy – Towards a Definition

The public policy exception is almost universal. It is found at Article 34(b)(ii) of the UNCITRAL Model Law that expressly provides that an arbitral award may be set aside if it contravenes public policy. It is also found at Article V(2)(b) of the New York Convention that states that the "[r]ecognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: [...] (b) The recognition or enforcement of the award would be contrary to the public policy of that country".

The public policy exception is widely acknowledged as an expression “*of the right of the State and its courts to exercise ultimate control over the arbitral process*”.<sup>13</sup> It is a powerful tool in the hands of the State courts when exercising their oversight over arbitral awards.

The crucial question is, therefore, how one may define public policy. Swiss and Indian courts have often expressed the difficulties they face in clearly demarcating the boundaries of this ever-evolving concept. The Indian Supreme Court has likened it to an “*untrustworthy guide*”<sup>14</sup> or an “*unruly horse*”,<sup>15</sup> the latter description being borrowed from a ruling of the English judge Burrough J., who held, back in 1824, that “[p]ublic policy is a very unruly horse, and when once you get astride it you never know where it will carry you”.<sup>16</sup> The Swiss Federal Tribunal has also grappled with the notion, likening it instead to a “*chameleon because of its changing aspect*”<sup>17</sup> and pragmatically stating that “*any attempt to answer the numerous issues raised by the interpretation of this notion only raised other difficult or even polemic questions*”.<sup>18</sup> Both courts have however attempted to define it.

The question of public policy in the context of international arbitration proceedings was first raised before the Indian Supreme Court in the case of *Renusagar Power Co. Ltd. v. General Electric Co.*<sup>19</sup> In this decision, the Court had to rule upon the enforcement of a foreign award under the Foreign Awards Act, 1961. The Court adopted a narrow interpretation of the concept and defined the contents of the public policy exception as comprising of three heads, (i) the fundamental policy of Indian law; (ii) the interests of India and (iii) justice or morality.<sup>20</sup> The Court also stated that it found it difficult to construe the expression ‘public policy’ in Article V(2)(b) of the New York Convention to mean international public policy, but rather that this expression ought to be construed to mean “*the doctrine of public policy as applied by the courts in which the foreign award is sought to be enforced*”.<sup>21</sup> In the Supreme Court’s opinion, the expression ‘public policy’ in Section 7(1)(b)(ii) of the Foreign Awards Act therefore meant the doctrine of public policy as applied by the courts in India. This jurisprudential interpretation was later adopted by

<sup>13</sup> Audley Sheppard, Interim IIA Report on Public Policy as a Bar to the Enforcement of International Arbitral Awards, 19(2) *Arbitration International* 217, 217 (2003).

<sup>14</sup> *Gherulal Parakh v Mahadeo Das* (1959) Supp. (2) S.C.R. 206 as cited in the LAW COMMISSION OF INDIA, SUPPLEMENTARY TO REPORT. NO. 246 (2016), ¶ 7.2, available at [http://lawcommissionofindia.nic.in/reports/Supplementary\\_to\\_Report\\_No.\\_246.pdf](http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf) [hereinafter “Supplementary Report”].

<sup>15</sup> *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*, (2003) 5 S.C.C. 705 (India) [hereinafter “*Saw Pipes*”].

<sup>16</sup> *Richardson v. Mellish* (1824) 2 Bing. 252, (Burrough J.) (Eng.) (as quoted by Lord Bramwell in *Mogul Steamship Co., McGregor, Gow and others*, 66 L. T. Rep. 6).

<sup>17</sup> Tribunal Fédéral [TF] Mar. 8, 2006, 132 ARRÊTS DU TRIBUNAL FEDERAL SUISSE [ATF] III 389, 391 (Switz.).

<sup>18</sup> *Id.*

<sup>19</sup> *Renusagar Power Co. Ltd. v. General Electric Co.*, 1994 Supp. 1 S.C.C. 644 [hereinafter “*Renusagar*”] (India).

<sup>20</sup> *Id.* ¶ 66.

<sup>21</sup> *Renusagar*, 1994 Supp. 1 S.C.C. 644, ¶ 63 (India).

the legislator at Section 34 of the 1996 Act, that specifically states that an award may be set aside if it is in conflict with the public policy of India.

In a subsequent decision, *ONGC v. Saw Pipes*,<sup>22</sup> the Indian Supreme Court added “*patent illegality*” to the three heads of the public policy exception as defined by the earlier bench in *Renusagar*. This decision, as described below, attracted criticism from all quarters.

A later decision of the Indian Supreme Court in *ONGC Ltd. v. Western Geco International Ltd*<sup>23</sup> further attempted to define the ‘fundamental policy of Indian law’, i.e., the first head of public policy as stated in *Renusagar*. In *Western Geco*, the Court added three other juristic principles to this category: *first*, the adoption by the court or the arbitrator of a ‘judicial approach’ which involves the application of judicial mind by the authority, *second*, the adherence to the principles of natural justice, including the *audi alterma partem* rule and *third*, the *Wednesbury* principle of reasonableness, meaning that a decision which is so perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law.<sup>24</sup>

One finds similar language and concepts in the Swiss definition of public policy. According to the Swiss Federal Tribunal, an award is incompatible with public policy if it “*violates the largely recognized essential values, which, according to the conception prevailing in Switzerland, should form the basis of every legal system*”.<sup>25</sup> In general, “*the public policy defense has to allow overturning situations which violate in a shocking way the most fundamental principles of the legal order as it stands in Switzerland*”.<sup>26</sup>

The Swiss Federal Tribunal distinguishes between procedural public policy and substantive public policy and defines these two concepts as follows,

“*There is a violation of procedural public policy when generally recognized fundamental principles have been breached causing an intolerable conflict with one’s sense of justice, such that the decision appears contrary to the values accepted in a state abiding by the rule of law*”.<sup>27</sup>

An international award will infringe substantive public policy if “*it violates fundamental principles of law and is therefore plainly incompatible with the legal system and the system of values on which it is based*”.<sup>28</sup>

<sup>22</sup> (2003) 5 S.C.C. 705 (India).

