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PATENT ILLEGALITY IN ARBITRATION: ALIGNING INDIAN JURISPRUDENCE WITH GLOBAL STANDARDS

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ABSTRACT

The principle of "patent illegality" under arbitration law has become an important but controversial basis for the setting aside of arbitral awards in Indian jurisprudence. Developed through judicial policy and subsequently enacted in Section 34(2A) of the Arbitration and Conciliation Act, 1996 (as amended in 2015), patent illegality is a specialized but subjective mechanism of judicial intervention in domestic arbitral awards. Though it seeks to uphold the sanctity of arbitration by avoiding awards marred with egregious legal mistakes, the inconsistency and expansiveness of the Indian judiciary in applying the term have created questions over its compatibility with the international arbitration regime, which favours low-key judicial intervention and finality of awards. This research article focuses on the impact of "patent illegality" on judicial scrutiny, arbitrator's discretion, and the enforceability of arbitral awards in India. It highlights the need to strike a balance between judicial supervision that is necessary and the finality desired in arbitration. The research article also contrasts India's approach to patent illegality with international standards, particularly that of the UNCITRAL Model Law and the 1958 New York Convention. It emphasizes the need to have patent illegality as clearly defined so that India's reputation as an arbitration-friendly jurisdiction is not undermined in maintaining the fundamental legal principles.

Keywords: *Patent Illegality, Judicial review in Arbitration, Domestic Arbitration, Judicial restraint, Arbitral award enforcement*

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1. INTRODUCTION

"Patent Illegality" refers to an error in law that is emphatically evident. The legal error can emerge when there is a clash with the constitution, statutory laws, or the specific terms of a contract. Section 34 of the Arbitration and Conciliation Act of 1996[1] specifies particular grounds on which arbitral awards, whether from domestic or international commercial arbitrations based in India, can be contested. The Arbitration and Conciliation (Amendment) Act, 2015 incorporated "patent illegality" as a new ground for challenging arbitral awards in domestic arbitration by adding this sub-section. This change influenced by the Law Commission of India's 246th Report from 2014[2], which recommended including this specific ground for setting aside awards in domestic arbitration cases. The 1996 Act, along with relevant judicial precedents, emphasizes that Indian courts typically permit challenges to arbitral awards only when they are found to be legally flawed. The 2015 Amendment introduced sub-section 2A to section 34, establishing "patent illegality" as an additional reason for annulment of an arbitral award[3].

In *NTPC Ltd. v. Deconar Services (P) Ltd.*[4], Chief Justice N.V. Ramana clarified that to succeed in challenging an arbitral award, it must be demonstrated that the award suffers from legal error or misconduct by the arbitrator. Simply showing that another reasonable interpretation is possible based on the evidence is insufficient for courts to interfere with the award.

An arbitral award can be deemed patently illegal if: a) it is contrary to substantive provisions of law or the Arbitration and Conciliation Act itself, b) the arbitrator's decision is found to be perverse or irritational, meaning that no reasonable person could arrive at the same conclusion, c) the arbitrator exceeds their jurisdiction by addressing matters not referred to them in the arbitration agreement. The Supreme Court has clarified that merely showing an error in law or a different interpretation of evidence is insufficient to invoke patent illegality, the award must shock the conscience of the court.

