2019 INSC 647

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 4779 OF 2019
(Arising out of Special Leave Petition (Civil) No.19033 of 2017)

Ssangyong Engineering
& Construction Co. Ltd. … Appellant

Versus

National Highways Authority
of India (NHAI) … Respondent

JUDGMENT

R.F. NARIMAN, J.

1. Leave granted.

2. The respondent, National Highways Authority of India ["**NHAI**"], invited bids for construction of a four-lane bypass on National Highway 26 in the State of Madhya Pradesh. The appellant's bid was accepted *vide* its letter of acceptance dated 30.12.2005, for a total contract value of INR 219,01,16,805/-. The appellant before us is a company registered under the laws of the Republic of Korea, whereas the respondent is a Government of India undertaking, responsible for

construction of National Highways throughout the territory of India. The components used in execution of work for which price adjustment was payable to the appellant are labour, plant and machinery, petroleum, oil and lubricant (POL), cement, steel, bitumen, and other local materials. Price adjustment for four of these components, i.e., cement, steel, plant and machinery, and other local materials was agreed to be calculated as per a formula given in sub-clause 70.3 of the contract. The relevant portion of sub-clause 70.3 states as under:

> "ii. Adjustment for Cement Component
>
> Price adjustment for increase or decrease in the cost of cement procured by the contractor shall be paid in accordance with the following formula:
>
> $$V_c = 0.85 \times \frac{P_c}{100} \times R_i \times \left(\frac{C_1 - C_0}{C_0}\right)$$
>
> Where,
>
> V_c = increase or decrease in the cost of work during the month under consideration due to change in rates of component.
>
> C_0 = the all India average wholesale price index for cement on the day 28 days prior to the closing date of submission of bids, as published by Ministry of Industrial Development, Government of India, New Delhi.
>
> C_1 = the all India average wholesale price index for cement on the day 28 days prior to the last day of the period to which a particular interim payment certificate is related, as published by Ministry of Industrial Development, Government of India, New Delhi.
>
> P_c = percentage of Cement component."

Insofar as the component C_0 is concerned, the date which is 28 days prior to the last submission of bids is 29.09.2005, which is the base date for calculation of price adjustment, since it is common ground that the date of submission of the bid is 27.10.2005.

3. The price adjustment was being paid to the appellant every month in terms of the agreed formula under sub-clause 70.3 by using the Wholesale Price Index ["**WPI**"] published by the Ministry of Industrial Development, which followed the years 1993-94 = 100 ["**Old Series**"]. However, with effect from 14.09.2010, the Ministry of Industrial Development stopped publishing the WPI for the Old Series and started publishing indices under the WPI series 2004-05 = 100 ["**New Series**"]. It is important to note that even under this New Series, the WPIs for the previous years beginning from April, 2005 were also being published by the Ministry. This being so, as both the indices C_1 and C_0 were available to the appellant under the New Series for calculating price adjustment, the appellant raised its bills accordingly. It is undisputed that payments of 90% of the monthly bills on this basis were made for the period September, 2010 to February, 2013. On 15.02.2013, the respondent issued a Policy Circular ["**Circular**"], in which a new formula for determining indices was used by applying a

"linking factor" based on the year 2009-10. However, this Circular expressly stated:

> "Thus, payment on account of price adjustment may be made by adopting the above process subject to the condition that the contractors furnish undertaking / affidavit that this price adjustment is acceptable to them and they will not make any claim, whatsoever, on this account in future after this payment."

4. After this Circular, the respondent stated that the Circular would have to be applied to the contract in question, as a result of which, a linking factor would have to be provided by which the Old Series was connected to the New Series. The appellant never accepted this and knocked at the doors of the High Court of Madhya Pradesh through a writ petition in which it challenged the validity of the Circular. However, the High Court *vide* its order dated 03.04.2013 disposed of the writ petition with the observation that there exists a dispute resolution mechanism through the Dispute Adjudication Board, after which arbitration is also provided, and as the appellant had an efficacious alternative remedy, it was relegated to the same. The respondent then asked the appellant to give its consent to receive monthly payment under the Circular. The appellant submitted a conditional undertaking dated 17.05.2013, in which it was clearly stated:

> "The above undertaking is without prejudice to the Contractor's right to challenge the said Circular dated

> 15.02.2013 as per provisions of contract and other legal remedies available to the Contractor before the appropriate forum."

5. The appellant then approached the Delhi High Court *vide* an application under Section 9 of the Arbitration and Conciliation Act, 1996 ["**1996 Act**"], for interim protection against deduction and recoveries sought to be made by the respondent by applying the said Circular. The Delhi High Court, by its order dated 31.05.2013, restrained the respondent from implementing the said Circular retrospectively.

6. Meanwhile, the aforesaid dispute was referred to the Dispute Adjudicating Board as envisaged under sub-clause 67 of the contract. The Dispute Adjudicating Board, by its majority recommendation dated 31.10.2013, recommended a certain linking factor and then arrived at the figures of price adjustment in the aforesaid four materials by applying such linking factor. However, one of the members of the Dispute Adjudicating Board gave a dissenting note in favour of the appellant, recommending that in view of the express terms of the contract, the provisions contained in the impugned Circular cannot be applied for calculation of price adjustment. Aggrieved by the recommendations of the Dispute Adjudicating Board, the appellant

issued a notice of dissatisfaction dated 19.11.2013, and referred the dispute to an arbitral tribunal consisting of three members. The appellant raised a claim of INR 2,01,42,827/- towards unpaid price adjustment for the period September 2010 up to May 2014, plus INR 1,00,86,417/- for interest on the aforesaid unpaid amount. The dispute that was thus referred to arbitration was a narrow one, namely, as to whether price adjustment would continue under the terms of the contract, or whether the Circular dated 15.02.2013, applying the linking factor, would have to be applied. Two out of three members of the arbitral tribunal, by their award dated 02.05.2016 made at New Delhi, after noting the arguments of both sides, held that the Circular could be applied as it was within contractual stipulations, as has been held by the Dispute Adjudicating Board, and hence, rejected the appellant's claim. While doing so, the majority award applied certain government guidelines of the Ministry of Commerce and Industry, as per which it was stated that the establishment of a linking factor to connect the Old Series with the New Series is imperative, and therefore, required. The appellant's argument that the linking factor is *de hors* the contract and not at all required was, therefore, rejected. The majority award further made it clear that these guidelines are available on a certain website, as they were not on record. Paragraph 13 of the guidelines was then

referred to, and applying the arithmetic conversion method, which is one of the three methods referred to in the said paragraph, a linking factor was applied in accordance with the formula prescribed in the said method which is as follows:

> "Arithmetic conversion method:
> $y = cx$ or $c = y/x$
> Where y is average value of indices of 12 months for the Old Series and x for the New Series; c being conversion factor. Meaning thereby that relation between y and x is linear. Average of 12 months for x is taken 100."

Thus, the final majority award, based on the aforesaid linking factor, was as follows:

> "9. Award
> 9.1. Based on the findings above, we hold that introducing linkage factor is imperative and required for conversion of indices from the base 2004-05 series to the earlier series base 1993-94 as basis for determination of price adjustment. Linking factors for four items of work/materials involved in price adjustment, shall be as under:
>
> | | |
> |---|---|
> | Cement | 1.528 |
> | Steel | 2.365 |
> | Plant and Machinery | 1.840 |
> | Other Materials | 1.873 |
>
> 9.2. The final amount of price adjustment shall be worked out on the basis of above-mentioned linkage factors. After deducting the amount already paid to the Claimant, the amount payable to them against their claim shall be determined and the same shall be paid by the Respondent to the Claimant.
> 9.3. This amount shall also attract interest @ 10% per annum compounded monthly from due date of payment to the date of award, viz. 02.05.2016.

> 9.4. Further interest @ 12% per annum, simple interest, shall be payable to the Claimant from 02.05.2016 onwards till the date of payments. No future interest however shall be payable in case the amounts are paid within 90 days of the date of the award, that is by 02.08.2016."

A dissenting award was given by Shri Dilip Namdeo Potdukhe, in which the learned dissenting arbitrator expressly stated that neither the Circular nor the guidelines could be applied as they were *de hors* the contract between the parties. Accordingly, the dissenting award awarded the claim of the claimant-appellant in full.

7. A Section 34 petition which was filed by the appellant was rejected by the learned Single Judge of the Delhi High Court, by a judgment and order dated 09.08.2016, in which it was held that a possible view was taken by the majority arbitrators which, therefore, could not be interfered with, given the parameters of challenge to arbitral awards. The learned Single Judge also went on to hold that the New Series published by the Ministry could be applied in the case of the appellant as the base indices for 2004-05 under the New Series were available. Having so held, the learned Single Judge stated that even though the view expressed in the dissenting award is more appealing, and that he preferred that view, yet he found that since the majority award is a possible view, the scope of interference being

limited, the Section 34 petition was dismissed. A Section 37 appeal to the Division Bench of the Delhi High Court yielded the same result, by the impugned judgment dated 03.04.2017.

8. Smt. Rashmeet Kaur, learned Advocate appearing on behalf of the appellant, first submitted that Section 34(2)(a)(iv) of the 1996 Act was attracted to the facts of the present case as the majority award contained decisions on matters beyond the scope of the submission to arbitration. The learned counsel argued that this was a jurisdictional error, and a new contract was substituted by the majority award amounting to a novation of the old agreement and the old formula contained in the agreement, which would be a decision on a matter beyond the scope of the submission to arbitration. She also argued that Section 34(2)(b)(ii) of the 1996 Act would also be attracted as the award was in conflict with the public policy of India, being contrary to the fundamental policy of Indian law as well as the most basic notions of justice. According to her, the rewriting of the terms of the contract ought to shock the conscience of the Court, as a new contract was foisted on one of the parties unilaterally. For this, she cited various judgments. She also argued that the principles of natural justice were violated and, therefore, Section 34(2)(a)(iii) would also be attracted. She argued that the government guidelines were never produced

before the arbitrators, and the arbitrators applied the said guidelines behind the back of the parties, thus, resulting in breach of Section 34(2)(a)(iii) of the 1996 Act. Finally, though she argued the ground of patent illegality, this argument was given up when it was pointed out by the Court that this ground, which obtains under Section 34(2A) of the 1996 Act, would not be available in the case of an international commercial arbitration that is decided in India. Shri Mukul Rohatgi, learned Senior Advocate, supplemented the submissions of Smt. Rashmeet Kaur.

9. On the other hand, Shri S. Nandakumar, learned counsel appearing on behalf of the respondent, argued that applying the new formula with the base index of 2004-05 would make the contract unworkable, as a result of which, it was imperative to have a linking factor. According to the learned counsel, the appellant itself applied a linking factor when the Tribunal asked it to do so, may be without prejudice to its other contentions. In any case, this was a matter of interpretation of the agreement in which the arbitrators' view is final, as has been correctly held by the learned Single Judge and the Division Bench. He also cited some judgments in support of this proposition. According to him, therefore, this appeal should be dismissed.

Applicability of the Arbitration and Conciliation (Amendment) Act, 2015

10. Since the Section 34 petition in the present case is dated 30.07.2016, an important question as to the applicability of the parameters of review of arbitral awards would arise in this case. More particularly, radical changes have been made by the Arbitration and Conciliation (Amendment) Act, 2015 ["**Amendment Act, 2015**"] with effect from 23.10.2015 – in particular, in the "public policy of India" ground for challenge of arbitral awards. The question which arises is whether the amendments made in Section 34 are applicable to applications filed under Section 34 to set aside arbitral awards made after 23.10.2015. This Court, in **Board of Control for Cricket in India v. Kochi Cricket (P.) Ltd. and Ors.**, (2018) 6 SCC 287 ["**BCCI**"], has held that the Amendment Act, 2015 would apply to Section 34 petitions that are made after this date. Thus, this Court held:

> "**75.** Shri Viswanathan then argued, relying upon *R. Rajagopal Reddy* v. *Padmini Chandrasekharan* [*R. Rajagopal Reddy* v. *Padmini Chandrasekharan*, (1995) 2 SCC 630], *Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.* [*Fuerst Day Lawson Ltd.* v. *Jindal Exports Ltd.*, (2001) 6 SCC 356], *SEDCO Forex International Drill Inc.* v. *CIT* [*SEDCO Forex International Drill Inc.* v. *CIT*, (2005) 12 SCC 717] and *Bank of Baroda* v. *Anita Nandrajog* [*Bank of Baroda* v. *Anita Nandrajog*, (2009) 9 SCC 462 : (2009) 2 SCC (L&S) 689] , that a clarificatory amendment can only be retrospective, if it does not substantively change the law, but merely clarifies some doubt which has crept

into the law. For this purpose, he referred us to the amendments made in Section 34 by the Amendment Act and stated that despite the fact that Explanations 1 and 2 to Section 34(2) stated that "for the avoidance of any doubt, it is clarified", this is not language that is conclusive in nature, but it is open to the court to go into whether there is, in fact, a substantive change that has been made from the earlier position or whether a doubt has merely been clarified. According to the learned Senior Counsel, since fundamental changes have been made, doing away with at least two judgments of this Court, being *Saw Pipes Ltd.* [*ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705] and *Western Geco* [*ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], as has been held in para 18 in *HRD Corpn.* v. *GAIL (India) Ltd.* [*HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471], it is clear that such amendments would only be prospective in nature. We do not express any opinion on the aforesaid contention since the amendments made to Section 34 are not directly before us. It is enough to state that Section 26 of the Amendment Act makes it clear that the Amendment Act, as a whole, is prospective in nature. Thereafter, whether certain provisions are clarificatory, declaratory or procedural and, therefore, retrospective, is a separate and independent enquiry, which we are not required to undertake in the facts of the present cases, except to the extent indicated above, namely, the effect of the substituted Section 36 of the Amendment Act."