<sup>23</sup> (2014) 9 S.C.C. 263, ¶ 35-39 [hereinafter “*Western Geco*”] (India).

<sup>24</sup> These components of the definition of public policy have been recently amended by the 2015 Amendment Act (as described in Section III, below).

<sup>25</sup> TF Mar. 8, 2006, 132 ATF III 389, 395 (Switz).

<sup>26</sup> TF Sep. 19, 2000, 126 ATF III 534, 538 (Switz.).

<sup>27</sup> TF May 27, 2014, 140 ATF III 278, 279; TF Mar. 8, 2006, 132 ATF III 389, 392, ¶2.2.1 (as translated in G. KAUFMANN-KOHLER, A. RIGOZZI, INTERNATIONAL ARBITRATION, LAW AND PRACTICE IN SWITZERLAND (2015), § 8.191 [hereinafter “KAUFMANN-KOHLER/RIGOZZI”] (Switz.).

Contrary to the position in India, however, the Swiss Federal Tribunal has highlighted the detachment of the notion of public policy from Swiss law. Unlike the 1996 Act, Article 190(2)(e) PILA only provides for incompatibility with ‘public policy’, without specifying whether such public policy refers to Swiss public policy or international public policy.<sup>29</sup> For a long time, case law was indecisive on this issue<sup>30</sup> and authors criticized the “*waltzing definitions given by the [Swiss Federal Tribunal]*”.<sup>31</sup> Without conclusively settling the debate,<sup>32</sup> the Swiss Federal Tribunal finally opted for a “*pragmatic approach*” judging that “*the application of Article 190 (2) (e) is not dependent on the existence of a subjective or objective connection between the case and Switzerland*” or on the application of Swiss substantive law.<sup>33</sup> “[I]f the arbitral tribunal is obliged to apply a substantive law other than Swiss law, and is therefore not required to respect Swiss public policy, obviously nothing would justify correcting its award, upon a motion to set aside, by reference to Swiss public policy”.<sup>34</sup> The Swiss Federal Tribunal therefore opted for “*a liberal interpretation of the concept of public policy, i.e. the choice of a transnational or universal public policy including fundamental legal principles that must be applied irrespective of the links between the dispute and a given country*”.<sup>35</sup>

But even though the Swiss Federal Tribunal has highlighted the detachment of the notion of public policy from Swiss law, it is aware that it cannot deny that there still remains a “Swiss feature” to this exception: “[...] *the Swiss judge, who does not live in a ‘no man’s land’, but in a country linked to a particular civilization, where certain values are favoured over other, is led to identify the mentioned principles subject to his own sensitivities and the essential values on which that civilization is formed; this is the Swiss feature of the public policy reservation*”.<sup>36</sup>

“Fundamental policy”, “fundamental principles”, “contrary to justice”, “incompatibility with a system of values”, what concretely then do these terms implicate?

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<sup>28</sup> TF Nov. 14, 1990, 116 Entscheidungen des schweizerischen Bundesgerichts [BGE] II 634, ¶ 4 (Switz.).

<sup>29</sup> This is in contrast to other articles of the PILA that specifically refer to ‘Swiss’ public policy (for e.g., Articles 17 and 27 (1)).

<sup>30</sup> KAUFMANN-KOHLER/RIGOZZI, *supra* note 27, ¶ 8.203.

<sup>31</sup> TF Mar. 8, 2006, 132 BGE III 389, ¶ 2.2.2, as translated in KAUFMANN-KOHLER/RIGOZZI, at 494 (Switz.).

<sup>32</sup> See B. BERGER AND F. KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND 1762 (2015) [hereinafter “BERGER/KELLERHALS”].

<sup>33</sup> TF Apr. 19, 1994, 120 BGE II 155, ¶ 6a (as translated in BERGER/KELLERHALS, *supra* note 32, ¶ 1762) (Switz.).

<sup>34</sup> *Id.*

<sup>35</sup> TF Apr. 19, 1994, 120 BGE II 155, ¶ 6a (Switz.).

<sup>36</sup> TF Mar. 8, 2006, 132 BGE III 389, ¶ 2.2.2 (as translated in BERGER/KELLERHALS, *supra* note 33, ¶ 1762) (Switz.).

#### IV. The Principle Applications of the Public Policy Exception

##### A. Public Policy and Fundamental Values

It was held, for example in *Renusagar*, that an award that contravened the provisions of the Indian Foreign Exchange Regulation Act, 1973 would be contrary to the public policy of India, because this Act had been enacted to ensure that India does not lose valuable foreign exchange, which is essential for the economic survival of the nation.<sup>37</sup>

Similarly, it is a fundamental principle of law that court orders must be complied with. Disregarding court orders “*would adversely affect the administration of justice and would be destructive of the rule of law*” and hence be contrary to public policy.<sup>38</sup> The enforcement of an arbitral award that would involve disregarding any order of a court would therefore be denied on the grounds of public policy.

A similar ground has been upheld in Switzerland where it has been expressly held that the principle of *res judicata* is a part of Swiss procedural public policy. One of the only two awards that the Swiss Federal Tribunal has annulled till date on the ground of public policy, was annulled due to the fact that the arbitral tribunal had disregarded a past order of the Zurich Cantonal Court. The award was, therefore, set aside as violating the procedural principle of *res judicata*.<sup>39</sup>

The second award to be annulled on the ground of public policy was on the basis of “*excessive commitments*” that the Swiss Federal Tribunal found to be in contravention of public policy. In this case, the Tribunal held that a worldwide and unlimited ban imposed by the FIFA Disciplinary Committee on a football player and upheld by the Court of Arbitration for Sport was an “*excessive commitment*” that was illicit under Article 27 of the Swiss Civil Code and thus against public policy.<sup>40</sup>

##### B. Public Policy and a Manifestly Erroneous Application of the Law or Determination of the Facts

One of the most controversial points in the public policy debate is whether State courts can use the exception of public policy to review the merits of an award decided by an arbitral tribunal, i.e. whether they can correct manifest errors of law or fact by the tribunal in the award.