1 Arbitration and Conciliation Act 1996, § 34, No. 26, Acts of Parliament, 1996 (India).

2 Law Commission of India, Amendments to the Arbitration and Conciliation Act, 1996, Report No. 246 (2014).

3 Arbitration and Conciliation Act 1996, § 34(2A), No. 26, Acts of Parliament, 1996 (India).

4 NTPC Ltd. v. Deconar Services (P) Ltd, (2021) 19 SCC 694.

2. Patent Illegality in Indian Jurisprudence: Understanding Its Implications and Challenges

In the case of *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*[5], quoted in the Law Commission's 246th report of 2014, it was held that an arbitral award can be set aside when it is against: a) the fundamental notions of Indian Law, b) national interest, c) justice or morality, and d) if it is manifestly illegal. It was the first case where the court acknowledged patent illegality as a legitimate reason to set aside an arbitral award, thereby broadening the sphere of "public policy" in section 34. However, the court did not clarify what constitutes patent illegality[6]. In another significant case, *I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Limited*[7], the Supreme Court of India reviewed sections 31[8], 34(1)[9], 34(2A) and 34(4)[10] of the 1996 Act. The court concluded that Section 34(4), which states "where it is appropriate", gives the court the discretion to decide whether or not to send the case back to the arbitral tribunal. The court also determined that "curable defects" in an arbitration award can be fixed. However, this requires actual findings on the issues at hand, not just reasoning. Simply providing reasoning cannot correct an error in the award if the findings are missing. Therefore, the court cannot use its authority under section 34 to address the issue if the record indicates patent illegality. The court emphasized that for curable defects to be addressed, there must be concrete findings, not just reasoning, and in this case patent illegality prevented the court from intervening[11].

Patent Illegality involves flaws in arbitral awards that strike at the core of the matter. In *Associate Builders v. Delhi Development Authority*[12], the court identified many instances like violations of substantive law, errors of law by the arbitrator, non -compliance with the 1996 Act, failure to provide reasoning and breaches of Section

5 Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd, (2003) 5 SCC 705.

6 Ishita Kashyap, *Patent Illegality As a Ground of Judicial Intervention*, LIVE LAW (June 8, 2025, 8:07 PM), https://www.livelaw.in/lawschool/articles/patent-illegality-ground-judicial-intervention-arbitration-264375.

7 I-Pay Clearing Services Pvt. Ltd. v. ICICI Bank Ltd, (2019) S.L.P. (C) No. 24278.

8 Arbitration and Conciliation Act 1996, § 31, No. 26, Acts of Parliament, 1996 (India).

9 Arbitration and Conciliation Act 1996, § 34(1), No. 26, Acts of Parliament, 1996 (India).

10 Arbitration and Conciliation Act 1996, § 34(4), No. 26, Acts of Parliament, 1996 (India).

11 Pratyush Singh & Aastha Malipatil, *Empirical insights into the legal quicksand: the case of patent illegality in Indian Arbitration*, OXFORD ACADEMIC (June 7, 2025 3:33 PM), https://doi.org/10.1093/arbint/aiae038.

12 Associate Builders v. Delhi Development Authority, (2014) 13 SCR 895.

28(3)[13]. The courts have emphasized that patent illegality must be evident within the award and cannot be deducted through re-evaluation.

The introduction of "*patent illegality*" in Section 34(2A) of the 1996 Act has re-shaped the face of arbitration in India by offering a predetermined basis for setting aside domestic arbitral awards. This has caused greater judicial scrutiny of arbitral awards with the courts having the discretion to determine whether or not an award is defective or irrational per se. Although such specificity is intended to render challenges more effective, it also raises issues of undue judicial intervention, which could vitiate the finality which arbitration seeks to attain.

2.1 Patent Illegality: Error of law apparent on the face of the arbitral award

In administrative law, an "*error of law apparent on the face of the record*" is a well-recognised ground for challenging and nullifying judicial or quasi-judicial orders through a writ of certiorari. In United Kingdom, tribunals have no latitude to incorrectly interpret legal questions; any such error it be as considered jurisdictional and renders the decision ultra vires, leading to its annulment[14].

In India, this principle is applied differently. An error of law must be evident and obvious from the record itself- it must be a patently clear mistake that is inconsistent with statutory provisions. The reviewing court must be able to identify this error without engaging in complex reasoning or debates over different interpretations. The mistake must be so glaring and manifest that it requires no elaborate argument to demonstrate its invalidity. Example of such errors include decisions that contradict constitutional provisions, legislative acts or binding judicial precedents from the Supreme court or relevant High courts. In the context of arbitration, an arbitral award that violates the 1996 Act, suffers from an evident legal defect and is deemed null and void such awards are treated as invalid from the outset (void ab initio), having no legal standing or enforceability[15]. Although section 34(2)[16] of the 1996 Act does not specifically mention certain defects as reasons for annulling and arbitral award, their enforcement can be still challenged under Section 36[17].