xxx xxx xxx

"**78.** The Government will be well-advised in keeping the aforesaid Statement of Objects and Reasons in the forefront, if it proposes to enact Section 87 on the lines indicated in the Government's Press Release dated 7-3-2018. The immediate effect of the proposed Section 87 would be to put all the important amendments made by the Amendment Act on a back-burner, such as the important amendments made to Sections 28 and 34 in particular, which, as has been stated by the Statement of Objects and Reasons,

> "… have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act",

and will now not be applicable to Section 34 petitions filed after 23-10-2015, but will be applicable to Section 34 petitions filed in cases where arbitration proceedings have themselves commenced only after 23-10-2015. This would mean that in all matters which are in the pipeline, despite the fact that Section 34 proceedings have been initiated only after 23-10-2015, yet, the old law would continue to apply resulting in delay of disposal of arbitration proceedings by increased interference of courts, which ultimately defeats the object of the 1996 Act. [These amendments have the effect, as stated in *HRD Corpn.* v. *GAIL (India) Ltd.*, (2018) 12 SCC 471 of limiting the grounds of challenge to awards as follows: (SCC p. 493, para 18)

> "*18*. In fact, the same Law Commission Report has amended Sections 28 and 34 so as to narrow grounds of challenge available under the Act. The judgment in *ONGC Ltd.* v. *Saw Pipes Ltd.*, (2003) 5 SCC 705 has been expressly done away with. So has the judgment in *ONGC Ltd.* v. *Western Geco International Ltd.*, (2014) 9 SCC 263. Both Sections 34 and 48 have been brought back to the position of law contained in *Renusagar Power Plant Co. Ltd.* v. *General Electric Company*, 1994 Supp (1) SCC 644, where "public policy" will now include only two of the three things set out therein viz. "fundamental policy of Indian law" and "justice or morality". The ground relating to "the interest of India" no longer obtains. "Fundamental policy of Indian law" is now to be understood as laid down in *Renusagar*, 1994 Supp (1) SCC 644. "Justice or morality" has been tightened and is now to be understood as meaning only basic notions of justice and morality i.e. such notions as would shock the conscience of the Court as understood in *Associate Builders* v. *DDA*, (2015)

> 3 SCC 49 : (2015) 2 SCC (Civ) 204. Section 28(3) has also been amended to bring it in line with the judgment of this Court in *Associate Builders*, (2015) 3 SCC 49 : (2015) 2 SCC (Civ) 204, making it clear that the construction of the terms of the contract is primarily for the arbitrator to decide unless it is found that such a construction is not a possible one."]
>
> It would be important to remember that the 246th Law Commission Report has itself bifurcated proceedings into two parts, so that the Amendment Act can apply to court proceedings commenced on or after 23-10-2015. It is this basic scheme which is adhered to by Section 26 of the Amendment Act, which ought not to be displaced as the very object of the enactment of the Amendment Act would otherwise be defeated."
>
> (emphasis supplied)

11. There is no doubt that the amendments made in Explanations 1 and 2 to Section 34(2)(b)(ii) have been made for the avoidance of any doubt, which language, however, is not found in Section 34(2A). Apart from the anomalous position which would arise if the Section were to be applied piecemeal, namely, that Explanations 1 and 2 were to have retrospective effect, being only to remove doubts, whereas sub-section (2A) would have to apply prospectively as a new ground, with inbuilt exceptions, having been introduced for the first time, it is clear that even on principle, it is the substance of the amendment that is to be looked at rather than the form. Therefore, even in cases where, for avoidance of doubt, something is clarified by way of an amendment, such clarification cannot be retrospective if the earlier law has been

changed substantively. Thus, in **Sedco Forex International Drill, Inc. and Ors. v. Commissioner of Income Tax, Dehradun and Anr.**, (2005) 12 SCC 717 ["**Sedco**"], this Court held:

> "**17.** As was affirmed by this Court in *Goslino Mario* [(2000) 10 SCC 165 : (2000) 241 ITR 312] a cardinal principle of the tax law is that the law to be applied is that which is in force in the relevant assessment year unless otherwise provided expressly or by necessary implication. (*See* also *Reliance Jute and Industries Ltd.* v. *CIT* [(1980) 1 SCC 139 : 1980 SCC (Tax) 67].) An Explanation to a statutory provision may fulfil the purpose of clearing up an ambiguity in the main provision or an Explanation can add to and widen the scope of the main section [*See Sonia Bhatia* v. *State of U.P.*, (1981) 2 SCC 585, 598 : AIR 1981 SC 1274, 1282 para 24]. If it is in its nature clarificatory then the Explanation must be read into the main provision with effect from the time that the main provision came into force [*See Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24 (para 44); *Brij Mohan Das Laxman Das* v. *CIT*, (1997) 1 SCC 352, 354; *CIT* v. *Podar Cement (P) Ltd.*, (1997) 5 SCC 482, 506]. But if it changes the law it is not presumed to be retrospective, irrespective of the fact that the phrases used are "it is declared" or "for the removal of doubts"."

12. There is no doubt that in the present case, fundamental changes have been made in the law. The expansion of "public policy of India" in **ONGC Ltd. v. Saw Pipes Ltd.**, (2003) 5 SCC 705 ["**Saw Pipes**"] and **ONGC Ltd. v. Western Geco International Ltd.**, (2014) 9 SCC 263 ["**Western Geco**"] has been done away with, and a new ground of "patent illegality", with inbuilt exceptions, has been introduced. Given this, we declare that Section 34, as amended, will apply only to Section

34 applications that have been made to the Court on or after 23.10.2015, irrespective of the fact that the arbitration proceedings may have commenced prior to that date.

Changes made by the Amendment Act, 2015

13. It is first necessary to survey the law insofar as it relates to the ground of setting aside an award if it is in conflict with the public policy of India, as it existed before the Amendment Act, 2015. In **Associate Builders v. Delhi Development Authority**, (2015) 3 SCC 49 ["**Associate Builders**"], this Court referred to the judgment in **Renusagar Power Co. Ltd. v. General Electric Co.**, 1994 Supp (1) SCC 644 ["**Renusagar**"], as follows:

> "**18.** In *Renusagar Power Co. Ltd.* v. *General Electric Co.* [*Renusagar Power Co. Ltd.* v. *General Electric Co.*, 1994 Supp (1) SCC 644], the Supreme Court construed Section 7(1)(*b*)(*ii*) of the Foreign Awards (Recognition and Enforcement) Act, 1961:
>
> > "**7. *Conditions for enforcement of foreign awards***.—(1) A foreign award may not be enforced under this Act—
> >
> > xxx xxx xxx
> >
> > (*b*) if the Court dealing with the case is satisfied that—
> >
> > xxx xxx xxx
> >
> > (*ii*) the enforcement of the award will be contrary to the public policy."
>
> In construing the expression "public policy" in the context of a foreign award, the Court held that an award contrary to

(*i*) The fundamental policy of Indian law,

(*ii*) The interest of India,

(*iii*) Justice or morality,

would be set aside on the ground that it would be contrary to the public policy of India. It went on further to hold that a contravention of the provisions of the Foreign Exchange Regulation Act would be contrary to the public policy of India in that the statute is enacted for the national economic interest to ensure that the nation does not lose foreign exchange which is essential for the economic survival of the nation (*see* SCC p. 685, para 75). Equally, disregarding orders passed by the superior courts in India could also be a contravention of the fundamental policy of Indian law, but the recovery of compound interest on interest, being contrary to statute only, would not contravene any fundamental policy of Indian law (*see* SCC pp. 689 & 693, paras 85 & 95)."

To this statement of the law, this Court added that the binding effect of the judgment of a superior court being disregarded would be equally violative of the fundamental policy of Indian Law [*see* paragraph 27].

14. It is important to note that Sections 34(2)(b) and 48(2)(b) of the 1996 Act, before their amendment in 2015, stated as follows:

"**34. Application for setting aside arbitral award**.—

xxx xxx xxx

(2) An arbitral award may be set aside by the court only if**–**

xxx xxx xxx

(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.

Explanation.–Without prejudice to the generality of sub-clause (ii) it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81.

xxx xxx xxx"

"**48. Conditions for enforcement of foreign awards**.—

xxx xxx xxx

(2) Enforcement of an arbitral award may also be refused if the Court finds that–

xxx xxx xxx

(b) The enforcement of the award would be contrary to the public policy of India.

Explanation.–Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption.

xxx xxx xxx"

It will thus be seen that whether the ground of "public policy of India" is used to set aside an award under Section 34, or to refuse recognition and enforcement of a foreign award under Section 48, Section 34(2)(b) ought to have been construed in the same manner as Section 48(2)(b).

15. However, this Court, in **Saw Pipes** (supra), added yet another ground, namely, that of "patent illegality" to the three grounds mentioned in **Renusagar** (supra) in order to set aside an award under

Section 34 of the 1996 Act. This ground was added in the following terms:

> "**31.** …… [Patent] Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void."

16. Given this interpretation of the law, insofar as Section 34 was concerned, this Court, in **DDA v. R.S. Sharma and Co.**, (2008) 13 SCC 80, summarised the law as it stood at that point of time, as follows:

> "**21.** From the above decisions, the following principles emerge:
>
> (*a*) An award, which is
>
> (i) contrary to substantive provisions of law; or
> (ii) the provisions of the Arbitration and Conciliation Act, 1996; or
> (iii) against the terms of the respective contract; or
> (iv) patently illegal; or
> (v) prejudicial to the rights of the parties;
>
> is open to interference by the court under Section 34(2) of the Act.
>
> (*b*) The award could be set aside if it is contrary to:
>
> (a) fundamental policy of Indian law; or
> (b) the interest of India; or
> (c) justice or morality.

(*c*) The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court.

(*d*) It is open to the court to consider whether the award is against the specific terms of contract and if so, interfere with it on the ground that it is patently illegal and opposed to the public policy of India. ……"

17. Yet another expansion of the phrase "public policy of India" contained in Section 34 of the 1996 Act was by another judgment of this Court in **Western Geco** (supra), which was explained in **Associate Builders** (supra) as follows:

"**28.** In a recent judgment, *ONGC Ltd.* v. *Western Geco International Ltd.* [(2014) 9 SCC 263 : (2014) 5 SCC (Civ) 12], this Court added three other distinct and fundamental juristic principles which must be understood as a part and parcel of the fundamental policy of Indian law. The Court held: (SCC pp. 278-80, paras 35 & 38-40)

"*35*. What then would constitute the 'fundamental policy of Indian law' is the question. The decision in *ONGC* [(2003) 5 SCC 705 : AIR 2003 SC 2629] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression 'fundamental policy of Indian law', we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The *first and foremost* is the principle that in every determination whether by a court or other authority that affects the rights of a citizen or leads to any civil consequences, the court or

authority concerned is bound to adopt what is in legal parlance called a '*judicial approach*' in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

xxx xxx xxx

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated *audi alteram partem* rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must

apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.

39. No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law. Perversity or irrationality of decisions is tested on the touchstone of *Wednesbury* [*Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corpn.*, (1948) 1 KB 223 : (1947) 2 All ER 680 (CA)] principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.

40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. 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 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 play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest."

(emphasis in original)

29. It is clear that the juristic principle of a "judicial approach" demands that a decision be fair, reasonable and objective. On the obverse side, anything arbitrary

and whimsical would obviously not be a determination which would either be fair, reasonable or objective.

30. The *audi alteram partem* principle which undoubtedly is a fundamental juristic principle in Indian law is also contained in Sections 18 and 34(2)(*a*)(*iii*) of the Arbitration and Conciliation Act. These sections read as follows:

> "**18. *Equal treatment of parties***.—The parties shall be treated with equality and each party shall be given a full opportunity to present his case.
>
> xxx xxx xxx
>
> **34. *Application for setting aside arbitral award***.—
>
> xxx xxx xxx
>
> (2) An arbitral award may be set aside by the court only if—
>
> (*a*) the party making the application furnishes proof that—
>
> xxx xxx xxx
>
> (*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;"

31. The third juristic principle is that a decision which is perverse or so irrational that no reasonable person would have arrived at the same is important and requires some degree of explanation. It is settled law that where:

(i) a finding is based on no evidence, or
(ii) an Arbitral Tribunal takes into account something irrelevant to the decision which it arrives at; or
(iii) ignores vital evidence in arriving at its decision,

such decision would necessarily be perverse.

32. A good working test of perversity is contained in two judgments. In *Excise and Taxation Officer-cum-*

Assessing Authority v. *Gopi Nath & Sons* [1992 Supp (2) SCC 312], it was held: (SCC p. 317, para 7)

> "*7*. … It is, no doubt, true that if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law."

In *Kuldeep Singh* v. *Commr. of Police* [(1999) 2 SCC 10 : 1999 SCC (L&S) 429], it was held: (SCC p. 14, para 10)

> "*10*. A broad distinction has, therefore, to be maintained between the decisions which are perverse and those which are not. If a decision is arrived at on no evidence or evidence which is thoroughly unreliable and no reasonable person would act upon it, the order would be perverse. But if there is some evidence on record which is acceptable and which could be relied upon, howsoever compendious it may be, the conclusions would not be treated as perverse and the findings would not be interfered with."

33. It must clearly be understood that 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 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 arbitral 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 arbitrator's approach is not arbitrary or capricious, then he is the last word on facts. In *P.R. Shah, Shares & Stock Brokers (P) Ltd.* v. *B.H.H. Securities (P) Ltd.* [(2012) 1 SCC 594 : (2012) 1 SCC (Civ) 342], this Court held: (SCC pp. 601-02, para 21)

> "*21*. A court does not sit in appeal over the award of an Arbitral Tribunal by reassessing or reappreciating the evidence. An award can be challenged only under the grounds mentioned in Section 34(2) of the Act. The Arbitral Tribunal has examined the facts and held that both the second respondent and the appellant are liable. The case as put forward by the first respondent has been accepted. Even the minority view was that the second respondent was liable as claimed by the first respondent, but the appellant was not liable only on the ground that the arbitrators appointed by the Stock Exchange under Bye-law 248, in a claim against a non-member, had no jurisdiction to decide a claim against another member. The finding of the majority is that the appellant did the transaction in the name of the second respondent and is therefore, liable along with the second respondent. Therefore, in the absence of any ground under Section 34(2) of the Act, it is not possible to re-examine the facts to find out whether a different decision can be arrived at."
>
> **34.** It is with this very important caveat that the two fundamental principles which form part of the fundamental policy of Indian law (that the arbitrator must have a judicial approach and that he must not act perversely) are to be understood."