<sup>37</sup> *Renusagar*, 1994 Supp. 1 S.C.C. 644, ¶¶ 75, 76 (India).

<sup>38</sup> *Id.* ¶ 85.

<sup>39</sup> 4A\_490/2009 (Apr. 13, 2010) (Swiss Federal Tribunal). (An English translation as well as introductory note is available at [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com) - last consulted Apr. 9, 2016) (Switz.).

<sup>40</sup> 4A\_558/2011, (Mar, 27, 2012 ) §§ 4.3.1, 4.3.2. (Swiss Federal Tribunal) (An English translation as well as introductory note is available at [www.swissarbitrationdecisions.com](http://www.swissarbitrationdecisions.com) - last consulted Apr. 9, 2016) (Switz.).

Several authors have stated that, in the view of the New York Convention, such a review would not be permitted. “It is a generally accepted interpretation of the Convention that the Court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator”.<sup>41</sup> Similarly, Alan Redfern and Martin Hunter have said, “[t]he New York Convention does not permit any review on the merits of an award to which the Convention applies [...]”.<sup>42</sup> It is therefore clear that the public policy exception, as found in the New York Convention, would not include a review of the facts or the law on which the award is based.

The debate is interesting because, on one hand, it may be stated that since party autonomy is one of the fundamental principles of arbitration, once the parties have confined a decision to an arbitral tribunal, this tribunal alone must judge the merits of the dispute before it. Indeed, the very basis of party autonomy would be rendered naught if State courts were permitted to re-adjudicate the entire case once the tribunal had handed down its decision.

On the other hand, the aims of justice and quality of arbitral awards could be advanced to justify a certain intervention from the courts. It is interesting to study the approach adopted by the Indian Supreme Court and the Swiss Federal Tribunal in this regard.

*i. Indian Law*

The jurisprudence of the Indian Supreme Court on this question has been a topic of extensive discussion and debate. In *Renusagar*, the Court held that “in order to attract [the] bar of public policy the enforcement of the award must invoke something more than the violation of the law of India”.<sup>43</sup> The Court, therefore, clearly established the principle that a court’s enquiry, when deciding upon whether an award falls under the public policy exception, “does not enable a party to the said proceedings to impeach the award on merits”.<sup>44</sup>

However, the inclusion of ‘patent illegality’ as a ground to set aside an arbitral award through the *Saw Pipes* decision was considered by some as the opening of “floodgates so far as judicial interference in arbitrations was concerned”.<sup>45</sup> In this decision, the Indian Supreme Court held that an award could

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<sup>41</sup> ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 269 (1981).

<sup>42</sup> ALAN REDFERN & MARTIN HUNTER, *REDFERN & HUNTER ON LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* 461 (2<sup>nd</sup> ed. 1991).

<sup>43</sup> *Renusagar*, 1994 Supp. 1 S.C.C. 644, ¶ 66 (India).

<sup>44</sup> *Id.* ¶ 37.

<sup>45</sup> Supplementary Report, *supra* note 14, ¶ 7.5 (India).

be set aside on the grounds of public policy if it was patently illegal, but only if such illegality “went to the root of the matter” and was “so unfair and unreasonable as to shock the conscience of the court”.<sup>46</sup>

The Court held that a patently illegal award could and should be interfered with under Section 34 of the 1996 Act because such an award “is likely to adversely affect the administration of justice” and “cannot be said to be in public interest”.<sup>47</sup> It distinguished itself from the holding in *Renusagar* based, *inter alia*, upon the fact that in *Renusagar*, the question had been of enforcement of a foreign award, whereas the case before the *Saw Pipes* bench concerned the annulment of an award made in India. Thus, while the narrower interpretation of public policy may be appropriate for the enforcement of an award that has already attained finality, a broader interpretation was required for the annulment of domestic awards, where the only available recourse was Section 34.<sup>48</sup> On the basis of this reasoning, the Court went on to set aside the award in so far as it considered that the tribunal had wrongly applied the law on liquidated damages and that its decision was in contradiction with the express terms of the contract.<sup>49</sup>

The *Saw Pipes* decision was widely criticized. Reputed senior advocate, Mr. Fali Nariman, condemned the *Saw Pipes* decision stating that it had “virtually set at naught the entire Arbitration and Conciliation Act of 1999 [...] If Courts continue to hold that they have the last word on facts and on law – notwithstanding consensual agreements to refer matters necessarily involving facts and law to adjudication by arbitration – the 1996 Act might as well be scrapped. [...] the Division Bench decision of the two Judges of the Court has altered the entire road-map of Arbitration Law and put the clock back to where we started under the old 1940 Act”.<sup>50</sup>

Notwithstanding this criticism, the *Saw Pipes* decision was consistently followed in domestic arbitrations and in international commercial arbitrations in India. For example, under the patent illegality doctrine, the Court has considered that it could interfere with the facts as determined by the arbitral tribunal. This was evident in the *Delhi Development Authority v. RS Sharma and Company* case,<sup>51</sup> where the Supreme Court set aside an award in which the tribunal had awarded extra cartage in favor of the contractor even though the contract itself contained no specific clause for extra cartage for bringing stones from elsewhere. The Court struck down the award because it held that the tribunal had proceeded on the wrong assumption that the appellant had insisted

<sup>46</sup> *Saw Pipes*, (2003) 5 S.C.C. 705, ¶ 31 (India).

<sup>47</sup> *Id.*

<sup>48</sup> *Saw Pipes*, (2003) 5 S.C.C. 705, ¶ 22 (India).

<sup>49</sup> *Id.* ¶ 74.

<sup>50</sup> Fali S. Nariman, Speech delivered in New Delhi on Legal Reforms in Infrastructure (May 2, 2003) (as cited in the 246<sup>th</sup> Report of the Law Commission of India, *supra* note 5, ¶ 8.1).