13 Arbitration and Conciliation Act 1996, § 28(3), No. 26, Acts of Parliament, 1996 (India).

14 O.P. Malhotra, *The Scope of Public Policy under the Arbitration and Conciliation Act*, 1996, 19(2) NLSIR (2007), https://repository.nls.ac.in/nlsir/vol19/iss2/2.

15 Jahnavi Sindhu, *Public Policy and Indian arbitration: Can the Judiciary and the Legislature rein the Unruly Horse?*, 58(4) J. INDIAN L. INST. 633 (2016), www.jstor.org/stable/45163080.

16 Arbitration and Conciliation Act 1996, § 34(2), No. 26, Acts of Parliament, 1996 (India).

17 Arbitration and Conciliation Act 1996, § 36, No. 26, Acts of Parliament, 1996 (India).

In a similar vein, section 38 of the Code of Civil Procedure, 1908[18] allows a decree to be executed by the court to which it has been sent. Ordinarily, an executive court cannot question the legality or validity of the decree and must proceed with its execution as it stands. However, an exemption exists: if the decree is a nullity due to the court's lack of inherent jurisdiction to pass it, its invalidity can be raised during execution proceedings. A decree passed without jurisdiction is inherently void and unenforceable.

2.2 Limited Scope of Section 34(2A)

An interesting point to make about Section 34(2A) of the Arbitration and Conciliation Act is that this ground is only applicable specifically to awards made under domestic commercial arbitration and not for international commercial arbitration. This highlights the limited scope of the subsection. One explanation of this distinction is through consideration of issues regarding the soundness of Indian domestic arbitral awards, often proving problematic for the concerned parties. If it is so, the reason may indicate a lack of faith in the domestic arbitration process or question rationality and credibility of domestic arbitral awards. Against this backdrop, it is relevant to examine if the legislature and judiciary have taken recent steps to decongest the courts from the burden of post-award arbitration.

The omission of the ground of "*patent illegality*" from international commercial awards is intentional, since its inclusion may undermine the finality and enforceability of such awards. Regimes of international arbitration usually provide only narrow bases for setting aside an award, and patent illegality is not one of them. Such narrowness is necessary to maintain certainty and predictability in enforcing foreign arbitral awards and to further the general policy of favouring international arbitration and facilitating cross-border trade and investment.

In addition, the definition of "*public policy*" should also vary in domestic and international arbitrations because of the difference in legal systems and issues of public policy. Domestic standards of public policy applied to international arbitrations can negatively impact their results. Thus, public policy within international arbitration should be in concordance with international norms in order to ensure harmony and dependability in enforcement. Unnecessary hurdles for the enforcement of foreign awards can stifle international trade and economic development. Therefore, the legislative purpose seems to be to promote an arbitration-friendly environment,

18 Code of Civil Procedure 1908, § 38, No. 05, Acts of Parliament, 1908 (India).

promote cross-border commerce, and draw in foreign investment.

In *Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Services Inc.*[19], Supreme Court took a "*seat-centric*" stance. The Court explained that the application of Part I of the Act, including Section 9, is merely based on the seat of arbitration being in India. If the arbitration seat is elsewhere outside India, Part I does not apply. Here, the restricted scope of the ground of patent illegality under Section 34(2A) relating only to domestic awards is made to appear contradictory to the seat-centric approach held in BALCO. What this may suggest is that the top court could, in the future, go on to expand the ambit of the said ground to international commercial arbitrations having their seat in India so as to ensure consistency with the emerging arbitration jurisprudence in India.