18. It is at this stage that certain fundamental changes were made in the law pursuant to the 246th Report of the Law Commission of India ["**Law Commission Report**"] of August 2014. The Law Commission Report first suggested an amendment to the Preamble of the 1996 Act as follows:

> "<u>Amendment to the Preamble</u>

After the words aforesaid “Model Law and Rules” the following be inserted:

“And WHEREAS it is further required to improve the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards as also to define the law relating to conciliation, in order to provide a fair, expeditious and cost-effective means of dispute resolution;”

[**NOTE**: This amendment is proposed in order to further demonstrate and reaffirm the Act’s focus on achieving the objectives of fairness, speed and economy in resolution of disputes through arbitration.]”

The Law Commission Report, when it came to setting aside of domestic awards and recognition or enforcement of foreign awards, prescribed certain changes to the 1996 Act as follows:

“**SETTING ASIDE OF DOMESTIC AWARDS AND RECOGNITION / ENFORCEMENT OF FOREIGN AWARDS**

34. Once an arbitral award is made, an aggrieved party may apply for the setting aside of such award. Section 34 of the Act deals with setting aside a domestic award and a domestic award resulting from an international commercial arbitration whereas section 48 deals with conditions for enforcement of foreign awards. As the Act is currently drafted, the grounds for setting aside (under section 34) and conditions for refusal of enforcement (section 48) are in *pari materia*. The Act, as it is presently drafted, therefore, treats all three types of awards – purely domestic award (i.e. domestic award not resulting from an international commercial arbitration), domestic award in an international commercial arbitration and a foreign award – as the same. The Commission believes that this has caused some problems. <u>The 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</u>

domestic award in an international commercial arbitration.

35. It is for this reason that the Commission has recommended the addition of section 34 (2A) to deal with purely domestic awards, which may also be set aside by the Court if the Court finds that such award is vitiated by "patent illegality appearing on the face of the award." In order to provide a balance and to avoid excessive intervention, it is clarified in the proposed *proviso* to the proposed section 34 (2A) that such "an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence." The Commission believes that this will go a long way to assuage the fears of the judiciary as well as the other users of arbitration law who expect, and given the circumstances prevalent in our country, legitimately so, greater redress against purely domestic awards. This would also do away with the unintended consequences of the decision of the Supreme Court in *ONGC vs. Saw Pipes Ltd*, (2003) 5 SCC 705, which, although in the context of a purely domestic award, had the unfortunate effect of being extended to apply equally to both awards arising out of international commercial arbitrations as well as foreign awards, given the statutory language of the Act. The amendment to section 28(3) has similarly been proposed solely in order to remove the basis for the decision of the Supreme Court in *ONGC vs. Saw Pipes Ltd*, (2003) 5 SCC 705 – and in order that any contravention of a term of the contract by the tribunal should not *ipso jure* result in rendering the award becoming capable of being set aside. The Commission believes no similar amendment is necessary to section 28 (1) given the express restriction of the public policy ground.

36. Although the Supreme Court has held in *Shri Lal Mahal v Progetto Grano Spa*, (2014) 2 SCC 433, that the expansive construction accorded to the term "public policy" in *Saw Pipes* cannot apply to the use of the same term "public policy of India" in section 48(2)(b), the recommendations of the Commission go even further and are intended to ensure that the legitimacy of court

intervention to address patent illegalities in purely domestic awards is directly recognised by the addition of section 34 (2A) and not indirectly by according an expansive definition to the phrase "public policy".

37. In this context, the Commission has further recommended the restriction of the scope of "public policy" in both sections 34 and 48. This is to bring the definition in line with the definition propounded by the Supreme Court in *Renusagar Power Plant Co Ltd v General Electric Co*, AIR 1994 SC 860 where the Supreme Court while construing the term "public policy" in section 7(1)(b)(ii) of Foreign Awards (Recognition and Enforcement) Act, 1961 held that an award would be contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". The formulation proposed by the Commission is even tighter and does not include the reference to "interests of India", which is vague and is capable of interpretational misuse, especially in the context of challenge to awards arising out of international commercial arbitrations (under S 34) or foreign awards (under S 48). Under the formulation of the Commission, an award can be set aside on public policy grounds *only* if it is opposed to the "fundamental policy of Indian law" or it is in conflict with "most basic notions of morality or justice"."

(emphasis supplied)

19. Consequently, changes were suggested in Sections 28, 34, and 48 of the 1996 Act. The amendment to Section 28 was prescribed in the following terms:

"Amendment of Section 28

16. In section 28,

xxx xxx xxx

(ii) In sub-section (3), after the words "tribunal shall decide" delete the words "in accordance with" and add the words "having regard to"

[**Note**: This amendment is intended to overrule the effect of *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705, where the Hon'ble Supreme Court held that any contravention of the terms of the contract would result in the award falling foul of Section 28 and consequently being against public policy.]"

Similarly, amendment of Section 34 was prescribed as follows:

"Amendment of Section 34

18. In section 34,

(i) In sub-section (1), after the words "sub-section (2)" add the words ", subsection (2A)".

(ii) In sub-section (2), after the word "*Explanation*.—" delete the words "Without prejudice to the generality of sub-clause (ii), it is hereby declared, for" and add the word "For" and after the words "the avoidance of any doubt," add the words "it is clarified" and after the words "public policy of India" add the word "only" and after the word "if" delete the word "-" and add the word ":" and add the sub-clause "(a)" before the words "the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81" and add the word "; or" after the words "violation of section 75 or section 81" and add sub-clause "(b) it is in contravention with the fundamental policy of Indian law; or" and add sub-clause "(c) it is in conflict with the most basic notions of morality or justice."

[**NOTE**: The proposed Explanation II is required to bring the standard for setting aside an award in conformity with the decision of the Supreme Court in *Renusagar Power Co. Ltd. v. General Electric Co*., 1994 Supp (1) SCC 644 and *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 SCC 433, for awards in both domestic as well as international commercial arbitrations. Ground (c) reflects an internationally recognized formulation. Such a formulation further tightens the *Renusagar* test and ensures that "morality or justice" – terms used in *Renusagar* – cannot be used to widen the test.]

(iii) After the *Explanation* in sub-section (2), insert sub-section "(2A) An 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.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence."

[**NOTE**: The proposed S 34(2A) provides an additional, albeit carefully limited, ground for setting aside an award arising out of a domestic arbitration (and not an international commercial arbitration). The scope of review is based on the patent illegality standard set out by the Supreme Court in *ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705. The proviso creates exceptions for erroneous application of the law and re-appreciation of evidence, which cannot be the basis for setting aside awards.]

xxx xxx xxx"

So far as Section 48 is concerned, an amendment was proposed as follows:

"Amendment of Section 48

22. In section 48,

(i) In sub-section (2), in the "*Explanation*.—", delete the words "Without prejudice to the generality of clause (b), it is hereby declared, for" and add the word "For" and after the words "avoidance of any doubt," add the words "it is clarified" and after the words "the public policy of India" add the word "only" and after the word "if" delete "-" and ";" and insert sub-clause "(a)" before the words "the making of the award" and delete "." And add ";" after the words "by fraud or corruption" and add sub-clauses "(b) it is in contravention with the fundamental policy of Indian law; (c) it is in conflict with India's most basic notions of morality or justice."

xxx xxx xxx"

20. After **Western Geco** (supra) was delivered by this Court, a Supplementary Report of February 2015 ["**Supplementary Report**"] was made by the Law Commission of India, in which the Law Commission stated:

> "**10. The 246th Report of the Law Commission and the decision in *Western Geco*.**
> **10.1.** The Law Commission, in the 246th Report, provided for the same narrow standard, namely that a *mere* violation of law of India would not be a violation of 'public policy' in cases of *international commercial arbitrations held in India*. It suggested substantial amendments to Section 34 of the Act, with an endeavour to ensure that the *Renusagar* position applies to all foreign awards and all awards passed in international commercial arbitrations. With respect to domestic arbitrations, the Commission recommended that the "patent illegality" test be retained, although it be construed more narrowly than under the *Saw Pipes* regime. In this regard, the following provisions were added to Section 34(2)(b)(ii) and a new provision, Section 34(2A) was introduced. These provisions are stated as follows:
>
> > S. 34(2)(b)(ii) the arbitral award is in conflict with the public policy of India.
> >
> > Explanation.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India only if:
> >
> > (a) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81;
> >
> > (b) it is in contravention with the fundamental policy of Indian law; or
> >
> > (c) it is in conflict with the most basic notions of morality or justice.
> >
> > (2A) An 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.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciating evidence.

10.2. The above amendments were suggested on the assumption that other terms such as "fundamental policy of Indian law" or conflict with "most basic notions of morality or justice" would not be widely construed.

10.3. However, a month after the submission of the 246th Report in August 2014, the term "fundamental policy of India" was construed widely by a three-judge bench of Supreme Court in *ONGC Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263 in September to include an award that "no reasonable person would have arrived at". This permitted the review of an arbitral award on merits on the basis of it violating public policy. The Supreme Court's decision was followed by a subsequent two-judge bench in *Associate Builders v. Delhi Development Authority*, (2015) 3 SCC 49 dated 25.11.2014. In the words of Supreme Court in *Western Geco*:

35. What then would constitute the "fundamental policy of Indian law" is the question. The decision in ONGC [*ONGC Ltd. v. Saw Pipes Ltd.*, (2003) 5 SCC 705] does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "fundamental policy of Indian law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the fundamental policy of Indian law. The first and foremost is the principle that in every determination whether by a court or other authority that affects the rights of a

citizen or leads to any civil consequences, the court or authority concerned is bound to adopt what is in legal parlance called a “judicial approach” in the matter. The duty to adopt a judicial approach arises from the very nature of the power exercised by the court or the authority does not have to be separately or additionally enjoined upon the fora concerned. What must be remembered is that the importance of a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a court, tribunal or authority vulnerable to challenge.

38. Equally important and indeed fundamental to the policy of Indian law is the principle that a court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated audi alteram partem rule one of the facets of the principles of natural justice is that the court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication. Application of mind is best demonstrated by disclosure of the mind and disclosure of mind is best done by recording reasons in support of the decision which the court or authority is taking. The requirement that an adjudicatory authority must

> apply its mind is, in that view, so deeply embedded in our jurisprudence that it can be described as a fundamental policy of Indian law.
>
> 39. *No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a court of law*. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury principle [*Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* (1948) 1 KB 223, (1947) 2 All ER 680 (CA)] of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a court of law often in writ jurisdiction of the superior courts but no less in statutory processes wherever the same are available.
>
> 40. It is neither necessary nor proper for us to attempt an exhaustive enumeration of what would constitute the fundamental policy of Indian law nor is it possible to place the expression in the straitjacket of a definition. 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 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 play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest.
>
> (emphasis in original)

Therefore, among others, the Wednesbury principle of reasonableness has now been incorporated into the public policy test under Section 34, as it is deemed to be part of “fundamental policy of Indian law.”

> **10.4.** Such a power to review an award on merits is contrary to the object of the Act and international practice. As stated in the Statement of Objects and Reasons of the 1996 Act itself, one of the principal objects of that law was "minimization of judicial intervention" [The 1996 Act, Statement of Objects and Reasons, paragraph 4(v)].
>
> (emphasis supplied)
>
> **10.5.** As the Supreme Court's judgment in *Western Geco* (supra) would expand the Court's power rather than minimise it, and given that it is also contrary to international practice, a clarification needs to be incorporated to ensure that the term "fundamental policy of Indian law" is narrowly construed. If not, all the amendments suggested by the Law Commission in relation to construction of the term "public policy" will be rendered nugatory, as the applicability of Wednesbury principles to public policy will certainly open the floodgates.
>
> **10.6.** This will have four major deleterious effect, being (a) a further erosion of faith in arbitration proceedings amongst individuals and businesses in India and abroad; (b) a reduction in popularity of India as a destination for international and domestic commercial arbitration; (c) increased investor concern, amongst domestic and foreign investors, about the efficacy and speed of dispute resolution and potential for judicial interference; and, (d) an incidental increase in judicial backlog. In this regard, the following amendment to the draft is suggested, by inserting Explanation 2 to Section 34(2)(b)(ii) of the Act:
>
> > "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."

21. Pursuant to the Law Commission Report, the 1996 Act was amended by the Amendment Act, 2015 with effect from 23.10.2015.

The Statement of Objects and Reasons of the Arbitration and Conciliation (Amendment) Bill, 2015 is set out as follows:

> "xxx xxx xxx
>
> **2.** The Act was enacted to provide for speedy disposal of cases relating to arbitration with least court intervention. With the passage of time, some difficulties in the applicability of the Act have been noticed. Interpretation of the provisions of the Act by courts in some cases have resulted in delay of disposal of arbitration proceedings and increase in interference of courts in arbitration matters, which tend to defeat the object of the Act. With a view to overcome the difficulties, the matter was referred to the Law Commission of India, which examined the issue in detail and submitted its 176th Report. On the basis of the said Report, the Arbitration and Conciliation (Amendment) Bill, 2003 was introduced in the Rajya Sabha on 22-12-2003. The said Bill was referred to the Department-related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice for examination and report. The said Committee, submitted its Report to Parliament on 4-8-2005, wherein the Committee recommended that since many provisions of the said Bill were contentious, the Bill may be withdrawn and a fresh legislation may be brought after considering its recommendations. Accordingly, the said Bill was withdrawn from the Rajya Sabha.
>
> **3.** On a reference made again in pursuance of the above, the Law Commission examined and submitted its 246th Report on "Amendments to the Arbitration and Conciliation Act, 1996" in August, 2014 and recommended various amendments in the Act. The proposed amendments to the Act would facilitate and encourage Alternative Dispute Mechanism, especially arbitration, for settlement of disputes in a more user-friendly, cost effective and expeditious disposal of cases since India is committed to improve its legal framework to obviate in disposal of cases.
>
> **4.** As India has been ranked at 178 out of 189 nations in the world in contract enforcement, it is high time that

urgent steps are taken to facilitate quick enforcement of contracts, easy recovery of monetary claims and award of just compensation for damages suffered and reduce the pendency of cases in courts and hasten the process of dispute resolution through arbitration, so as to encourage investment and economic activity.