<sup>51</sup> (2008) 13 S.C.C. 80, ¶¶ 27-29 (India).

upon the use of stones brought from another location. Since the award was contrary to the facts and to the specific terms of the agreement, it was held to be contrary to the public policy of India.

Subsequent benches acknowledged the criticism directed against the *Saw Pipes* decision, but also held that they were bound to observe it under the principle of *stare decisis*. In *Mcdermott International Inc v. Burn Standard Co. Ltd. & Ors.*,<sup>52</sup> the Court expressly noted that it was only for a higher bench to reconsider the correctness of the *Saw Pipes* decision and that till this was done, the decision was binding upon it.

To counter this jurisprudential extension of the notion of public policy, in August 2014, the Law Commission of India proposed, in its 246<sup>th</sup> Report on “Amendments to the Arbitration and Conciliation Act 1996”, that a mere violation of the laws of India would not be a violation of the public policy exception in cases of international commercial arbitrations held in India.<sup>53</sup> Upon this recommendation, the explanatory note added to Section 34 of the 1996 Act by the 2015 Amendment Act now clarifies that an award is contrary to the public policy of India in only three cases – i) if it was induced or affected by fraud or corruption, ii) if it contravened the fundamental policy of Indian law or iii) if it was in conflict with the most basic notions of morality or justice. Patent illegality is therefore no longer a ground under which an international commercial award in India can be set aside. The 2015 Amendment Act has therefore had the effect of bringing the definition of public policy in line with the definition originally propounded by the Supreme Court in *Renusagar*, minus the reference to the ‘interest of India’ which was deliberately omitted because it was held to be vague and capable of interpretational misuse.<sup>54</sup>

The Law Commission however soon realized that the term ‘interest of India’ was not the only head of the public policy definition that was capable of interpretational misuse. A month following its report, in September 2014, the Indian Supreme Court in *Western Geco* interpreted the ‘fundamental policy of Indian law’, i.e., the first head of public policy as stated in *Renusagar*, to include perversity or irrationality. An award could therefore be set aside if it was perverse or irrational. The perversity or irrationality of the decision was to be tested on the touchstone of the *Wednesbury* principle of reasonableness.<sup>55</sup> The Court stated, “*What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been*

<sup>52</sup> (2006) 11 S.C.C. 181 (India) [hereinafter “*Mc Dermott*”].

<sup>53</sup> 246<sup>th</sup> Report of the Law Commission of India, ¶ 35; *See also* Supplementary Report, ¶ 10.1.

<sup>54</sup> 246<sup>th</sup> Report of the Law Commission of India, ¶ 37.

<sup>55</sup> *Western Geco*, (2014) 9 S.C.C. 263, ¶ 39 (India).

*drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal that enjoys considerable latitude and plays at the joints in making awards will be open to challenge and may be cast away or modified [...]*”<sup>56</sup> In that case, the court considered that the fact that the arbitral tribunal had failed to consider a glaring fact and had not applied the same test for holding the appellant liable for delay to respondent and for respondent’s failure to take timely action in right earnest, violated the fundamental policy of Indian law and, therefore, the public policy of India. The Court went one step further and instead of merely setting aside the award, it chose to modify the award by correcting the purported error.<sup>57</sup> This approach taken by the Court is interesting given that under the 1996 Act, Courts may only intervene where expressly provided by the Act and the 1996 Act does not permit Courts to alter arbitral awards.

In *Associate Builders v. Delhi Development Authority*, the Supreme Court clarified this principle of perversity to mean that a decision would necessarily be perverse “*where a finding is based on no evidence*”, or “*an arbitral tribunal takes into account something irrelevant to the decision it arrives at*” or “*it ignores vital evidence in arriving at its decision*”.<sup>58</sup> Thus, for factual errors to be relevant to the setting aside of an award, the Court had to find that the arbitrator’s approach was arbitrary or capricious: “*when a court is applying the ‘public policy’ test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on the facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his award. Thus an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrators approach is not arbitrary or capricious, then he is the last word on the facts*”.<sup>59</sup>

Here, a Division Bench of the High Court had set aside the order of a Single judge upholding the award, on the basis that the arbitrator had mechanically applied the Hudson formula and had wrongly taken into account the entire contract value for calculating the establishment expenses instead of taking into account the value of the work completed. The Supreme Court overturned the ruling of the High Court, holding that where different formulae can be applied and damages can be computed by taking into account one formula or another, this fell within the competence of the arbitrator and it was not for the courts to interfere in the calculation. The Supreme Court, therefore, struck down the order of the High Court.

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<sup>56</sup> *Id.* ¶ 40.

<sup>57</sup> *Id.* ¶¶ 31-33, 41.

<sup>58</sup> (2015) 3 S.C.C. 49, ¶ 31 (India) [hereinafter “*Associate Builders*”].

<sup>59</sup> *Id.* ¶ 33.

The setting aside of the award by Indian Courts for factual errors was, therefore, limited to whether or not the court considered the arbitrator's approach to be 'arbitrary', and thus patently illegal. This, once again, left room for interpretation.

This was precisely the fear that prompted the Law Commission of India to resubmit a *Supplementary Report* dated February 6, 2015 on the recommendations and suggestions that it had already made in its 246<sup>th</sup> Report. The Law Commission of India felt the need for such a supplement because of the broad interpretation of the term 'public policy' adopted by the Supreme Court in *Western Geco*, namely the precise inclusion of the *Wednesbury* principle of reasonableness within the phrase 'fundamental policy of Indian law'.<sup>60</sup>

In its Supplementary Report, the Law Commission clarified that the explanation it had proposed to add at Section 34 of the Act had been suggested on the assumption that the terms 'fundamental policy of Indian law' or 'conflict with the most basic notions of morality or justice' would not be construed widely. According to the Law Commission, the inclusion by the *Western Geco* and *Associate Builders* decisions of the *Wednesbury* principle of reasonableness into the public policy test through the concept of 'fundamental policy of Indian law' had however proved this assumption wrong.<sup>61</sup> The Commission therefore suggested a further amendment to the draft as follows: "*For the avoidance of doubt the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute*". This recommendation was adopted by the 2015 Amendment Act.

