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PATENT ILLEGALITY: A NARROW GROUND OR A RESIDUAL APPELLATE REVIEW?

Atul Kumar¹ and Gunjan Agarwal²

ABSTRACT

The doctrine of “patent illegality” under Section 34(2A) of the Arbitration and Conciliation Act, 1996 was introduced to confine judicial intervention in arbitral awards to manifest errors apparent on the face of the award, thereby reinforcing arbitral finality and party autonomy. However, its judicial evolution reflects a departure from this narrow objective, primarily due to the absence of a precise statutory definition and the resulting conceptual ambiguity. Courts have increasingly invoked patent illegality to engage in substantive scrutiny of arbitral awards, particularly in matters of contractual interpretation, evidentiary assessment, and perversity, thereby blurring the distinction between supervisory review and appellate adjudication. This expansion has significant normative implications, as it undermines the finality of arbitral awards and erodes party autonomy by effectively substituting judicial reasoning for arbitral determination. The doctrine, originally conceived as a limited safeguard, thus risks transforming arbitration into an intermediate stage of judicial review rather than a final dispute resolution mechanism. In this context, the article argues for a disciplined and restrictive application of patent illegality, confined strictly to manifest and self-evident errors, in order to restore doctrinal clarity, ensure predictability, and preserve the integrity of arbitration as an effective alternative to litigation.

Keywords: Patent Illegality, Arbitration, Party Autonomy, Judicial Intervention

I. INTRODUCTION

Arbitration, as a preferred mode of dispute resolution, rests on the foundational principles of the finality of awards and party autonomy, whereby parties consciously choose to exclude extensive judicial intervention and

¹ 4th Year BBA LLB (Hons.) Student In Amity Law School, NOIDA, atul3704kumar@gmail.com.

² 4th Year BBA LLB (Hons.) Student In Amity Law School, NOIDA, gunjan04agarwal@gmail.com.

entrust adjudication to a privately constituted tribunal.³ This structural shift from court-centric adjudication to consensual dispute resolution necessitates a correspondingly limited role for courts, confined to ensuring procedural integrity and legality without revisiting the merits of the disputes.

This legislative philosophy is reflected in Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter refer as “the Act”), which provides an exhaustive and narrowly circumscribed framework for setting aside arbitral awards. However, the judicial evolution of patent illegality reveals a departure from this intention. Although conceived as a limited safeguard, the doctrine has increasingly been invoked to justify the substantive scrutiny of arbitral awards⁴. Courts have engaged with issues of contractual interpretation, evidentiary sufficiency, and perversity, often extending their inquiries beyond the confines of supervisory jurisdiction.

This trend is particularly evident in cases where courts examine contractual interpretation, assess evidentiary sufficiency, or invoke the notion of perversity to justify their interference. While such interventions are formally couched in the language of patent illegality, they often entail a degree of scrutiny that closely resembles appellate review⁵. As contemporary analyses suggest, Section 34 proceedings have, in certain instances, evolved into a form of “appellate review in disguise,” thereby diluting the distinction between supervisory jurisdiction and merits-based adjudication.

The implications of this doctrinal shift are significant for several reasons. Beyond undermining the finality of arbitral awards, it raises concerns regarding the erosion of party autonomy, as judicial intervention effectively substitutes the tribunal’s determination with that of the court. This not only alters the character of arbitration but also reintroduces elements of judicial control that the arbitral process seeks to minimize.

II. LEGISLATIVE FRAMEWORK AND DOCTRINAL FOUNDATIONS

“Patent illegality” broadly refers to an obvious and apparent error in an arbitral award that is visible on the face of the decision itself, without requiring a detailed examination of evidence or re-evaluation of facts. In simple terms, it covers situations where the arbitral tribunal has clearly acted contrary to the law or the terms agreed between the parties.⁶ For instance, if an arbitrator ignores a binding contractual clause or applies a legal principle that is clearly inapplicable, such an error may amount to patent illegality. The concept is intended to

³ Gary B. Born, *International Commercial Arbitration* (2nd edn., Kluwer Law International 2014) 89.