3. Public Policy in Indian Arbitration Harmonising with Global Standards

When parties consent to arbitration, they implicitly undertake to relinquish their right of appeal from the arbitral award in a normal court of law, so that the effectiveness of the process can be maintained. A certain measure of judicial supervision is still essential, however, to safeguard arbitral awards from illegality in the sense that they continue to be in accord with and not deviate from the legal paradigm under which they are being conducted. This oversight is essential because arbitral tribunals created by the consent of the parties, have limited authority and cannot enforce their awards through sanctions. To enforce an award, parties must turn to a court, which has the exclusive authority to recognize and integrate the award legal system. Consequently, arbitral award must adhere to the fundamental principles of the jurisdiction's legal order and should not undermine broader public interests. Internationally, this standard is most effectively represented by the concept of "public policy".

The term "*public policy,*" though commonly understood, is highly dynamic and varies in interpretation depending on the area of law such as administrative or contractual law or the jurisdiction whether civil or criminal[20]. In arbitration, there is a general consensus that the concept of public policy should not be employed to reassess the

19 Bharat Aluminium Co. (BALCO) v. Kaiser Aluminium Technical Services Inc., AIR 2016 SC 1285.

20 Yash Pathak, V. Harini, *The Public Policy Exception: Sword or Shield in Indian Arbitration,* Nliu L. Rev. (June 8, 2025, 9:29 PM), https://nliulawreview.nliu.ac.in/blog/the-public-policy-exception-sword-or-shield-in-indian-arbitration.

merits of an arbitral award. The arbitral tribunal is viewed as the final authority on both legal and factual matters. Consequently, an application made under section 34 of the act is regarded as a challenge to the award rather than an appeal.

During the development of the UNCITRAL Model Law on International Commercial Arbitration, which serves as a framework for national arbitration laws, Indian delegates expressed concerns regarding the ambiguity of the term *"public policy"*[21]. Despite these issues, the international community chose to retain the term for its flexibility in allowing each nation to interpret it in line with their respective legal systems. India's increasing judicial activism in review of arbitral awards has made it less desirable as an arbitration hub and violated its obligations under 1958 New York Convention, which makes enforcement of foreign arbitral awards easy. The convention eliminates the requirement of *double exequatur*, so awards no longer need validation in the issuing country before enforcement elsewhere. It also restricts objections to enforcement, interpreting *"public policy"* narrowly, similar to the French *ordre public*, focusing on fundamental morality and justice rather than allowing merit reviews[22].

The UNCITRAL Model Law, as adopted by section 34 of the Indian Arbitration Act, had imposed the same rigid methodology on public policy, limiting it to serious issues like corruption, fraud, or procedural improprieties. It established with certainty that the enforcement of an award and not its merit is to be examined for a contravention of public policy.

Internationally, the objections in public policy are confined to cases of unconscionable, immoral or essentially unfair options. Indian courts adhered to the strict definition initially, focusing on underlying policy, morality and justice. This was amended through cases like *Renusagar Power Co. Ltd. v. General Electric Co.*[23], in which a broader definition of public policy became prominent, leading to greater judicial interference.

4. Evolution From Expansive Judicial Review to Judicial Restraint

The Indian judiciary's response to resolving patent illegality in arbitration has