5. As Parliament was not in session and immediate steps were required to be taken to make necessary amendments to the Arbitration and Conciliation Act, 1996 to attract foreign investment by projecting India as an investor friendly country having a sound legal framework, the President was pleased to promulgate the Arbitration and Conciliation (Amendment) Ordinance, 2015.

xxx xxx xxx"

(emphasis supplied)

22. Section 28(3), before the Amendment Act, read as follows:

"**28. Rules applicable to substance of dispute**.—

xxx xxx xxx

(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Section 28(3), after amendment, reads as follows:

"**28. Rules applicable to substance of dispute**.—

xxx xxx xxx

(3) 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."

Section 34(2)(b)(ii), after amendment, reads as follows:

"**34. Application for setting aside arbitral award**.—

xxx xxx xxx

(2) An arbitral award may be set aside by the Court only if —

xxx xxx xxx

(*b*) the Court finds that—

xxx xxx xxx

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

Explanation 1.—For the avoidance of any doubt, it is 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.

Explanation 2.—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.

xxx xxx xxx"

Sub-section (2A) of Section 34 was also added, which reads as follows:

"**34. Application for setting aside arbitral award**.—

xxx xxx xxx

(2A) An 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:

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence.

xxx xxx xxx"

Correspondingly, Section 48 was also amended to bring the unamended Section 48 in line with the amendments made in Section 34, except that sub-section (2A) of Section 34 is missing in Section 48 as the said Section deals with recognition and enforcement of foreign awards. Section 48, post amendment, reads as follows:

"**48. Conditions for enforcement of foreign awards**.—

xxx xxx xxx

(2) Enforcement of an arbitral award may also be refused if the Court finds that—

xxx xxx xxx

(*b*) the enforcement of the award would be contrary to the public policy of India.

Explanation 1.—For the avoidance of any doubt, it is 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.

Explanation 2.—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.

xxx xxx xxx"

23. What is clear, therefore, is that the expression “public policy of India”, whether contained in Section 34 or in Section 48, would now mean the “fundamental policy of Indian law” as explained in paragraphs 18 and 27 of **Associate Builders** (supra), i.e., the fundamental policy of Indian law would be relegated to the “Renusagar” understanding of this expression. This would necessarily mean that the **Western Geco** (supra) expansion has been done away with. In short, **Western Geco** (supra), as explained in paragraphs 28 and 29 of **Associate Builders** (supra), would no longer obtain, as under the guise of interfering with an award on the ground that the arbitrator has not adopted a judicial approach, the Court’s intervention would be on the merits of the award, which cannot be permitted post amendment. However, insofar as principles of natural justice are concerned, as contained in Sections 18 and 34(2)(a)(iii) of the 1996 Act, these continue to be grounds of challenge of an award, as is contained in paragraph 30 of **Associate Builders** (supra).

24. It is important to notice that the ground for interference insofar as it concerns “interest of India” has since been deleted, and therefore, no longer obtains. Equally, the ground for interference on the basis that the award is in conflict with justice or morality is now to be understood as a conflict with the “most basic notions of morality or justice”. This

again would be in line with paragraphs 36 to 39 of **Associate Builders** (supra), as it is only such arbitral awards that shock the conscience of the court that can be set aside on this ground.

25. Thus, it is clear that public policy of India is now constricted to mean firstly, that a domestic award is contrary to the fundamental policy of Indian law, as understood in paragraphs 18 and 27 of **Associate Builders** (supra), or secondly, that such award is against basic notions of justice or morality as understood in paragraphs 36 to 39 of **Associate Builders** (supra). Explanation 2 to Section 34(2)(b)(ii) and Explanation 2 to Section 48(2)(b)(ii) was added by the Amendment Act only so that **Western Geco** (supra), as understood in **Associate Builders** (supra), and paragraphs 28 and 29 in particular, is now done away with.

26. Insofar as domestic awards made in India are concerned, an additional ground is now available under sub-section (2A), added by the Amendment Act, 2015, to Section 34. Here, there must be patent illegality appearing on the face of the award, which refers to such illegality as goes to the root of the matter but which does not amount to mere erroneous application of the law. In short, what is not subsumed within “the fundamental policy of Indian law”, namely, the contravention

of a statute not linked to public policy or public interest, cannot be brought in by the backdoor when it comes to setting aside an award on the ground of patent illegality.

27. Secondly, it is also made clear that re-appreciation of evidence, which is what an appellate court is permitted to do, cannot be permitted under the ground of patent illegality appearing on the face of the award.

28. To elucidate, paragraph 42.1 of **Associate Builders** (supra), namely, a mere contravention of the substantive law of India, by itself, is no longer a ground available to set aside an arbitral award. Paragraph 42.2 of **Associate Builders** (supra), however, would remain, for if an arbitrator gives no reasons for an award and contravenes Section 31(3) of the 1996 Act, that would certainly amount to a patent illegality on the face of the award.

29. The change made in Section 28(3) by the Amendment Act really follows what is stated in paragraphs 42.3 to 45 in **Associate Builders** (supra), namely, that the construction of the terms of a contract is primarily for an arbitrator to decide, unless the arbitrator construes the contract in a manner that no fair-minded or reasonable person would; in short, that the arbitrator's view is not even a possible view to take.

Also, if the arbitrator wanders outside the contract and deals with matters not allotted to him, he commits an error of jurisdiction. This ground of challenge will now fall within the new ground added under Section 34(2A).

30. What is important to note is that a decision which is perverse, as understood in paragraphs 31 and 32 of **Associate Builders** (supra), while no longer being a ground for challenge under "public policy of India", would certainly amount to a patent illegality appearing on the face of the award. Thus, a finding based on no evidence at all or an award which ignores vital evidence in arriving at its decision would be perverse and liable to be set aside on the ground of patent illegality. Additionally, a finding based on documents taken behind the back of the parties by the arbitrator would also qualify as a decision based on no evidence inasmuch as such decision is not based on evidence led by the parties, and therefore, would also have to be characterised as perverse.

31. Given the fact that the amended Act will now apply, and that the "patent illegality" ground for setting aside arbitral awards in international commercial arbitrations will not apply, it is necessary to

advert to the grounds contained in Section 34(2)(a)(iii) and (iv) as applicable to the facts of the present case.

Section 34(2)(a) Does Not Entail a Challenge to an Arbitral Award on Merits

32. Section 34(2)(a)(iii) and (iv) state as under:

> "**34. Application for setting aside arbitral award**.—
> xxx xxx xxx
> (2) An arbitral award may be set aside by the Court only if—
> (*a*) the party making the application furnishes proof that—
> xxx xxx xxx
> (*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:
> Provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside; or
> xxx xxx xxx"

33. In **Renusagar** (supra), this Court dealt with a challenge to a foreign award under Section 7 of the Foreign Awards (Recognition and

Enforcement) Act, 1961 [“**Foreign Awards Act**”]. The Foreign Awards Act has since been repealed by the 1996 Act. However, considering that Section 7 of the Foreign Awards Act contained grounds which were borrowed from Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 [“**New York Convention**”], which is almost in the same terms as Sections 34 and 48 of the 1996 Act, the said judgment is of great importance in understanding the parameters of judicial review when it comes to either foreign awards or international commercial arbitrations being held in India, the grounds for challenge/refusal of enforcement under Sections 34 and 48, respectively, being the same. After referring to the New York Convention, this Court delineated the scope of enquiry of grounds under Sections 34/48 (equivalent to the grounds under Section 7 of the Foreign Awards Act, which was considered by the Court), and held:

> “**34.** Under the Geneva Convention of 1927, in order to obtain recognition or enforcement of a foreign arbitral award, the requirements of clauses (*a*) to (*e*) of Article I had to be fulfilled and in Article II, it was prescribed that even if the conditions laid down in Article I were fulfilled recognition and enforcement of the award would be refused if the Court was satisfied in respect of matters mentioned in clauses (*a*), (*b*) and (*c*). The principles which apply to recognition and enforcement of foreign awards are in substance, similar to those adopted by the English courts at common law. (*See*: Dicey &

Morris, *The Conflict of Laws*, 11th Edn., Vol. I, p. 578). It was, however, felt that the Geneva Convention suffered from certain defects which hampered the speedy settlement of disputes through arbitration. The New York Convention seeks to remedy the said defects by providing for a much more simple and effective method of obtaining recognition and enforcement of foreign awards. Under the New York Convention the party against whom the award is sought to be enforced can object to recognition and enforcement of the foreign award on grounds set out in sub-clauses (*a*) to (*e*) of clause (1) of Article V and the court can, on its own motion, refuse recognition and enforcement of a foreign award for two additional reasons set out in sub-clauses (*a*) and (*b*) of clause (2) of Article V. None of the grounds set out in sub-clauses (*a*) to (*e*) of clause (1) and sub-clauses (*a*) and (*b*) of clause (2) of Article V postulates a challenge to the award on merits.

35. Albert Jan van den Berg in his treatise *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation*, has expressed the view:

> "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. Furthermore, under the Convention the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the grounds for refusal of Article V(1) is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration." (p. 269)

36. Similarly Alan Redfern and Martin Hunter have said:

> "The New York Convention does not permit any review on the merits of an award to which the Convention applies and, in this respect, therefore, differs from the provisions of some systems of national law governing the challenge of an award, where an appeal to the courts on points of law may be permitted." (Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, 2nd Edn., p. 461.)

37. In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits.

xxx xxx xxx

65. This would imply that the defence of public policy which is permissible under Section 7(1)(*b*)(*ii*) should be construed narrowly. In this context, it would also be of relevance to mention that under Article I(*e*) of the Geneva Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1837 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. Article V(2)(*b*) of the New York Convention of 1958 and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of enforcement and the ground of challenge is confined to the recognition and enforcement

> being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(*b*) of the New York Convention and Section 7(1)(*b*)(*ii*) of the Foreign Awards Act is not used in the same sense in which it was used in Article I(*c*) of the Geneva Convention of 1927 and Section 7(1) of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7(1)(*b*)(*ii*) has been used in a narrower sense and 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. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria, it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (*i*) fundamental policy of Indian law; or (*ii*) the interests of India; or (*iii*) justice or morality."
>
> (emphasis supplied)

This judgment was cited with approval in *Redfern and Hunter on International Arbitration* by Nigel Blackaby, Constantine Partasides, Alan Redfern, and Martin Hunter (Oxford University Press, Fifth Ed., 2009) ["**Redfern and Hunter**"] as follows:

> "**11.56.** First, the New York Convention does not permit any review on the merits of an award to which the Convention applies. [This statement, which was made in an earlier edition of this book, has since been cited with approval by the Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.* The court added that in its opinion 'the scope of enquiry before the court

> in which the award is sought to be enforced is limited [to the grounds mentioned in the Act] and does not enable a party to the said proceedings to impeach the Award on merits']. Nor does the Model Law."

The same theme is echoed in standard textbooks on international arbitration. Thus, in *International Commercial Arbitration* by Gary B. Born (Wolters Kluwer, Second Ed., 2014) ["**Gary Born**"], the learned author deals with this aspect of the matter as follows:

> "**[12] No Judicial Review of Merits of Foreign or Non-Domestic Awards in Recognition Actions**
>
> It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign or nondomestic arbitral awards in recognition proceedings. Virtually every authority acknowledges this rule and virtually nobody suggests that this principle should be abandoned. When national courts do review the merits of awards, they labour to categorize their action as an application of public policy, excess of authority, or some other Article V exception, rather than purporting to justify a review of the merits.
>
> [a] **No Judicial Review of Awards Under New York and Inter-American Conventions**
>
> Neither the New York Convention nor the Inter-American Convention contains any exception permitting non-enforcement of an award simply because the arbitrators got their decision on the substance of the parties' dispute wrong, or even badly wrong. This is reasonably clear from the language of the Convention, which makes no reference to the possibility of a review of the merits in Article V's exhaustive list of the exclusive grounds for denying recognition of foreign and nondomestic awards. There is also no hint in the New York Convention's drafting history of any authority to

reconsider the merits of an arbitral award in recognition proceedings.

Likewise, the prohibition against review of the merits of the arbitrator's decision is one of the most fundamental pillars of national court authority interpreting the Convention. This prohibition has repeatedly and uniformly been affirmed by national courts, in both common law and civil law jurisdictions. Simply put: "the court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact" [*Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,* 364 F.3d 274, 287-88 (5th Cir. 2004)]. Thus, in the words of the Luxembourg Supreme Court [*Judgment of 24 November 1993*, XXI Y.B. Comm. Arb. 617, 623 (Luxembourg Cour Supérieure de Justice) (1996)]:

> "The New York Convention does not provide for any control on the manner in which the arbitrators decide on the merits, with as the only reservation, the respect of international public policy. Even if blatant, a mistake of fact or law, if made by the arbitral tribunal, is not a ground for refusal of enforcement of the tribunal's award."

Or, as a Brazilian recognition decision under the Convention held [*Judgment of 19 August 2009, Atecs Mannesmann GmbH v. Rodrimar S/A Transportes Equipamentos Industriais e Armazes Gerais*, XXXV Y.B. Comm. Arb. 330, 331 (Brazilian Tribunal de Justiça) (2010)]:

> "these questions pertain to the merits of the arbitral award that, according to precedents from the Federal Supreme Court and of this Superior Court of Justice, cannot be reviewed by this Court since recognition and enforcement of a foreign award is limited to an analysis of the formal requirements of the award."