As mentioned above, this amendment only applies to international commercial arbitrations seated in India. For domestic arbitrations, the ground of patent illegality has been preserved with the express proviso that "*an award shall not be set aside merely on the ground of an erroneous application of the law or by reappraisal of evidence*".<sup>62</sup>

It, therefore, seems that the debate has finally been put to rest and, as far as international commercial arbitrations in India are concerned, Indian Courts can no longer review the merits of a decision on the basis of patent illegality or any other component of the public policy definition. The amendment to the 1996 Act clearly demonstrates the will of the Indian legislator to interpret the public policy exception restrictively. It remains to be seen how this amendment will effectively be put into practice by the Courts.

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<sup>60</sup> Supplementary Report, *supra* note 14, ¶¶ 10.2-10.3.

<sup>61</sup> *Id.*

<sup>62</sup> Arbitration and Conciliation (Amendment) Act, 2015, No. 3 of 2016, § 34(2)(A) (India).

*ii. Swiss law*

The Swiss Federal Tribunal, on the other hand, rarely interferes with the merits of the dispute as adjudicated by the arbitral tribunal in the case of international commercial arbitrations. The plea of “arbitrariness” that is open to the setting aside of domestic arbitral awards (Art. 393(e), CCP) has been expressly refused by the Swiss Federal Tribunal when deciding matters dealing with international arbitrations. Such refusal is based *inter alia* on the reasoning that by introducing the notion of ‘public policy’ during the parliamentary debates, the Swiss legislator had expressly replaced the notion of arbitrariness as a ground for setting aside international arbitration awards.<sup>63</sup> In the opinion of the Swiss Federal Tribunal therefore, the notion of public policy is narrower than that of arbitrariness. As a result, in international commercial arbitrations, it is not sufficient for an award to be arbitrary to be set aside; the award must cross the higher threshold and be “*intolerable to the level that it shocks one's sense of justice*”.<sup>64</sup>

An award can, therefore, be set aside only if the appellant clearly establishes in his submission which fundamental principle of law he considers the award to have contravened.<sup>65</sup> In the view of the Swiss Federal Tribunal, as far as international arbitration is concerned, “arbitrariness” or “perversity” of an international arbitral award does not qualify as a “fundamental principle of law” as such: “[a]s the notion of public policy is narrower than the notion of arbitrariness, even clear violations of law and manifestly false fact findings, or fact findings which are contrary to the file, are not in and of themselves sufficient to constitute a violation of public policy in international arbitration proceedings”.<sup>66</sup> The Swiss Federal Tribunal therefore refuses to correct a grossly wrongful application of the law governing the merits of the dispute or set aside an award on the ground that it is manifestly erroneous, and thus arbitrary.<sup>67</sup>

It also refuses to interfere with the facts of the case as determined by the arbitral tribunal. The only circumstance under which an award based on a manifestly wrong observation or contrary to the facts of the case can be annulled is if this amounts to a formal denial of justice.<sup>68</sup> In this case, the Swiss Federal Tribunal has annulled such an award, albeit not on the ground of public policy (Article 190(2)(e), PILA), but on the basis of a denial of the right to be heard (Article 190(2)(d),

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<sup>63</sup> TF Oct. 3, 1989, 115 ATF II 288 (292) (Switz.).

<sup>64</sup> KAUFMANN-KOHLER/RIGOZZI, *supra* note 26, ¶ 8.196.

<sup>65</sup> TF Nov. 14, 1990, 116 BGE II 634, ¶ 4 (Switz.) (“The Federal Tribunal will enter into the substance of an appeal based on the violation of public order only if the appellant exposes concretely in its submission which fundamental law principle the award violates. Even obvious violations of law or manifestly wrong fact considerations do not, in and of by themselves, permit the setting aside of an arbitral award on the ground of incompatibility with public order”) (Free translation).

<sup>66</sup> TF Sep. 10, 2001, 127 ATF III 576, 578; TF Apr. 25, 1995, 121 ATF III 331, 333 (Switz.).

<sup>67</sup> 4A\_150/2012, ¶ 5.1 (Jul. 12, 2012) (Swiss Federal Tribunal) (Switz.).

<sup>68</sup> TF Apr. 25, 1995, 121 ATF III 331 (Switz.).

PILA) because the tribunal had failed to take into consideration a relevant piece of evidence. Even here, the Swiss Federal Tribunal adopts a very narrow interpretation: “[t]he right to be heard contains no right to a materially accurate decision. It is not for the Federal Tribunal to review whether the arbitral tribunal took into account all documents and rightly understood them or not. What is required is a denial of justice, meaning that the right to be heard of the parties was factually made meaningless by the obvious mistake and that as a result the party finds itself no better off than if the right to be heard had been completely denied with regard to an issue important for the decision. He who wishes to deduce a violation of the right to be heard from a blatant disregard of facts must demonstrate that the judicial omission made it impossible for him to bring forward and prove his point of view as to issues procedurally relevant in the case”.<sup>69</sup>

This extremely restrictive approach in the case of international arbitrations contrasts with the approach taken by the Federal Tribunal in domestic arbitrations. Unlike awards issued in international arbitration, Swiss courts continue to set aside domestic arbitral awards on the grounds of arbitrariness, which allows the Swiss Federal Tribunal a more substantive review of the merits of a case. For example, the Swiss Federal Tribunal recently partially annulled an award as being arbitrary because the arbitral tribunal had awarded interest on amounts that a party had invoiced but which were, in its view, neither due nor owed to it.<sup>70</sup> In another case, a party challenged a domestic award on the grounds of arbitrariness because it considered that the arbitral tribunal had ordered its opposing party certain fees under an assignment and agency agreement on the basis of a very general reference to the principle of good faith. The Swiss Federal Tribunal accepted the challenge on the ground of arbitrariness, stating that a cursory reference to the principle of good faith did not qualify as application of the law and the award was, therefore, struck down on the ground of being arbitrary.<sup>71</sup>

The new sub-section 2A inserted at Section 34 of the 1996 Act by the 2015 Amendment Act aligns the position under Indian law with the solution adopted by the Swiss courts by restricting the patent illegality defence only to cases of domestic arbitrations. However, the amendment also stipulates that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence. Indian Courts may therefore adopt a narrower concept of arbitrariness in the future than the current approach adopted by the Swiss Federal Tribunal.

