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In Word and Deed? The Indian Supreme Court's Approach to Scrutiny of Awards

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It is no secret that Indian courts have previously faced criticism over their excessive interference in arbitral awards. However, there has been a course-correction in recent years, through legislation and judicial decisions. With the 2015 amendments to the Arbitration and Conciliation Act, 1996 (“**Act**”), it is clear that judicial scrutiny of arbitral awards should be extremely limited. Recent decisions of the Supreme Court of India (“**Supreme Court**”) on Section 34 of the Act (challenges to awards in India-seated arbitrations) also emphasise this position.

However, our analysis of the Supreme Court's judgments between January 2020 through September 2021 demonstrates that while its decisions largely adhere to settled principles on Section 34, there have been a couple of notable outliers. The Supreme Court seems to be conscious of this tendency and recently even expressed some cautionary observations on it.

1. Present scope of scrutiny under Section 34 of the Act

The Supreme Court comprehensively laid down the scope of judicial scrutiny under Section 34 following the 2015 amendments in two landmark judgments — *Ssangyong Engineering and Construction Co. Ltd. v. National Highways Authority of India* (discussed [here](#)) and *MMTC Limited v. Vedanta Limited*.

The Supreme Court clearly stated that there should be no review on merits of the award, as the court under Section 34 is not sitting in appeal. The ground of public policy, through which parties often subverted the limited judicial review under Section 34, is now restricted to: (a) fundamental policy of Indian law; (b) conflict with most basic notions of morality and justice; and (c) fraud or corruption in the making of the award. Patent illegality (now a separate ground) covers only illegality that goes to the root of the matter and does not include erroneous application of law by the arbitral tribunal. While examining the challenge on the ground of patent illegality, the court cannot re-appreciate evidence. Nor can the court substitute the arbitrator's view for its own where the arbitrator's view is a possible view.

These decisions have settled the law on judicial scrutiny under Section 34.

2. Notable departures

Despite these decisions, in some instances, courts have engaged in excessive intervention, suitably fitting their analysis into one or more of the grounds under Section 34.

a. Supreme Court's decision in *PSA Sical*

In its July 2021 decision in *PSA Sical Terminals Pvt. Ltd. v. Board of Trustees of V. O. Chidambranar Port Trust Tuticorin and Ors.*, the Supreme Court reiterated the principles laid down in *Ssangyong* and *MMTC*, but the manner in which these principles have been applied merits consideration.

The dispute related to the change of law clause in a licence agreement for development of a container terminal at a port. The arbitral tribunal passed an award in favour of PSA Sical Terminals Private Limited holding that there was a change in law entitling it to a higher level of tariff collection.

Following two rounds of litigation before lower courts on a challenge to the award under Section 34, the parties reached the Supreme Court. The Supreme Court held that the arbitral tribunal's finding on change of law was based on 'no evidence' and 'ignorance of vital evidence', thus making it perverse and liable to be set aside on the ground of patent illegality.

The judgment started off on the premise that the court's job is to "*examine the correctness of [the arbitral tribunal's] finding [on change of law]*". This is at variance with its reiteration of the principles that the court is not required to undertake a review on merits or substitute its own view for that of the arbitral tribunal. It is more so when nothing in the judgment indicates that the arbitral tribunal's view was so irrational, and one that no reasonable or fair-minded person would have taken.

Thereafter, the Supreme Court assessed whether there was a change of law, going at length into the various tariff guidelines and orders involved. This invariably involves a review on merits. Ultimately, the Supreme Court gave its own interpretation of the tariff guidelines and orders to hold that there was no change of law, and that the arbitral tribunal's finding was based on "no evidence" and "ignorance of vital evidence."

The Supreme Court also stepped into the territory of reappreciation of evidence by examining the tariff guidelines and orders, justifying its approach under the pretext of seeing whether the award is based on no evidence or in ignorance of vital evidence.