Commentators have uniformly adopted the same view of the Convention [*See, for e.g*., K.-H. Böckstiegel, S. Kröll & P. Nacimiento, *Arbitration in Germany* 452 (2007)]."

(at pp. 3707-3710)

(emphasis supplied)

Likewise, the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (2016 Ed.) ["**UNCITRAL Guide on the New York Convention**"] also states:

> "9. The grounds for refusal under article V do not include an erroneous decision in law or in fact by the arbitral tribunal. A court seized with an application for recognition and enforcement under the Convention may not review the merits of the arbitral tribunal's decision. This principle is unanimously confirmed in the case law and commentary on the New York Convention."

The Ground of Challenge under Section 34(2)(a)(iii)

34. Under Section 34(2)(a)(iii), one of the grounds of challenge of an arbitral award is that a party is unable to present its case. In order to understand the import of Section 34(2)(a)(iii), Section 18 of the 1996 Act should also be seen. Section 18 reads as follows:

> "**18. Equal treatment of parties.—**The parties shall be treated with equality and each party shall be given a full opportunity to present his case."
>
> (emphasis supplied)

Section 24(3) also states as follows:

> "**24. Hearings and written proceedings.—**
> xxx xxx xxx

(3) All statements, documents or other information supplied to, or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties."

Section 26 of the 1996 Act is also important and states as follows:

"**26. Expert appointed by arbitral tribunal**.—(1) Unless otherwise agreed by the parties, the arbitral tribunal may—

(*a*) appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and

(*b*) require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in an oral hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

(3) Unless otherwise agreed by the parties, the expert shall, on the request of a party, make available to that party for examination all documents, goods or other property in the possession of the expert with which he was provided in order to prepare his report."

35. Section 24(3) is a verbatim reproduction of Article 24(3) of the UNCITRAL Model Law on International Commercial Arbitration ["**UNCITRAL Model Law**"]. Similarly, Section 26(1) and (2) is a verbatim reproduction of Article 26 of the UNCITRAL Model Law. Sub-

section (3) of Section 26 has been added by the Indian Parliament in enacting the 1996 Act.

36. Sections 18, 24(3), and 26 are important pointers to what is contained in the ground of challenge mentioned in Section 34(2)(a)(iii). Under Section 18, each party is to be given a full opportunity to present its case. Under Section 24(3), all statements, documents, or other information supplied by one party to the arbitral tribunal shall be communicated to the other party, and any expert report or document on which the arbitral tribunal relies in making its decision shall be communicated to the parties. Section 26 is an important pointer to the fact that when an expert's report is relied upon by an arbitral tribunal, the said report, and all documents, goods, or other property in the possession of the expert, with which he was provided in order to prepare his report, must first be made available to any party who requests for these things. Secondly, once the report is arrived at, if requested, parties have to be given an opportunity to put questions to him and to present their own expert witnesses in order to testify on the points at issue.

37. Under the rubric of a party being otherwise unable to present its case, the standard textbooks on the subject have stated that where

materials are taken behind the back of the parties by the Tribunal, on which the parties have had no opportunity to comment, the ground under Section 34(2)(a)(iii) would be made out. In *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards – Commentary*, edited by Dr. Reinmar Wolff (C.H. Beck, Hart, Nomos Publishing, 2012), it is stated:

> "**4. Right to Comment**
>
> According to the principle of due process, the tribunal must grant the parties an opportunity to comment on all factual and legal circumstances that may be relevant to the arbitrators' decision-making.
>
> **a) Right to Comment on Evidence and Arguments Submitted by the Other Party**
>
> As part of their right to comment, the parties must be given an opportunity to opine on the evidence and arguments introduced in the proceedings by the other party. The right to comment on the counterparty's submissions is regarded as a fundamental tenet of adversarial proceedings. However, in accordance with the general requirement of causality, the denial of an opportunity to comment on a particular piece of evidence or argument is not prejudicial, unless the tribunal relied on this piece of evidence or argument in making its decision.
>
> In order to ensure that the parties can exercise their right to comment effectively, the arbitral tribunal must grant them **access to the evidence and arguments submitted by the other side**. Affording a party the opportunity to make submissions or to give its view without also informing it of the opposing side's claims and arguments typically constitutes a violation of due process, unless specific non-disclosure rules apply (*e.g.*, such disclosure would constitute a violation of trade secrets or applicable legal privileges).

In practice, national courts have **afforded arbitral tribunals considerable leeway in setting and adjusting the procedures** by which parties respond to one another's submissions and evidence, reasoning that there were "several ways of conducting arbitral proceedings." Accordingly, absent any specific agreement by the parties, the arbitral tribunal has wide discretion in arranging the parties' right to comment, permitting or excluding the introduction of new claims, and determining which party may have the final word.

b) Right to Comment on Evidence Known to or Determined by the Tribunal

The parties' right to comment also extends to facts that have not been introduced in the proceedings by the parties, but that the tribunal has raised *sua sponte*, provided it was entitled to do so. For instance, if the tribunal gained "**out of court knowledge**" of circumstances (*e.g.*, through its own investigations), it may only rest its decision on those circumstances if it informed both parties in advance and afforded them the opportunity to comment thereon. The same rule applies to cases where an arbitrator intends to base the award on his or her own **expert knowledge**, unless the arbitrator was appointed for his or her special expertise or knowledge (*e.g.*, in quality arbitration). Similarly, a tribunal must give the parties an opportunity to comment on **facts of common knowledge** if it intends to base its decision on those facts, unless the parties should have known that those facts could be decisive for the final award."

(emphasis in original)

In *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, 1999) ["**Fouchard**"] it is stated:

"In some rare cases, recognition or enforcement of an award has been refused on the grounds of a breach of due process. One example is the award made in a quality arbitration where the defendant was never

> informed of the identity of the arbitrators hearing the dispute [*Danish buyer v German (F.R.) seller*, IV Y.B. Comm. Arb. 258 (1979) (Oberlandesgericht Cologne)]. It also occurred in a case where various documents were submitted by one party to the arbitral tribunal but not to the other party [*G.W.I. Kersten & Co. B.V. v. Société Commerciale Raoul Duval et Co.*, XIX Y.B. Comm. Arb. 708 (Amsterdam Court of Appeals) (1992)], in another case where the defendant was not given the opportunity to comment on the report produced by the expert appointed by the tribunal [*Paklito Inv. Ltd. v. Klockner East Asia Ltd.*, XIX Y.B. Comm. Arb. 664, 671 (Supreme Court of Hong Kong) (1994)], and again where the arbitral tribunal criticized a party for having employed a method of presenting evidence which the tribunal itself had suggested [*Iran Aircraft Indus. v Avco Corp*., 980 F.2d 141 (2nd Cir. 1992)]."
>
> (at p. 987)

Gary Born (supra) states:

> "German courts have adopted similar reasoning, holding that the right to be heard entails two related sets of rights: (a) a party is entitled to present its position on disputed issues of fact and law, to be informed about the position of the other parties and to a decision based on evidence or materials known to the parties [*See, e.g.,* Judgment of 5 July 2011, 34 SCH 09/11, II(5)(c)(bb) (Oberlandesgericht Munchen)]; and (b) a party is entitled to a decision by the arbitral tribunal that takes its position into account insofar as relevant [*See, e.g*., Judgment of 5 October 2009, 34 Sch 12/09 (Oberlandesgericht Munchen)]. Other authorities provide comparable formulations of the content of the right to be heard [*See, e.g.*, *Slaney v. Int'l Amateur Athletic Foundation*, 244 F.3d 580, 592 (7th Cir. 2001)]."
>
> (at p. 3225)

Similarly, in *Redfern and Hunter* (supra):

> "**11.73.** The national court at the place of enforcement thus has a limited role. Its function is *not* to decide whether or not the award is correct, as a matter of fact and law. Its function is simply to decide whether there has been a fair hearing. One mistake in the course of the proceedings may be sufficient to lead the court to conclude that there was a denial of justice. For example, in a case to which reference has already been made, a US corporation, which had been told that there *was* no need to submit detailed invoices, had its claim rejected by the Iran-US Claims Tribunal, for failure to submit detailed invoices! The US court, rightly it is suggested, refused to enforce the award against the US company [*Iran Aircraft Ind v Avco Corp.* 980 F.2d. 141 (2nd Cir. 1992)]. In different circumstances, a German court held that an award that was motivated by arguments that had not been raised by the parties or the tribunal during the arbitral proceedings, and thus on which the parties had not had an opportunity to comment, violated due process and the right to be heard [*See* the decision of the Stuttgart Court of Appeal dated 6 October 2001 referred to in Liebscher, *The Healthy Award, Challenge in International Commercial Arbitration* (Kluwer law International, 2003), 406]. Similarly, in *Kanoria v Guinness*, [2006] EWCA Civ. 222, the English Court of Appeal decided that the respondent had not been afforded the chance to present its case when critical legal arguments were made by the claimant at the hearing, which the respondent could not attend due to a serious illness. In the circumstances, the court decided that 'this is an extreme case of potential injustice' and resolved not to enforce the arbitral award.
>
> **11.74.** Examples of unsuccessful 'due process' defences to enforcement are, however, more numerous. In *Minmetals Germany v Ferco Steel,* [1999] CLC 647, the losing respondent in an arbitration in China opposed enforcement in England on the grounds that the award was founded on evidence that the arbitral tribunal had obtained through its own investigation. An English court

rejected this defence on the basis that the respondent was eventually given an opportunity to ask for the disclosure of evidence at issue and comment on it, but declined to do so. The court held that the due process defence to enforcement was not intended to accommodate circumstances in which a party had failed to take advantage of an opportunity duly accorded to it."

38. In **Minmetals Germany GmbH v. Ferco Steel Ltd.**, [1999] CLC 647, the Queen's Bench Division referred to this ground under the New York Convention, and held as follows:

"**The inability to present a case issue**

Although many of those states who are parties to the New York Convention are civil law jurisdictions or are those which like China derive the whole or part of their procedural rules from the civil law and therefore have essentially an inquisitorial system, art. V of the Convention protects the requirements of natural justice reflected in the *audi alteram partem* rule. Therefore, where the tribunal is procedurally entitled to conduct its own investigations into the facts, the effect of this provision will be to avoid enforcement of an award based on findings of fact derived from such investigations if the enforcee has not been given any reasonable opportunity to present its case in relation to the results of such investigations. Article 26 of the CIETAC rules by reference to which the parties had agreed to arbitrate provided:

> 'Article 26 – The parties shall give evidence for the facts on which their claim or defence is based. The arbitration tribunal may, if it deems it necessary, make investigations and collect evidence on its own initiative.'

That, however, was not treated by the Beijing court as permitting the tribunal to reach its conclusions and make an award without first disclosing to both parties the materials which it had derived from its own

> investigations. That quite distinctly appears from the grounds of the court's decision – that Ferco was, for reasons for which it was not responsible, unable 'to state its view'. Those reasons could only have been its lack of prior access to the sub-sale award and the evidence which underlay it. I conclude that it was to give Ferco's lawyer an opportunity to refute this material that the Beijing court ordered a 'resumed' arbitration."
>
> (at pp. 656-657)

The Ground of Challenge under Section 34(2)(a)(iv)

39. So far as this defence is concerned, standard textbooks on the subject have held that the expression "submission to arbitration" either refers to the arbitration agreement itself, or to disputes submitted to arbitration, and that so long as disputes raised are within the ken of the arbitration agreement or the disputes submitted to arbitration, they cannot be said to be disputes which are either not contemplated by or which fall outside the arbitration agreement. The expression "submission to arbitration" occurs in various provisions of the 1996 Act. Thus, under Section 28(1)(a), an arbitral tribunal "… shall decide the dispute submitted to arbitration …". Section 43(3) of the 1996 Act refers to "… an arbitration agreement to submit future disputes to arbitration ….". Also, it has been stated that where matters, though not strictly in issue, are connected with matters in issue, they would not readily be held to be matters that could be considered to be outside or

beyond the scope of submission to arbitration. Thus, in *Fouchard* (supra), it is stated:

> "This provision applies where the arbitrators have gone beyond the terms of the arbitration agreement. It complements Article V, paragraph 1(a), which concerns invalid arbitration agreements. The two grounds are similar in nature: in both cases, the arbitrator will have ruled in the absence of an arbitration agreement, either because the agreement is void (as in subsection (a)) or because it does not cover the subject-matter on which the arbitrator reached a decision (as in subsection (c)). For that reason, more recent arbitration statutes often either treat the two grounds as one, as in Article 1502 1º of the French New Code of Civil Procedure, or refer generally to the "absence of a valid arbitration agreement," as in Article 1065 of the Netherlands Code of Civil Procedure.
>
> However, Article V, paragraph 1(c) does not cover all the cases listed in Article 1502 3º of the French New Code of Civil Procedure, which provides that recognition or enforcement can be refused where "the arbitrator ruled without complying with the mission conferred upon him or her." That extends to decisions that are either *infra petita* and *ultra petita,* as well as to situations where the arbitrators have exceeded their powers in the examination of the merits of the case (for example, by acting as *amiable compositeurs* when that was not agreed by the parties, or by failing to apply the rules of law chosen by the parties). Generally speaking, such situations cannot be said to be outside the terms of the arbitration agreement within the meaning of the New York Convention. In practice, it is only where the terms of reference – which, provided that they have been accepted by the parties, can constitute a form of arbitration agreement – set out the parties' claims in detail that arbitrators who have decided issues other than those raised in such claims can be said both to have ruled *ultra petita* and to have exceeded the terms of the arbitration agreement. If, on the other hand, the

arbitration agreement is drafted in general terms and the claims are not presented in a way that contractually determines the issues to be resolved by the arbitrators, a decision that is rendered *ultra petita* would not contravene Article V, paragraph 1(c).