21 Jahnavi Sindhu, *supra* note 15, at 425.

22 O.P. Malhotra, *supra* note 14, at 27.

23 Renusagar Power Co. Ltd. v. General Electric Co., AIR 1985 SC 1156.

seesawed between two extremes, expansive early-decade judicial activism, and a significant trend towards judicial restraint after the 2015 amendments of the Arbitration and Conciliation Act, 1996. This is an indication of a larger effort to reconcile the independence of arbitral processes with judicial oversight to make them fair and lawful. Yet, the Supreme Court's attempts to define the boundaries of interference under Section 34(2A) to cater to patent illegality in domestic arbitrations, have ironically created new uncertainties, defeating the very certainty attempted to be brought by these reforms. The 2015 amendments to the Arbitration and Conciliation Act attempted to resolve issues by bringing in Section 34(2A), which specifically circumscribed judicial intervention into domestic arbitrations to instances of patent illegality reflected on the face of the award. This provision, combined with amendments restricting the public policy exception, indicated a legislative will to encourage judicial restraint and harmonize Indian arbitration law with international pro-arbitration norms, like the UNCITRAL Model Law. The subsequent decisions of the Supreme Court, such as *Ssangyong Engineering v. NHAI*[24], sought to define the boundaries of patent illegality, reiterating that courts must not attempt to reappreciate evidence or sit as appeal courts. The shift towards judicial restraint has not been unproblematic nonetheless. The inherently subjective nature of phrases such as "*patent illegality*" and "*shocking the conscience*" has resulted in inconsistent judicial interpretation, generating new fields of uncertainty. For example, courts have struggled to articulate the test for patent illegality, especially where there are intricate factual disputes or procedural refinements. Recent rulings, like *Delhi Metro Rail Corporation v. Voestalpine*[25], reflect persisting tensions, with courts at times falling back on interventionist inclinations under the guise of correctives for patent errors.

Finally, though the transition from expansive judicial review to restraint betrays a forward-thinking conformity to international arbitration standards, the Indian judiciary's difficulty in applying Section 34(2A) consistently signifies a deeper difficulty. The absence of clear parameters for patent illegality continues to incite litigation, deferring the fulfilment of arbitration's potential as a rapid and independent mechanism for the resolution of disputes. It is resolved by additional judicial restraint and, perhaps, legislative clarification to make sure that the contours of interference are evident and uniformly enforced.

24 Ssangyong Engineering v. NHAI, AIR 2019 SC 5041.

25 Delhi Metro Rail Corporation v. Voestalpine, (2021) 112 DNJ 326 (Del.).

The idea of patent illegality, as instituted in Section 34(2A) of the Arbitration and Conciliation Act, 1996, after it was put in place through the 2015 Amendment, has been further evolved through recent court rulings, highly impacting the structure of domestic arbitration in India. A case in point here is *Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd.*[26], in which the Supreme Court exercised its power of curative under Article 142[27] of the Constitution to set aside an arbitral award. The Court held the tribunal's construction of the clause for termination of the concession agreement unreasonable and ignoring vital evidence so that the award was patently illegal. The tribunal's unwillingness to correctly evaluate contractual provisions and evidence, most notably the "*effective steps*" necessary in terminating, was so unreasonable as to be one which no reasonable person could have come to. This decision underlines that patent illegality goes beyond the breach of substantive law to encompass perverse interpretations of contracts or findings not based on evidence, in keeping with Associate Builders and Ssangyong Engineering established principles. Yet, invoking the curative petition to interfere underscores the ongoing conflict between upholding judicial restraint and correcting manifest miscarriages of justice, touching off fears of judicial over-reach into domestic arbitration. The Delhi Metro case underscores that patent illegality has to be evident on the face of the award, but its application in complex contractual disputes threatens subjective judicial constructions, potentially undermining the finality of arbitral awards. Another notable case that elucidated the principle of patent illegality is the Delhi High Court's ruling in *Amazing Research Laboratories v. Krishna Pharma*[28], which explained how violations of substantive law, i.e., provisions of the Indian Contract Act, 1872, can render an award liable to be set aside. The Court held that the tribunal's method of allocating funds under a running account, which infringed Sections 59[29], 60[30], and 61[31] of the Contract Act, was a patent illegality since it went to the root of the resolution of the dispute and was so egregious as to violate the court's conscience. The ruling highlights the arbitrator's responsibility under Section 28 of the 1996 Act to remain bound by the substantive legal provisions regulating contracts in India. In addition, the introduced Arbitration and Conciliation (Amendment) Bill, 2024[32], aims