<sup>69</sup> TF Mar. 22, 2007, 133 BGE III 235, ¶ 5.2; TF Sep. 10, 2001, 127 ATF III 576, ¶ 2b-f; 4A\_550/2009, ¶ 5.1 (Swiss Federal Tribunal) (Switz.).

<sup>70</sup> 4A\_117/2014, (Jul. 23, 2014, 33 ASA BULLETIN (2015) 136 (Switz.).

<sup>71</sup> 4A\_190/2014, (Jan 28, 2015) (Swiss Federal Tribunal) (Switz.).

C. Public Policy and the Interpretation of the Terms of the Contract

i. Indian Law

The addition of “patent illegality” as a ground under of public policy in the *Saw Pipes* decision had opened the doors to the setting aside of awards made in India under three new circumstances.<sup>72</sup>

If the award contravened the substantive law of India, because such contravention would be against Section 28(1)(a) of the 1996 Act.<sup>73</sup>

Any contravention of the 1996 Act itself would be contrary to the public policy of India. Hence, an award that did not state the reasons upon which it was based would be in contravention of Section 31(3) of the 1996 Act and could therefore be struck down as being patently illegal. This contrasts with the Swiss notion of public policy where the Swiss Federal Tribunal has held that the right to be heard of the parties in international arbitrations does not require arbitral tribunal to motivate their decisions: “*The right to be heard in adversarial proceedings as per article 190 (2) (d) definitely does not demand that an international arbitration award be motivated*”.<sup>74</sup>

Finally, an award would be set aside if it were in contravention of Section 28(3) of the 1996 Act, which reads as follows: “*While deciding and making an award, the arbitral tribunal shall, in all cases, take into account the terms of the contract and trade usages applicable to the transaction*”.

This last ground had sometimes been used by Indian courts, under the guise of patent illegality, to reinterpret the terms of a contract that had already formed the basis of a decision by the arbitrators.

For example, in *Hindustan Zinc Ltd v. Friends Coal Carbonisation*,<sup>75</sup> a Supreme Court bench, following *Saw Pipes*, set aside the decision of an arbitral tribunal that it considered contrary to the price escalation clause contained in a contract. In the Court's opinion, the tribunal had used the wrong base price for determining escalation in light of the fact that claimant had changed the quality of the coking coal it had used to produce metallurgical coke during the execution of the contract, from Washery grade I to Washery grade II. The Court rebuked the arbitrators for assuming that the contract price was based on the base price of Washery Grade II coal and

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<sup>72</sup> *Associate Builders*, (2015) 3 S.C.C. 49, ¶ 42 (India).

<sup>73</sup> Section 28(1)(a) of the 1996 Act reads as follows: “(1) *Where the place of arbitration is situate in India,— (a) in an arbitration other than an international commercial arbitration, the arbitral tribunal shall decide the dispute submitted to arbitration in accordance with the substantive law for the time being in force in India.*”.

<sup>74</sup> TF Jan. 22, 2008, 134 ATF III 186, ¶ 6.1 and references therein.

<sup>75</sup> (2006) 4 S.C.C. 445 (India).

substituted its own opinion that the contract price should rather be based on the base price of Washery Grade I coal.<sup>76</sup>

The decision of the Supreme Court is logically sound and while it is reasonable to assume that the price escalation be calculated as per the base price of the quality of coal actually used, one can legitimately question if the ruling of the tribunal was “*so unfair and unreasonable*” that it “*shock[ed] the conscience of the court*” as dictated in *Saw Pipes*.

Other decisions have followed *Saw Pipes* but in all fairness they have tried to “*reign in the effects*” of the patent illegality exception.<sup>77</sup> In *Mcdermott*, the Court held that it cannot correct the errors of the arbitrators, it can only quash the award leaving the parties free to begin the arbitration again if they so desired.<sup>78</sup>

In *MSK Projects (I) (JV) Ltd. v. State of Rajasthan*,<sup>79</sup> the Court held: “[i]f the arbitrator commits an error in the construction of the contract, that is an error within his jurisdiction. But if it wanders outside the contract and deals with matters not allotted to him, he commits a jurisdictional error.”

Similarly, in *Rashtriya Ispat Nigam Ltd. v. Dewan Chand Ram Saran*,<sup>80</sup> the Court clearly stated that, where the interpretation taken by the arbitrator was a possible or plausible one, the court cannot interfere with the award and substitute its own views in place of those of the arbitrators. Thus, where two interpretations were possible, the interpretation chosen by the arbitrators cannot be second guessed: “[i]n any case, assuming that Clause 9.3 was capable of two interpretations, the view taken by the arbitrator was clearly a possible if not a plausible one. It is not possible to say that the arbitrator had travelled outside his jurisdiction, or that the view taken by him was against the terms of the contract. That being the position, the High Court had no reason to interfere with the award and substitute its view in place of the interpretation accepted by the arbitrator”.

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<sup>76</sup> *Id.* ¶ 23 (“[i]n the operative portion, the Arbitrators having correctly stated that the respondent will be entitled to price increase as per the escalation clause and that from 14.7.1992, the price escalation will be with reference to change in the price of washery grade I coal, acted in violation of the specific terms of the contract by stating that – ‘The base price for determining escalation is the price of coking coal washery grade II coal ruling as on 8.11.1991.’ This sentence should have actually been as follows: ‘The base price for determining escalation is the price of washery grade I coal ruling as on 8.11.1991, for determining escalation for supplies from 14.7.1992.’ A reading of the award shows that what was intended to be given was escalation in terms of an escalation clause in the purchase order. But on account of apparent error in the Award, the calculation of escalation has been done with reference to the prevailing price of superior quality of coal (washery grade I) and the base price of inferior quality of coal (washery grade II) instead of calculating escalation with reference to the prevailing price of the superior quality of coal (washery grade I) and the base price of superior quality of coal (washery grade I)”).