It is important to note that the Convention provides that the refusal of recognition or enforcement can be confined to aspects of the award which fail to comply with the terms of the arbitration agreement, provided that those aspects can be separated from the rest of the award (Art. V(1)(c)).

Once again, the courts have taken a very restrictive view of the application of this ground."

(at p. 988)

Similarly, *Gary Born* (supra) states:

"There are a number of recurrent grounds for claiming that an arbitral tribunal has exceeded its authority. These generally involve claims of either *extra petita* (the tribunal went beyond the limits of its authority) or *infra petita* (the tribunal failed to fulfil its mandate by not exercising authority it was granted).

[a] Awards Ruling on Matters Outside Scope of Parties' Submissions

Article 34(2)(a)(iii) permits annulment of awards where the arbitrators "rule (d) on issues not presented to [them] by the parties" – so-called "extra *petita"* or "*ultra petita"* [*Allen v. Hounga* [2012] EWCA Civ 609 (English Ct. App.)] As with other grounds for annulment, most courts are reluctant to accept claims that the arbitrators exceeded the scope of the parties' submissions [*See, e.g., Stark v. Sandberg, Phoenix & von Gontard, PC,* 381 F.3d 793, 800 (8th Cir. 2004)].

One of the clearest examples of an excess of authority under Article 34(2)(a)(iii) and parallel provisions of other national arbitration legislation is a tribunal's award of relief that neither party requested. A French appellate decision explained the rationale for these limits on the arbitrators' authority (which, in this respect, are more rigorous under French law than some other

national arbitration regimes) as follows [Judgment of 30 June 2005, *Pilliod v. Econosto*, 2006 Rev. arb. 687, 688 (Paris Cour d'appel)]:

> "The fact that the contract was governed by French law does not allow the arbitrators to award interest pursuant to Art.1153 (1) of the Civil Code on the sole ground that this is permitted under that provision, even in the absence of a request of the parties. There is a difference between the role of a state court and that of an arbitrator, whose jurisdiction is based on the parties' consent and who must therefore preserve the consensual character of the proceedings by consulting the parties on their intention as to the mission of the tribunal."

Similarly, another court annulled an award on the grounds that the relief ordered by the tribunal "exceeded the arbitrators' powers because it was not sought by either party, and was completely irrational because it wrote material terms of the contract out of existence" [*PMA Capital Inc. Co. v. Platinum Underwriters Bermuda, Ltd.,* 400 F. Appx. 654 (3d Cir. 2010)].

Nonetheless, an award will not be subject to annulment where the arbitrators grant relief that, while different from what a party requested, is subsumed within relief that the party requested (most obviously, a lower quantum of damages than that requested by the claimant). More generally, courts also accord arbitrators substantial discretion in fashioning remedies, including granting relief that neither party has expressly requested [*See, e.g., Harper Ins. Ltd. v. Century Indem. Co.,* 819 F. Supp. 2d 270, 277 (S.D.N.Y 2011)]. Although categorical rules are impossible to formulate, the decisive issue appears to be whether the relief granted by the arbitrators was subsumed within or reasonably related to that requested by the parties.

Another example of an excess of authority under Article 34(2)(a)(iii) and parallel provisions of other arbitration statues involves awards deciding issues or disputes that the parties have not submitted to the arbitral tribunal [*See, e.g., Emilio v. Sprint Spectrum LP,*

2013 WL 203361 (2d Cir.)]. A tribunal exceeds its authority by ruling on an issue not presented by the parties in the arbitration even if the issue or dispute that it addresses is within the scope of the parties' arbitration agreement. As one court explained: "Arbitrators have the authority to decide only those issues actually submitted by the parties" [*AGCO Corp. v. Anglin,* 216 F.3d 589, 593 (7th Cir. 2000)].

Doubts about the scope of the parties' submissions are resolved in most legal systems in favour of encompassing matters decided by the arbitrators. Put differently, a considerable measure of judicial deference is accorded to the arbitrators' interpretation of the scope of their mandate under the parties' submissions [*See, e.g., Downer v. Siegel,* 489 F.3d 623, 627 (5th Cir. 2007)]. In the words of one court, "[w]e will not over-scrutinize the panel's language and leap to the conclusion that it exceeded its power in formulating the award" [*Certain Underwriters at Lloyd's v. BCS Ins. Co.,* 239 F. Supp. 2d 812,817 (N.D. III. 2003)].

Some annulment courts have adopted unduly formalistic approaches to the question whether a particular issue or argument was submitted to the tribunal. For example, one recent Singaporean decision held that issues not raised in the parties' "pleadings" had not been submitted to the tribunal, notwithstanding the fact that these issues had been raised in argument during the arbitration [*See PT Prima Int'l Dev. v. Kempinski Hotels SA,* [2012] SGCA 35]. The better view is not to look to local rules of civil procedure or litigation practices in determining whether an issue was presented to the arbitrators; the proper inquiry is instead a pragmatic one into whether the parties and tribunal had an opportunity to consider and submit evidence and argument on a particular issue."

(at pp. 3289-3293)
(emphasis supplied)

Redfern and Hunter (supra) states as follows:

"**11.77.** The first part of this ground for refusal of enforcement under the Convention (and under the Model Law) envisages a situation in which the arbitral tribunal is alleged to have acted in excess of its authority, ie *ultra petita,* and to have dealt with a dispute that was not submitted to it. According to a leading authority on the Convention, the courts almost invariably reject this defence [*See* Albert Jan van den Berg, '*Court Decisions on the New York Convention*', Swiss Arbitration Association Conference, February 1996, Collected Reports, 86]. By way of example, the German courts have rejected *ultra petita* defences raised in complaint of an arbitral tribunal's application of *lex mercatoria,* [*see* the decision of the regional court of Hamburg of 18 September 1997, (2000) XXV Y.B. Comm. Arb. 710] and an arbitral tribunal's award of more interest than was claimed [*see* the decision of the Court of Appeal of Hamburg of 30 July 1998, (2000) XXV Y.B. Comm. Arb. 714]. A further robust rejection of such a defence comes from the US Court of Appeals for the District of Columbia, in a case in which it was pleaded that the arbitral tribunal had awarded a considerable sum of damages for consequential loss, when the contract between the parties clearly excluded this head of damage [*Libyan American Oil Company (Liamco) v Socialist Peoples Libyan Arab Yamahirya*, (1982) VII Y.B. Comm. Arb. 382]. The court stated that, without an in-depth review of the law of contract, the court could not state whether a breach of contract would abrogate a clause which excluded consequential damages. However, 'the standard of review of an arbitration award by an American Court is extremely narrow', and (adopting the words of the US Court of Appeals in the well-known case of *Parsons Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2nd Cir. 1974)*)* the Convention did not sanction 'second-guessing the arbitrators' construction of the parties' agreement'. Nor would it be proper for the court to 'usurp the arbitrators' role' [*Libyan American Oil Company (Liamco) v Socialist Peoples Libyan Arab*

Yamahirya, (1982) VII Y.B. Comm. Arb., 382 at 388]. Accordingly, enforcement was ordered."

40. The Court of Appeal of Singapore, in **CRW Joint Operation v. PT Perusahaan Gas Negara (Persero) TBK**, [2011] SGCA 33, held as follows:

> "**25.** The court's power to set aside an arbitral award is limited to setting aside based on the grounds provided under Art 34 of the Model Law and s 24 of the IAA. As declared by this court in *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR(R) 86 ("*Soh Beng Tee*") at [59], the current legal framework prescribes that the courts should not without good reason interfere in the arbitral process. This policy of minimal curial intervention by respecting finality in the arbitral process acknowledges the primacy which ought to be given to the dispute resolution mechanism that the parties have expressly chosen.
>
> **26.** However, it has also been said (correctly) that no State will permit a binding arbitral award to be given or enforced within its territory without being able to review the award, or, at least, without allowing the parties an opportunity to address the court if there has been a violation of due process or other irregularities in the arbitral proceedings (*see* Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions* (Sweet & Maxwell, 3rd Ed, 2010) at para 7-001).
>
> **27.** While the Singapore courts infrequently exercise their power to set aside arbitral awards, they will unhesitatingly do so if a statutorily prescribed ground for setting aside an arbitral award is clearly established. The relevant grounds in this regard can be classified into three broad categories (*see* generally Nigel Blackaby *et al, Redfern and Hunter on International Arbitration* (Oxford University Press, 5th Ed, 2009) ("*Redfern and Hunter*") at paras 10.30–10.86). First, an award may be

challenged on jurisdictional grounds (*ie*, the non-existence of a valid and binding arbitration clause, or other grounds that go to the adjudicability of the claim determined by the arbitral tribunal). Second, an award may be challenged on procedural grounds (*eg*, failure to give proper notice of the appointment of an arbitrator), and, third, the award may be challenged on substantive grounds (*eg*, breach of the public policy of the place of arbitration)."

xxx xxx xxx

31. It is useful, at this juncture, to set out some of the legal principles underlying the application of Art 34(2)(a)(iii) of the Model Law. First, Art 34(2)(a)(iii) is not concerned with the situation where an arbitral tribunal did not have jurisdiction to deal with the dispute which it purported to determine. Rather, it applies where the arbitral tribunal improperly decided matters that had not been submitted to it or failed to decide matters that had been submitted to it. In other words, Art 34(2)(a)(iii) addresses the situation where the arbitral tribunal exceeded (or failed to exercise) the authority that the parties granted to it (*see* Gary B Born, *International Commercial Arbitration* (Wolters Kluwer, 2009) at vol 2, pp 2606–2607 and 2798–2799). This ground for setting aside an arbitral award covers only an arbitral tribunal's substantive jurisdiction and does not extend to procedural matters (*see* Robert Merkin & Johanna Hjalmarsson, *Singapore Arbitration Legislation Annotated* (Informa, 2009) ("*Singapore Arbitration Legislation*") at p 117).

32. Second, it must be noted that a failure by an arbitral tribunal to deal with *every* issue referred to it will *not* ordinarily render its arbitral award liable to be set aside. The crucial question in every case is whether there has been real or actual prejudice to either (or both) of the parties to the dispute. In this regard, the following passage in *Redfern and Hunter* ([27] *supra* at para 10.40) correctly summarises the position:

> The significance of the issues that were not dealt with has to be considered in relation to the award as a whole. For example, it is not difficult

> to envisage a situation in which the issues that were overlooked were of such importance that, if they had been dealt with, the whole balance of the award would have been altered and its effect would have been different. [emphasis added]
>
> **33.** Third, it is trite that mere errors of law or even fact are not sufficient to warrant setting aside an arbitral award under Art 34(2)(a)(iii) of the Model Law (*see Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 at [19]–[22]). In the House of Lords decision of *Lesotho Highlands Development Authority v Impregilo SpA* [2006] 1 AC 221, which concerned an application to set aside an arbitral award on the ground of the arbitral tribunal's "exceeding its powers" (*see* s 68(2)(b) of the Arbitration Act 1996 (c 23) (UK) ("the UK Arbitration Act")), Lord Steyn made clear (at [24]–[25]) the vital distinction between the erroneous exercise by an arbitral tribunal of an available power vested in it (which would amount to no more than a mere error of law) and the purported exercise by the arbitral tribunal of a power which it did not possess. Only in the latter situation, his Lordship stated, would an arbitral award be liable to be set aside under s 68(2)(b) of the UK Arbitration Act on the ground that the arbitral tribunal had exceeded its powers. In a similar vein, Art 34(2)(a)(iii) of the Model Law applies where an arbitral tribunal exceeds its authority by deciding matters beyond its ambit of reference or fails to exercise the authority conferred on it by failing to decide the matters submitted to it, which in turn prejudices either or both of the parties to the dispute (*see* above at [31]).
>
> (emphasis supplied)

The *UNCITRAL Guide on the New York Convention* (supra) states:

> "2. Article V (1)(*c*) finds its roots in article 2(*c*) of the 1927 Geneva Convention. The language at the outset of article V (1)(*c*), providing a ground for refusal of

recognition or enforcement of awards exceeding the scope of the arbitration agreement, is largely unchanged from its counterpart in the 1927 Geneva Convention. The New York Convention, however, limits the scope of article V (1)(*c*) by omitting language found in article 2 of the 1927 Geneva Convention which permitted enforcing authorities to delay, or create conditions in relation to, the enforcement of awards, where the award did not cover all the questions submitted to the arbitral tribunal.

3. The drafters of the New York Convention further built on the 1927 Geneva Convention by explicitly allowing for severability of the part of the award dealing with a difference not contemplated by or not falling within the terms of the submission to arbitration, or containing decisions on matters beyond the scope of the submission to arbitration, in order to permit recognition and enforcement of the part of the award containing decisions on matters submitted to arbitration. Although there is generally little discussion of article V (1)(*c*) in the *travaux préparatoires*, the inclusion of the provision allowing for partial recognition and enforcement was the subject of some debate. The *travaux préparatoires* show that various concerns were raised over the form and substance of this principle, including concerns that severability of arbitral awards would in practice "open the door to a review as to substance", which the drafters of the New York Convention sought to prevent. Courts have since uncompromisingly asserted that article V (1)(*c*) does not permit an enforcing authority to reconsider the merits of a dispute.

xxx xxx xxx

6. Courts and commentators agree that an arbitration agreement constitutes a "submission to arbitration" within the meaning of article V (1)(*c*). Consequently, where an arbitral tribunal has rendered an award which decides matters beyond the scope of the arbitration agreement, there is a ground for refusing to enforce an award under article V (1)(*c*).

7. Courts have also held that the term "submission to arbitration" can include an arbitration agreement modified, amended or supplemented by an arbitral

institution's terms of reference agreed to by the arbitrators and disputing parties. Terms of reference may indeed supplement or modify the arbitration agreement. For example, a German court of appeal held that the parties had concluded a new arbitration agreement by signing ICC Terms of Reference. Similarly, a decision by the English House of Lords stated that "[i]n the present case one is dealing with an ICC arbitration agreement. In such a case the terms of reference which under article 18 of the ICC rules are invariably settled may, of course, amend or supplement the terms of the arbitration agreement."