26 Delhi Metro Rail Corporation Ltd. v. Delhi Airport Metro Express Pvt. Ltd., 2024 SCC OnLine SC 522.

27 INDIA CONST. art. 142.

28 Amazing Research Laboratories v. Krishna Pharma, 2023 LiveLaw (Del) 231.

29 Indian Contract Act, 1872, § 59, No. 9, Acts of Parliament, 1872 (India).

30 Indian Contract Act, 1872, § 60, No. 9, Acts of Parliament, 1872 (India).

31 Indian Contract Act, 1872, § 61, No. 9, Acts of Parliament, 1872 (India).

32 Arbitration and Conciliation (Amendment) Bill, 2024 (India).

to promote arbitration by encouraging institutionalized platforms and preventing judicial intervention, while leaving Section 34(2A) intact, affirming legislative intent to uphold patent illegality as insurance for domestic awards. This legislative approach, combined with decisions such as Amazing Research Laboratories, demonstrates the tension between compliance through the law and autonomy in arbitration. However, the subjective test of what "shocks the conscience" remains problematic for consistent application, calling for more detailed guidelines to bring India's arbitration law in line with international norms like those in the UNCITRAL Model Law, which focus on minimal judicial intervention and procedural fairness.

The Supreme Court has not yet established a clear test or standard to decide what is *"patent illegality."* This leaves the gates open for lower courts to resort to very subjective thinking, usually based on factual sympathy or perceived injustice rather than on legal correctness. For example, courts can resort to *"public interest"* or *"shocks the conscience"* as intangible concepts unrelated to definite statutory or doctrinal bases. This vagueness of interpretation does not merely undermine the credibility of arbitral tribunals but also discourages foreign investors and businesses from making India an arbitration seat. Though the Supreme Court decisions in Ssangyong point towards a forward-thinking trend, the uneven application at the High Court level makes it clear that doctrinal clarity is the need of the hour. The lack of uniformity also stands in stark contrast to international standards, where judicial review of awards is strictly confined to procedural impropriety or abuse of natural justice, as in jurisdictions such as Singapore, the UK, and Switzerland[33].

Conclusion

The 1996 Act aimed to limit the role of courts so that disputes are settled by way of arbitration finality and enforceability. The inclusion of *"patent illegality"* in India's Arbitration and Conciliation Act is a double-edged sword in the field of arbitration. While on one hand it opens a much-needed window for reversing arbitral awards that are severely flawed or absurd, safeguarding against gross legal errors. But this amendment also promises too much judicial intervention, something that would ruin the very foundation of arbitration, its finality and promptness. *"Patent illegality"* cannot be defined with precision in law, and so it generates confusion and

33 Payal Chawla, *Decoding the Meaning of Public Policy & Patent Illegality, their interplay with PASL Wind and its impact on the future of Domestic Arbitration*, (June 9, 2025), https://payalchawla.com/2023/01/09/decoding-the-meaning-of-public-policy-patent-illegality-their-interplay-with-pasl-wind-and-its-impact-on-the-future.

subjective interpretation which leads to increased debate over its impact on court interference in domestic arbitration. It imposes limits on the arbitrator's discretion, compelling them to ensure that their awards strictly adhere to legal norms and contractual terms. Therefore, arbitrators would be compelled to exercise restraint in their reasoning and adjudication process. Even execution of arbitral awards could be impacted by the threat of annulment due to patent illegality, in that parties would be less likely to make use of arbitration when they believe that there is a greater chance for judicial intervention post-award. Judicial rulings have also clarified the application of patent illegality, setting out that only clear and manifest errors would warrant intervention. Lastly, while the introduction of illegality under patent offers a vehicle for addressing gross errors in arbitral awards, it raises significant issues of how to balance judicial control with the need for finality in arbitration.

With the growing use of arbitration in India, familiarity with limited grounds for setting aside awards like the strict standard of patent illegality is necessary. Indian courts have to handle arbitration cases in a serious manner to uphold the finality and enforceability of awards, crucial to maintain India's position as an arbitration centre. India's regime of arbitration stands at a juncture of promise and duty. With the country adopting international norms, it is essential that attention is laid to building confidence and enhancing efficiency. The actual promise of arbitration does not only reside in resolving disputes but also in developing a mechanism that upholds justice, integrity and fairness.