<sup>77</sup> Sumeet Kachwaha, *Enforcement of Arbitration Awards in India*, 4 Asian International Arbitration Journal 68 (2008).

<sup>78</sup> *McDermott*, (2006) 11 S.C.C. 181 (India), ¶ 52.

<sup>79</sup> (2011) 10 S.C.C. 573, ¶ 17.

<sup>80</sup> (2012) 5 S.C.C. 306, ¶ 43.

In *Associate Builders*, the Court once again used the *Wednesbury* principle of reasonableness as the outer limits of the arbitrator's autonomy, within which he was free to construe the contract. However, as soon as the arbitrator stepped outside this limit, or rather, as soon as the Court considered that the arbitrator had stepped outside this limit, it could and would intervene: “if an arbitrator construes a term of the contract in a reasonable manner, it will not mean that the award can be set aside on this ground. Construction of the terms of a contract is primarily for an arbitrator to decide unless the arbitrator construes the contract in such a way that it could be said to be something that no fair minded or reasonable person could do”.<sup>81</sup> The Court could, therefore, not interfere in a contract merely because another view was possible.

While it is true that the *Wednesbury* reasonableness test is a stricter test that requires a showing of something more than that the decision was merely unreasonable, it still left room for interpretation and could have been used by the courts to interfere with the tribunal's interpretation of the contract. The introduction of the new explanatory note at Section 34 of the 1996 Act by the 2015 Amendment Act has removed patent illegality from the scope of the public policy exception. Any possibility of the reinterpretation of the contractual terms under the guise of public policy should also then fall away.

ii. Swiss Law

Under Swiss law, the Swiss Federal Tribunal has categorically refused to interfere with the interpretation of an underlying contract by the arbitrators in international commercial arbitrations. While the principle of *pacta sunt servanda* (or contractual fidelity) has been held to be part of substantive public order,<sup>82</sup> its interpretation by the Swiss Federal Tribunal is so narrow that no award till date has been annulled on the basis of this principle. Indeed, the Swiss Federal Tribunal has itself stated several times that almost all disputes resulting from the violation of a contract are excluded from the scope of application of the principle of *pacta sunt servanda*, as envisaged under the public policy exception pursuant to Article 190(2)(e).<sup>83</sup>

In this regard, the Swiss Federal Tribunal has consistently held that there can only be a violation of the principle of *pacta sunt servanda* if the tribunal admits the existence of a contract but refuses

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<sup>81</sup> *Associate Builders*, (2015) 3 S.C.C. 49, ¶ 42.3.

<sup>82</sup> TF Apr. 3, 2000, 128 ATF III 191 ¶ 6b; TF Apr. 19, 1994, 120 BGE II 155, ¶ 6a (Switz.).

<sup>83</sup> 4A\_150/2012, ¶ 5.1 (Jul. 12, 2012) (Swiss Federal Tribunal) (Switz.).

to order compliance with it, based on irrelevant reasons or inapplicable legal provisions, or, on the contrary, denies the existence of a contract but nevertheless grants a contractual obligation.<sup>84</sup>

The Swiss Federal Tribunal has held for example that where a tribunal has interpreted a contract or evaluated factual findings in a way different from that of the party seeking to annul the award, this is not in itself a violation of the principle of *pacta sunt servanda*. Grounds such as the fact that “*the tribunal did not apply the pertinent contractual provisions*” or that “*it interpreted or applied them wrongly*” cannot be invoked as violations of public policy.<sup>85</sup> According to the Swiss Federal Tribunal, “*an arbitral tribunal, even if it had interpreted or applied the relevant legal provisions or the specific clauses of the contract in an untenable manner, specifically by not basing itself on the legal provisions that are supposed to govern the litigious question or by mixing up distinct terms found in a contractual clause, would not find itself facing a violation of substantive public policy within the restrictive meaning given to it by case law*”.<sup>86</sup>

To draw a parallel between the approach of the Swiss Federal Tribunal and that of the Indian Supreme Court (before the amendment to the 1996 Act), the approach adopted under Swiss law is such that, even where the arbitrator has crossed the *Wednesbury* test of reasonableness, the Swiss Federal Tribunal will refuse to interfere with the award in an international arbitration. In other words, in international arbitration, under no circumstances can the tribunal’s interpretation of a contract be challenged on the ground of public policy.

Inherent contradictions within an award are also not sanctioned by the Swiss Federal Tribunal on the ground of public policy. This is irrespective of the fact of whether the contradictions were found between the reasons given for the award,<sup>87</sup> or between such reasons and the operative part,<sup>88</sup> or even between two sections of the operative part itself.<sup>89</sup> According to the Swiss Federal Tribunal, the objective of quality cannot justify that such contradictions be elevated to the level of public policy: “[*That an award reaches a minimum level of quality is certainly desirable. From there, to construct a requirement into an essential principle, which should form the basis of any legal order according to prevailing concepts in Switzerland, so that any awards including an irreducible internal contradiction should be sanctioned, is a step which case law has taken a little too quickly in its initial attempts at defining the concept of public policy. From a qualitative point of view, it is indeed hardly justifiable to consider such an award more*

<sup>84</sup> TF Nov. 14, 1990, 116 BGE II 634, 638 (Switz.).

<sup>85</sup> 4A\_176/2008, ¶ 5.2 (Sep. 23, 2008) (Swiss Federal Tribunal) (Switz.).

<sup>86</sup> 4A\_14/2012, ¶ 5.2.2 (May 2, 2012) (Swiss Federal Tribunal) (Switz.).

<sup>87</sup> 4A\_150/2012, ¶ 5.2.1. (Jul. 12, 2012) (Swiss Federal Tribunal) (Switz.).