8. Authors and courts have also considered whether article V (1)(*c*) provides grounds for refusing to recognize or enforce where the arbitrator's decision goes beyond the parties' pleadings or prayers for relief to render an award *ultra petita*. Though some authors have argued that article V (1)(*c*) provides a second, separate ground for refusal to enforce an award rendered *ultra petita*, courts have rejected challenges to recognition or enforcement under article V (1)(c) based on the fact that the arbitrators had exceeded their authority by deciding on issues or granting forms of relief beyond those pleaded by the parties. As one United States court observed, "[u]nder the New York Convention, we examine whether the award exceeds the scope of the [arbitration agreement], not whether the award exceeds the scope of the parties' pleadings". This interpretation of article V (1)(*c*) which distinguishes the parties' pleadings or prayers for relief from the "submission to arbitration" referred to in article V (1)(*c*), is consistent with a narrow interpretation of the grounds for refusal to recognize or enforce an award."

(emphasis supplied)

41. In an early U.S. judgment, *viz*., **Parsons & Whittemore Overseas Co., Inc., v. Societe Generale De L'industrie Du Papier**

(RAKTA), 508 F.2d 969 (United States Court of Appeals, Second Circuit, 1974) [“**Parsons**”], it was held:

> “**19.** Under Article V(1)(c), one defending against enforcement of an arbitral award may prevail by proving that:
>
> **20.** The award deals with a difference 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.
>
> **21.** This provision tracks in more detailed form 10(d) of the Federal Arbitration Act, 9 U.S.C. 10(d), which authorizes vacating an award ‘where the arbitrators exceeded their powers.’ Both provisions basically allow a party to attack an award predicated upon arbitration of a subject matter not within the agreement to submit to arbitration. <u>This defense to enforcement of a foreign award, like the others already discussed, should be construed narrowly.</u> Once again, a narrow construction would comport with the enforcement-facilitating thrust of the Convention. In addition, the case law under the similar provision of the Federal Arbitration Act strongly supports a strict reading. See, e.g., United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); Coenen v. R. W. Pressprich & Co., 453 F.2d 1209 (2d Cir.), cert. denied, 406 U.S. 949, 92 S.Ct. 2045, 32 L.Ed.2d 337 (1972).
>
> **22.** In making this defense as to three components of the award, Overseas must therefore overcome a powerful presumption that the arbitral body acted within its powers. Overseas principally directs its challenge at the $185,000 awarded for loss of production. Its jurisdictional claim focuses on the provision of the contract reciting that ‘neither party shall have any liability for loss of production.’ The tribunal cannot properly be charged, however, with simply ignoring this alleged limitation on the subject matter over which its decision-making powers extended. Rather, the arbitration court interpreted the provision not to preclude jurisdiction on this matter. As in

United Steelworkers of America v. Enterprise Wheel & Car Corp., supra, the court may be satisfied that the arbitrator premised the award on a construction of the contract and that it is 'not apparent,' 363 U.S. 593 at 598, 80 S.Ct. 1358, that the scope of the submission to arbitration has been exceeded."

xxx xxx xxx

"**24.** Although the Convention recognizes that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this defense, however, calls upon the court to ignore this limitation on its decision-making powers and usurp the arbitrator's role. The district court took a proper view of its own jurisdiction in refusing to grant relief on this ground."

(emphasis supplied)

In **Lesotho Highlands Development Authority v. Impregilo SpA and Ors.**, [2005] 3 All ER 789 [HL], after setting out the English statutory provision, the precise question which faced the Court was stated thus:

"[**3**] …… Section 68, so far as material, reads as follows:

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award …

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant –

… (b) the tribunal exceeding its powers (otherwise than by exceeding

its substantive jurisdiction: *see* section 67)"

The question arises how section 68(2)(b) and section 69, so far as the latter excludes a right of appeal on a question of law, are to operate. Specifically, can an alleged error of arbitrators in interpreting the underlying or principal contract be an excess of power under section 68(2)(b), so as to give the court the power to intervene, rather than an error of law, which can only be challenged under section 69 if the right of appeal has not been excluded?"

This was answered by the Court, thus:

"[**23**] Contrary to the view I have expressed, I will now assume that the tribunal committed an error of law. That error of law could have taken more than one form. The judge (para 25) and the Court of Appeal (para 35) approached the matter on the basis that the tribunal erred in the interpretation of the underlying contract. Another possibility is that the tribunal misinterpreted its powers, under section 48(4) to express the award in any currency. Let me approach the matter on the basis that there was a mistake by the tribunal in one of these forms. Whichever is the case, the highest the case can be put is that the tribunal committed an error of law."

xxx xxx xxx

"[**30**] The New York Convention on the recognition and enforcement of Foreign arbitral awards 1958 and article 34 of the UNCITRAL Model Law on International Commercial Arbitration were in part a provenance of section 68: *see* General Note to section 68 of the Arbitration Act 1996 as published in Current Law Statutes 1996, p 23-46. Specifically, it is likely that the inspiration of the words "the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction)" in section 68 are the terms of article V(1)(c) of the New York Convention and the jurisprudence on it. The context is that article V(1)(a) stipulates that the invalidity of the arbitration agreement is a ground for

non-enforcement of an award: it involves the competence of the arbitrator. Article V(1)(c) relates to matters beyond the scope of the submission to arbitration. It deals with cases of excess of power or authority of the arbitrator. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award: *Parsons & Whittemore Overseas Co Inc v Sociéte Générale de l'Industrie du Papier (RAKTA)* 508 F 2d 969 (2nd Cir 1974); Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (1981), pp 311-318; Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001), pp 158-162. By citing the *Parsons* decision counsel for the contractors alerted the House to this analogy. It points to a narrow interpretation of section 68(2)(b). The policy underlying section 68(2)(b) as set out in the DAC report similarly points to a restrictive interpretation.

[**31**] By its very terms section 68(2)(b) assumes that the tribunal acted within its substantive jurisdiction. It is aimed at the tribunal *exceeding its powers* under the arbitration agreement, terms of reference or the 1996 Act. Section 68(2)(b) does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law. This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement. In cases where the right of appeal has by agreement, sanctioned by the Act, been excluded, it would be curious to allow a challenge under section 68(2)(b) to be based on a mistaken interpretation of the underlying contract. Moreover, it would be strange where there is no exclusion agreement, to allow parallel challenges under section 68(2)(b) and section 69.

[**32**] In order to decide whether section 68(2)(b) is engaged it will be necessary to focus intensely on the particular power under an arbitration agreement, the

> terms of reference, or the 1996 Act which is involved, judged in all the circumstances of the case. In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A mere error of law will not amount to an excess of power under section 68(2)(b).
>
> [**33**] For these reasons the Court of Appeal erred in concluding that the tribunal exceeded its powers on the currency point. If the tribunal erred in any way, it was an error within its power.
>
> [**34**] I am glad to have arrived at this conclusion. It is consistent with the legislative purpose of the 1996 Act, which is intended to promote one-stop adjudication. If the contrary view of the Court of Appeal had prevailed, it would have opened up many opportunities for challenging awards on the basis that the tribunal exceeded its powers in ruling on the currency of the award. Such decisions are an everyday occurrence in the arbitral world. If the view of the Court of Appeal had been upheld, a very serious defect in the machinery of the 1996 Act would have been revealed. The fact that this case has been before courts at three levels and that enforcement of the award has been delayed for more than three years reinforces the importance of the point."
>
> (emphasis supplied)

The High Court of Ireland, in **Patrick Ryan & Ann Ryan and Kevin O'Leary (Clonmel) Ltd. & General Motors**, [2018] IEHC 660 (High Court of Ireland, 2018), put it thus:

> "**24.** As regards the second principle which emerges from the case law, namely, that an application to set aside is not an appeal from the decision of the arbitrator and does not confer upon the court the opportunity of second-guessing the arbitrator's decision on the merits, it is sufficient to refer to a small number of the Irish cases and the observations made in those cases. In *Snoddy*

(*Snoddy* v. *Mavroudis* [2013] IEHC 285), Laffoy J. made it very clear that it was not open to the court to second-guess the construction of the relevant contractual issue in that case by the arbitrator by way of a set aside application. Laffoy J. stated that if the court were to do so, it would be usurping the arbitrator's role (para. 34, p. 16). In *Delargy* (*Delargy* v. *Hickey* [2015] IEHC 436), Gilligan J. stated:

> *"It is no function of this Court to attempt in any way to second guess the decision as arrived at by the arbitrator and this Court does not propose to do so."* (para. 74, p. 37).

Later in his judgment, Gilligan J. stated that:

> *"This Court does not consider that it is appropriate to revisit the merits of the arbitrator's award."* (para. 78, p. 39).

25. In *O'Leary Lissarda* (*O'Leary Lissarda* v. *Ryan* [2015] IEHC 820), McGovern J. noted the acknowledgment of the applicant that an application to set aside an award "*…is not a proceeding in the nature of an appeal against the arbitral award on the merits*." (para. 5, p. 2). He rejected one of the grounds on which it was sought to set aside the award in that case on the basis that it "… *effectively amounts to an attempt to appeal the arbitrator's decision which is not permissible.*" (para. 11, p. 4).

xxx xxx xxx

"**39.** The Irish courts have had the opportunity of considering the proper approach to be taken in considering a challenge to an award based on Article 34(2)(a)(iii) where it is suggested that an arbitrator has exceeded his or her authority or acted outside his or her mandate. The leading Irish case on this point is *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285). In *Snoddy*, (*Snoddy* v. *Mavroudis* [2013] IEHC 285) Laffoy J. quoted with approval the commentary contained in Mansfield in relation to Article 34(2)(a)(iii). She stated as follows:

> "*Mansfield's* commentary on that provision is that it is a ground –

> ‘[t]hat the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Commentators have noted that ‘this ground is infrequently invoked and it is even less frequently accepted by national courts to set an award aside’ and international case-law decided under the Model Law has held that this ground is to be narrowly construed.’
>
> The commentators cited in that passage are Brekoulakis and Shore in Mistelis on Concise International Arbitration (1st Ed., Kluwer, 2010). In that text, the commentators also state (at p. 647) that ‘a strong presumption should exist that a tribunal acts within its mandate’.” (per Laffoy J. at para. 32, pp. 14 - 14).

40. Laffoy J. in *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285) went on to observe that Article 34(2)(a)(iii) of the Model Law was based on a corresponding provision contained in the New York Convention (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958), which was Article V(1)(c). Laffoy J. continued:

> “As was pointed out by Lord Steyn in *Lesotho Highlands Development v. Impregilo SpA* [2006] 1 AC 221, s. 68 of the UK Arbitration Act 1996 was modelled on the New York Convention and on the Model Law. In considering the application of that statutory provision, Lord Steyn considered Article V(1)(c) of the New York Convention stating (at p. 236):
>
> > ‘It deals with cases of excess of power or authority of the arbitrator. It is well established that article V(1)(c) must be construed narrowly and should never lead to a re-examination of the merits of the award.’
>
> Lord Steyn cited a decision of the US Federal Courts as authority for that last proposition: *Parsons*

> *& Whittemore Overseas Co Inc v Sociéte Générale de l'Industrie du Papier*, (1974) 508 F. 2d 969 (2nd Circuit). The limits on the excess of jurisdiction ground for setting aside an arbitration are, in my view, clearly brought home by the following passage from the opinion of Judge Smith in the *Parsons* case where he stated:
>
> > 'Although the Convention recognises that an award may not be enforced where predicated on a subject matter outside the arbitrator's jurisdiction, it does not sanction second-guessing the arbitrator's construction of the parties' agreement. The appellant's attempt to invoke this defense, however, calls upon the Court to ignore this limitation on its decision-making powers and usurp the arbitrator's role.'" (per Laffoy J. at para. 33, pp. 15 - 16)."
>
> **41.** These dicta of Laffoy J. in *Snoddy* (*Snoddy* v. *Mavroudis* [2013] IEHC 285) were cited with approval and followed by Galligan J. in *Delargy* (*Delargy* v. *Hickey* [2015] IEHC 436) (at para. 31, pp. 13 - 14 and para. 65, pp. 33 - 34). The cases make clear that there is a presumption that the arbitral tribunal has acted within its mandate and the onus of establishing otherwise rests with the party seeking to set aside the award on this ground."
>
> (emphasis in original)

In **State of Goa v. Praveen Enterprises**, (2012) 12 SCC 581 ["**Praveen Enterprises**"], this Court set out what is meant by "reference to arbitration" as follows:

> "**10.** "Reference to arbitration" describes various acts. Reference to arbitration can be by parties themselves or by an appointing authority named in the arbitration agreement or by a court on an application by a party to the arbitration agreement. We may elaborate:

(*a*) If an arbitration agreement provides that all disputes between the parties relating to the contract (some agreements may refer to some exceptions) shall be referred to arbitration and that the decision of the arbitrator shall be final and binding, the "reference" contemplated is the act of parties to the arbitration agreement, referring their disputes to an agreed arbitrator to settle the disputes.

(*b*) If an arbitration agreement provides that in the event of any dispute between the parties, an authority named therein shall nominate the arbitrator and refer the disputes which required to be settled by arbitration, the "reference" contemplated is an act of the appointing authority referring the disputes to the arbitrator appointed by him.

(*c*) Where the parties fail to concur in the appointment of the arbitrator(s) as required by the arbitration agreement, or the authority named in the arbitration agreement failing to nominate the arbitrator and refer the disputes raised to arbitration as required by the arbitration agreement, on an application by an aggrieved party, the court can appoint the arbitrator and on such appointment, the disputes between the parties stand referred to such arbitrator in terms of the arbitration agreement.