The Supreme Court observed that had the arbitral tribunal considered the initial tariff orders, it would have arrived at the conclusion that there was no change of law. For this purpose, the Supreme Court interpreted the initial tariff orders, differently from the arbitral tribunal's interpretation. In effect, the Supreme Court substituted its view for that of the arbitral tribunal's, without considering whether the tribunal's view was a possible one.

The Supreme Court's approach blurs the lines between the separate assessments to be undertaken by courts under the various grounds in Section 34, and the limitations imposed by legislation or judicial precedent on those grounds.

b. Supreme Court's approach in *SEAMEC*

In its May 2020 decision in *South East Asia Marine Engineering and Constructions Limited v. Oil India Limited*, the Supreme Court again undertook a review of the merits, interpreting a contractual provision on change of law. The Supreme Court framed the scope of its analysis as being an examination of whether the arbitral tribunal's interpretation was "reasonable and fair" – an exercise entirely different from considering whether no "reasonable and fair-minded person" would have taken the arbitral tribunal's interpretation. This, in a nutshell, is indicative of the inconsistent application of the yardsticks laid down for Section 34 challenges.

The Supreme Court set aside the award holding the tribunal's interpretation of the contractual provision to be perverse. This was on the basis that the arbitral tribunal gave a liberal interpretation which did not consider other terms of the contract and was based on no evidence. The Supreme Court was re-interpreting the contractual provisions, and substituting its view for the arbitral tribunal's – even though the arbitral tribunal had adopted a liberal (and permissible) interpretation after considering witness testimony. A liberal interpretation is not necessarily the same as an implausible one, but the Supreme Court conflated the two. Further, the Supreme Court's exercise fails to meet the high threshold required for perversity. Perversity requires that the arbitral tribunal's finding "outrageously defies logic" or was arrived at by ignoring or excluding relevant material or by considering irrelevant material – not that the arbitral tribunal adopted a possible liberal interpretation instead of a narrow one.

3. Restoring the balance — *Delhi Airport Metro Express*

In *Delhi Airport Metro Express Pvt. Ltd. v. Delhi Metro Rail Corporation Ltd.*, the Supreme Court reiterated the law laid down in *Ssangyong* and emphasised the need for judicial restraint when exercising jurisdiction under Section 34. This decision is an excellent example of the measured approach to be taken by courts.

The case was an appeal against a decision partially setting aside an arbitral award on grounds of patent illegality and conflict with most basic notions of justice. The Supreme Court dealt with various findings of the subordinate court, particularly on interpretation of the concession agreement between the parties. The Supreme Court observed that where the arbitral tribunal's interpretation was a possible one, it should not be interfered with even if another interpretation could be taken. Similarly, findings of fact by the arbitral tribunal could not be interfered with.

The Supreme Court also made an astute observation – often enough, courts approach the exercise of reviewing the award under Section 34 from a lawyer's perspective, although many awards may be passed by engineers or non-lawyers. This leads to a tendency to excessively interfere with findings, resulting in misguided application of the grounds under Section 34. In this case too, the subordinate court had held the arbitral tribunal's view to be perverse and supplanted its view on facts.

4. Conclusion

The judicial review undertaken under Section 34 requires a tight-rope balancing act, to ensure that it does not become an appellate mechanism. Therefore, there is a great need for clarity, coherence and uniformity in the manner in which the review is done.

The decisions in *PSA Sical* and *SEAMEC* show that the Supreme Court's own approach sometimes deviates from the yardsticks set by it. These judgments set the course backwards, by providing parties with new ways of canvassing their claims under the grounds set out in Section 34. Further, it also creates a situation where the arbitral award often becomes the start of a prolonged litigation rather than the end of it. The decision in *Delhi Airport Metro Express* on the other hand is the beacon for correctly applying the grounds to any challenge under Section 34. We hope that we will see similar jurisprudence from the Supreme Court, which will trickle down to lower courts as well.

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