<sup>88</sup> 4A\_386/2010, ¶ 8.3.1 (Jan. 3, 2011) (Swiss Federal Tribunal) (Switz.).

<sup>89</sup> TF Apr. 3, 2002, 128 ATF III 191, at 198 (Switz.).

*severely than an award based on unsustainable findings of fact or on the arbitrary application of a rule of law, which does not fall within the anticipations of Art. 190(2)(e) PILA*".<sup>90</sup>

These illustrations demonstrate the extremely narrow approach taken by the Swiss Federal Tribunal in relation to the ground of public policy in international arbitrations.

It is interesting to note that at around the same time that India was beginning to consider how it could delimit the public policy exception and minimize judicial intervention, Swiss authors were beginning to question the extremely narrow approach to public policy taken by the Swiss Federal Tribunal. In its own words, such a setting aside would be a "*chose rarissime*",<sup>91</sup> i.e., virtually impossible. Of the approximately 150 appeals made to the Swiss Federal Tribunal on the grounds of public policy from 1989 (year when the new international arbitration law entered into force) to 2013, only two awards have been annulled till date.<sup>92</sup>

Swiss commentators have criticized this excessively narrow approach adopted by the Swiss Federal Tribunal, questioning whether it really corresponds to the intention of the legislator, a justification often advanced by the Tribunal itself.<sup>93</sup> Some complain that "[o]ver the years, the [Swiss Federal Tribunal] may have lost sight of one of the original functions of Article 190 (2) (e), which was to ensure that awards rendered in international arbitrations seated in Switzerland would meet minimum standards of quality", suggesting that a change is required: "[a] sensible way forward would be to revert to this function and apply public policy in such a manner that awards whose result is wholly unsustainable, indefensible, offensive to basic values of justice would not pass the minimum quality test".<sup>94</sup>

Hence, while India has tried to reign in the excessively broad interpretation of public policy given by its courts, Swiss authors ponder over whether the approach adopted by the Federal Tribunal is not excessively narrow. These authors consider that a court called upon to apply the public policy exception must strive to find the right balance between the finality of the award and the respect of party autonomy on one hand, and quality and justice on the other. As Lord Denning rightly said in response to his learned friend's observation on public policy, "[w]ith a good man in the saddle, the unruly horse can be kept in control".<sup>95</sup>

<sup>90</sup> 4A\_464/2009, (Feb. 15, 2010) (Swiss Federal Tribunal (Switz.).

<sup>91</sup> TF Mar. 8, 2006, 132 ATF III 389, 391 (Switz.).

<sup>92</sup> F. Dasser & D. Roth, Challenge of Swiss Arbitral Awards – Selected Statistical Data as of 2013, 32 ASA BULLETIN 460.

<sup>93</sup> P. Lalive, *L'Article 190 al. 2 LDIP a-t-il une utilité?* 28 ASA BULLETIN 731-734; KAUFMANN-KOHLER/RIGOZZI, *supra* note 27, ¶ 8.204.

<sup>94</sup> KAUFMANN-KOHLER/RIGOZZI, *supra* note 27, ¶ 8.204.

<sup>95</sup> *Enderby Town Football Club Ltd v. The Football Association Ltd* (1971) Ch. 591, 606 (U.K.).

V. Conclusion

Arbitration is a remarkable institution, adapted to the development of international commerce. It permits one to decouple international legal relations from national jurisdictions and find a truly transnational and neutral forum. Such freedom however comes with its risks, since it places the public function of justice in the hands of private parties, the arbitrators. Their activities must, therefore, be overseen.

The success of arbitration depends first and foremost on the quality of the arbitrators. The arbitral proceedings and its outcome are entirely in their hands. That is why a strict control must be exercised in this regard. Several efforts have already been made, for example, the implementation of strict restrictions governing the independence and impartiality of arbitrators and the possibility to challenge them before national courts. National courts therefore play an important role even at this early stage.

In this regard, arbitral institutions also play a vital role in the development of arbitration when they take on the role of overseeing the arbitrators and the procedures they govern; not with the view to substitute the arbitrators, but to ensure that the arbitrator's behavior and conduct of the proceedings is irreproachable and corresponds to what the parties expect of them. One can, for example, underline the role of institutions, like the ICC, that oblige arbitrators to submit a draft award that is subject to scrutiny and constructive criticism.

Finally, arbitration depends, to a large extent, on the support of the national Courts that guarantee that the fundamental principles of fair and equitable justice are respected. There is no question that when doing so they cannot systematically re-evaluate the tribunal's decisions. Allowing parties, who have consciously chosen to circumvent national institutions, to come back to the courts under the pretext that the person they chose to adjudicate their dispute decided in a manner that they do not agree with, would undermine the very autonomy that national courts are bound to protect.

Parties, however, do have the right to expect that the decision was made by independent and impartial arbitrators, after a fair procedure where no fundamental legal principles were violated. Party autonomy and the freedom granted to the arbitrators within the realms of their competence cannot be seen as a *carte blanche* handed to the arbitrators to do as they please: the national courts must play a preventive role in ensuring the efficiency of arbitration, and if need be, even a corrective one. As put by Justice Mustill, “[w]hatever view is taken regarding the correct

*balance of the relationship between international arbitration and national courts, it is impossible to doubt that at least in some instances the intervention of the court may be not only permissible, but highly beneficial*".<sup>96</sup>

Vague as it may be, the notion of public policy expresses this limit. The problem, however, is that there is no authority competent at the international level to control decisions handed down by the national courts, for example, when applying international conventions like the New York Convention. That is why every effort must be made to communicate, inform and compare. Arbitration is first and foremost a venue for dialogue. It is for all arbitration practitioners, the younger generation in particular, to contribute to this exchange. The present article was intended to be an illustration.

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<sup>96</sup> Coppee-Lavalin S.A./N.V. v. Ken Ren Chemicals & Fertilizers Ltd., [1994] 2 All E.R. 449 (U.K.).