11. Reference to arbitration can be in respect of all disputes between the parties or all disputes regarding a contract or in respect of specific enumerated disputes. Where "all disputes" are referred, the arbitrator has the jurisdiction to decide all disputes raised in the pleadings (both claims and counterclaims) subject to any limitations placed by the arbitration agreement. Where the arbitration agreement provides that all disputes shall be settled by arbitration but excludes certain matters from arbitration, then, the arbitrator will exclude the excepted matter and decide only those disputes which are arbitrable. But where the reference to the arbitrator is to

> decide specific disputes enumerated by the parties/court/appointing authority, the arbitrator's jurisdiction is circumscribed by the specific reference and the arbitrator can decide only those specific disputes."

42. A conspectus of the above authorities would show that where an arbitral tribunal has rendered an award which decides matters either beyond the scope of the arbitration agreement or beyond the disputes referred to the arbitral tribunal, as understood in **Praveen Enterprises** (supra), the arbitral award could be said to have dealt with decisions on matters beyond the scope of submission to arbitration.

43. We therefore hold, following the aforesaid authorities, that in the guise of misinterpretation of the contract, and consequent "errors of jurisdiction", it is not possible to state that the arbitral award would be beyond the scope of submission to arbitration if otherwise the aforesaid misinterpretation (which would include going beyond the terms of the contract), could be said to have been fairly comprehended as "disputes" within the arbitration agreement, or which were referred to the decision of the arbitrators as understood by the authorities above. If an arbitrator is alleged to have wandered outside the contract and dealt with matters not allotted to him, this would be a jurisdictional error which could be corrected on the ground of "patent illegality", which, as we have seen, would not apply to international commercial

arbitrations that are decided under Part II of the 1996 Act. To bring in by the backdoor grounds relatable to Section 28(3) of the 1996 Act to be matters beyond the scope of submission to arbitration under Section 34(2)(a)(iv) would not be permissible as this ground must be construed narrowly and so construed, must refer only to matters which are beyond the arbitration agreement or beyond the reference to the arbitral tribunal.

Most Basic Notions of Justice

44. The expression "most basic notions of … justice" finds mention in Explanation 1 to sub-clause (iii) to Section 34(2)(b). Here again, what is referred to is, substantively or procedurally, some fundamental principle of justice which has been breached, and which shocks the conscience of the Court. Thus, in **Parsons** (supra), it was held:

> "**7.** Article V(2)(b) of the Convention allows the court in which enforcement of a foreign arbitral award is sought to refuse enforcement, on the defendant's motion or *sua sponte*, if 'enforcement of the award would be contrary to the public policy of (the forum) country.' The legislative history of the provision offers no certain guidelines to its construction. Its precursors in the Geneva Convention and the 1958 Convention's ad hoc committee draft extended the public policy exception to, respectively, awards contrary to 'principles of the law' and awards violative of 'fundamental principles of the law.' In one commentator's view, the Convention's failure to include similar language signifies a narrowing of the defense [Contini, International Commercial Arbitration, 8

> Am.J.Comp.L. 283, 304]. On the other hand, another noted authority in the field has seized upon this omission as indicative of an intention to broaden the defense [Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1070-71 (1961)].
>
> **8.** Perhaps more probative, however, are the inferences to be drawn from the history of the Convention as a whole. The general pro-enforcement bias informing the Convention and explaining its supersession of the Geneva Convention points toward a narrow reading of the public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove preexisting obstacles to enforcement. [*See* Straus, Arbitration of Disputes between Multinational Corporations, in New Strategies for Peaceful Resolution of International Business Disputes 114-15 (1971); Digest of Proceedings of International Business Disputes Conference, April 14, 1971, at 191 (remarks of Professor W. Reese)]. Additionally, considerations of reciprocity – considerations given express recognition in the Convention itself – counsel courts to invoke the public policy defense with caution lest foreign courts frequently accept it as a defense to enforcement of arbitral awards rendered in the United States.
>
> **9.** We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. [Restatement Second of the Conflict of Laws 117, comment c, at 340 (1971); Loucks v. Standard Oil Co., 224 N.Y. 99, 111, 120 N.E. 198 (1918)]."

In **Dongwoo Mann+hummel Co. Ltd. v. Mann+hummel Gmbh**, [2008] SGHC 67, the High Court of Singapore held:

"**131.** In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR 597 ("*PT Asuransi Jasa Indonesia (Persero)*"), the Court of Appeal explained what would constitute a conflict with public policy (at [57] and [59]):

> *57.* … The legislative policy under the Act is to minimise curial intervention in international arbitrations. Errors of law or fact made in an arbitral decision, *per se*, are final and binding on the parties and may not be appealed against or set aside by a court except in the situations prescribed under s 24 of the Act and Art 34 of the Model Law. … In the present context, errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(b) (ii) of the Model Law when they cannot be set aside under Art 34(2)(a) (iii) of the Model Law.
>
> xxx xxx xxx
>
> *59*. Although the concept of public policy of the State is not defined in the Act or the Model Law, the general consensus of judicial and expert opinion is that public policy under the Act encompasses *a narrow scope*. In our view, it should only operate in instances where the upholding of an arbitral award would "*shock the conscience*" (*see Downer Connect* ([58] *supra*) at [136]), or is "*clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public*" (*see Deutsche Schachbau v Shell International Petroleum Co Ltd* [1987] 2 Lloyds' Rep 246 at 254, per Sir John Donaldson MR), or *where it violates the forum's most basic notion of morality and justice*: *see Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier (RAKTA)* 508 F 2d, 969 (2nd Cir, 1974) at 974. This would be consistent with the concept of public policy that can be ascertained from the preparatory materials to the Model Law. As was highlighted in the Commission Report (A/40/17), at para

297 (referred to in *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* by Howard M Holtzmann and Joseph E Neuhaus (Kluwer, 1989) at 914):

> In discussing the term 'public policy', it was understood that it was not equivalent to the political stance or international policies of a State but comprised the *fundamental notions and principles of justice*… It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, *instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside."*
>
> (emphasis in original)

132. In *Profilati Italia SRL v Paine Webber Inc* [2001] 1 Lloyd's Rep 715 ("*Profilati*"), Moore-Bick J made the following observations in relation to the argument that non-disclosure of material documents constituted a breach of public policy in the context of s 68 of the English Arbitration Act 1996 (at [17], [19] and [26]):

> *17*. … Where the successful party is said to have procured the award in a way which is contrary to public policy it will normally be necessary to satisfy the Court that some form of reprehensible or unconscionable conduct on his part has contributed in a substantial way to obtaining an award in his favour. Moreover, I do not think that the Court should be quick to interfere under this section [*ie*, s 68(2)(g) of the Arbitration Act 1996]. In those cases in which s. 68 has so far been considered the Court has emphasized that it is intended to operate only in extreme cases...

> xxx xxx xxx
>
> *19.* Where an important document which ought to have been disclosed is deliberately withheld and as a result the party withholding it has obtained an award in his favour the Court may well consider that he procured that award in a manner contrary to public policy. After all, such conduct is not far removed from fraud…
>
> xxx xxx xxx
>
> *26*. Even if there had been a deliberate failure to give disclosure of the two documents in question it would still be necessary for Profilati to satisfy the Court that it had suffered substantial injustice as a result."

And finally, in **BAZ v. BBA and Ors.**, [2018] SGHC 275, the High Court of Singapore stated:

> "**156.** From the outset, it is important to reiterate that the public policy ground for setting aside or refusal of recognition/enforcement is very narrow in scope. The Court of Appeal has held that the ground should only succeed in cases where upholding or enforcing the arbitral award would "shock the conscience", or be "clearly injurious to the public good or … wholly offensive to the ordinary reasonable and fully informed member of the public", or violate "the forum's most basic notion of morality and justice" (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 ("*PT Asuransi*") at [59]). In *Sui Southern Gas Co Ltd v Habibullah Coastal Power Co (Pte) Ltd* [2010] 3 SLR 1 ("*Sui Southern Gas*"), the High Court stated that to succeed on a public policy argument, the party "had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice" (at [48]). The *1985 UN Commission Report* states at para 297 that the term public policy "comprised the fundamental notions and principles of justice", and it was understood that the term "covered fundamental

> principles of law and justice in substantive as well as procedural respects". The *1985 UN Commission Report* further explains that Art 34(2)(b)(ii) of the Model Law "was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at".
>
> **157.** It is clear that errors of law or fact, *per se*, do not engage the public policy of Singapore under Art 34(2)(b)(ii) of the Model Law when they cannot be set aside under Art 34(2)(a)(iii) of the Model Law (*PT Asuransi* at [57]), with the exception that the court's judicial power to decide what the public policy of Singapore is cannot be abrogated (*AJU v AJT* [2011] 4 SLR 739 ("*AJU v AJT*") at [62]). ……
>
> xxx xxx xxx
>
> **159.** …… This balance is generally in favour of the policy of enforcing arbitral awards, and only tilts in favour of the countervailing public policy where the violation of that policy would "shock the conscience" or would be contrary to "the forum's most basic notion of morality and justice". In determining whether the balance tilts towards the countervailing public policy, it is important to consider both the subject nature of the public policy, the degree of violation of that public policy and the consequences of the violation."
>
> (emphasis supplied)

45. Given these parameters of challenge, let us now examine the arguments of learned counsel on behalf of the appellant. There can be no doubt that the government guidelines that were referred to and strongly relied upon by the majority award to arrive at the linking factor were never in evidence before the Tribunal. In fact, the Tribunal relies upon the said guidelines by itself and states that they are to be found

on a certain website. The ground that is expressly taken in the Section 34 petition by the appellant is as follows:

> "It is pertinent to mention here that no such guidelines of the Ministry of Industrial Development had been filed on record by either of the parties and therefore, the Tribunal had no jurisdiction to rely upon the same while deciding the issue before it. Accordingly, the impugned Award is liable to be set aside."

46. Learned counsel for the respondent also agreed that these guidelines were never, in fact, disclosed in the arbitration proceedings. This being the case, and given the authorities cited hereinabove, it is clear that the appellant would be directly affected as it would otherwise be unable to present its case, not being allowed to comment on the applicability or interpretation of those guidelines. For example, the appellant could have argued, without prejudice to the argument that linking is *de hors* the contract, that of the three methods for linking the New Series with the Old Series, either the second or the third method would be preferable to the first method, which the majority award has applied on its own. For this reason, the majority award needs to be set aside under Section 34(2)(a)(iii).

47. Insofar as the argument that a new contract had been made by the majority award for the parties, without the consent of the appellant, by applying a formula outside the agreement, as per the Circular dated

15.02.2013, which itself could not be applied without the appellant's consent, we are of the view that this ground under Section 34(2)(a)(iv) would not be available, given the authorities discussed in detail by us. It is enough to state that the appellant argued before the arbitral tribunal that a new contract was being made by applying the formula outside what was prescribed, which was answered by the respondent, stating that it would not be possible to apply the old formula without a linking factor which would have to be introduced. Considering that the parties were at issue on this, the dispute as to whether the linking factor applied, thanks to the Circular dated 15.02.2013, is clearly something raised and argued by the parties, and is certainly something which would fall within the arbitration clause or the reference to arbitration that governs the parties. This being the case, this argument would not obtain and Section 34(2)(a)(iv), as a result, would not be attracted.

48. However, when it comes to the public policy of India argument based upon "most basic notions of justice", it is clear that this ground can be attracted only in very exceptional circumstances when the conscience of the Court is shocked by infraction of fundamental notions or principles of justice. It can be seen that the formula that was applied by the agreement continued to be applied till February, 2013 –

in short, it is not correct to say that the formula under the agreement could not be applied in view of the Ministry's change in the base indices from 1993-94 to 2004-05. Further, in order to apply a linking factor, a Circular, unilaterally issued by one party, cannot possibly bind the other party to the agreement without that other party's consent. Indeed, the Circular itself expressly stipulates that it cannot apply unless the contractors furnish an undertaking/affidavit that the price adjustment under the Circular is acceptable to them. We have seen how the appellant gave such undertaking only conditionally and without prejudice to its argument that the Circular does not and cannot apply. This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula *de hors* the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court. However, we repeat that this ground is available only in very

exceptional circumstances, such as the fact situation in the present case. Under no circumstance can any Court interfere with an arbitral award on the ground that justice has not been done in the opinion of the Court. That would be an entry into the merits of the dispute which, as we have seen, is contrary to the ethos of Section 34 of the 1996 Act, as has been noted earlier in this judgment.

49. The judgments of the Single Judge and of the Division Bench of the Delhi High Court are set aside. Consequently, the majority award is also set aside. Under the Scheme of Section 34 of the 1996 Act, the disputes that were decided by the majority award would have to be referred afresh to another arbitration. This would cause considerable delay and be contrary to one of the important objectives of the 1996 Act, namely, speedy resolution of disputes by the arbitral process under the Act. Therefore, in order to do complete justice between the parties, invoking our power under Article 142 of the Constitution of India, and given the fact that there is a minority award which awards the appellant its claim based upon the formula mentioned in the agreement between the parties, we uphold the minority award, and state that it is this award, together with interest, that will now be executed between the parties. The minority award, in paragraphs 11 and 12, states as follows:

> "11. I therefore award the claim of the Claimant in full.
> 12. Costs – no amount is awarded to the parties. Each party shall bear its own cost."

Given the reliefs claimed by the appellant in their statement of claim before the learned arbitrators, what is awarded to the appellant is the principal sum of INR 2,01,42,827/- towards price adjustment payable under sub-clause 70.3 of the contract, for the work done under the contract from September 2010 to May 2014, as well as interest at the rate of 10%, compounded monthly from the due date of payment to the date of the award, i.e., 02.05.2016, plus future interest at the rate of 12% per annum (simple) till the date of payment.

50. The appeal is allowed in the aforesaid terms.

……J.
(R.F. Nariman)

……J.
(Vineet Saran)

New Delhi
May 08, 2019.