⁴ Srinivasan, B. (2011). Public Policy and Setting Aside Patently Illegal Arbitral Awards in India. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.1958201>.

⁵ Bock, J. (2020). Deconfounding and Sandboxing Patent Litigation with a Specialized Patent Trial Court. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.3747411>

⁶ Nikita Sharma, *Patent Illegality as a Ground of Judicial Intervention in Arbitration*, LiveLaw (2024), <https://www.livelaw.in/lawschool/articles/patent-illegality-ground-judicial-intervention-arbitration-264375>

act as a limited safeguard against fundamentally flawed awards, while ensuring that courts do not interfere merely because another view is possible⁷.

The statutory scheme governing judicial intervention in arbitral awards is structured under Section 34 of the Arbitration and Conciliation Act, 1996, which embodies a closed and exhaustive set of grounds for setting aside an award. Unlike appellate provisions, Section 34 does not permit the correction of errors on merits; rather, it confines judicial scrutiny to issues affecting the legality and integrity of the arbitral process.⁸ This distinction is central to preserving arbitration's autonomy and finality.

Prior to the 2015 amendment, the scope of intervention under the “public policy” ground had been considerably expanded through judicial interpretation, most notably in *ONGC Ltd. v. Saw Pipes Ltd.*⁹, where patent illegality was subsumed within the public policy. This expansive formulation enabled courts to interfere with awards on broad grounds, including errors of law and contractual interpretation, thereby diluting the supervisory nature of Section 34.

The Act sought to address this overexpansion by introducing Section 34(2A) as a distinct ground applicable exclusively to domestic awards. The provision was intended to confine judicial review to patent illegality appearing on the face of the award, thereby separating it from the threshold and more indeterminate concept of public policy. The legislative intent, as reflected in the 246th Law Commission Report, was to ensure that interference is limited to manifest errors that go to the root of the matter, without permitting re-appreciation of evidence or substitution of judicial reasoning.¹⁰

This restrictive approach is further reinforced by Explanation 2 to Section 34(2), which clarifies that contravention of the fundamental policy of Indian law shall not entail a review of the merits of the dispute.¹¹ The combined effect of these provisions is to delineate a narrow supervisory jurisdiction, within which courts are required to assess only whether the award suffers from a defect that is apparent and legally unsustainable, rather than whether it is correct on the facts or law.

However, the absence of a precise statutory definition has left the contours of patent illegality to judicial construction, resulting in doctrinal fluidity. As observed in recent analyses, the term has been interpreted

⁷ Ankita Priya, *Review of Patent Illegality in Setting Aside Arbitral Award in India*, (IJLRA), Vol. 2, Issue 7 (September 2022), <https://ijlra.com/details/review-of-patent-illegality-in-setting-aside-arbitral-award-in-india-by-ankita-priya>

⁸ Redfern and Hunter, *Law and Practice of International Commercial Arbitration* (6th edn., OUP 2015) 570.

⁹ (2003) 5 SCC 705.

¹⁰ Law Commission of India, *246th Report on Amendments to the Arbitration and Conciliation Act, 1996* (2014).

¹¹ Arbitration and Conciliation Act, 1996, Explanation 2 to s. 34(2).

variably to include errors of law, perversity, and failure to consider material evidence, thereby expanding its scope beyond the narrow limits envisaged by the legislature.¹²

III. DOCTRINAL AMBIGUITY AND CONCEPTUAL CONFUSION IN “PATENT ILLEGALITY”

Despite its statutory incorporation, the doctrine of “patent illegality” continues to operate within a zone of conceptual ambiguity, owing to the absence of a precise legislative definition and the persistence of overlapping judicial formulations. This has resulted in unstable jurisprudence, where the boundaries between illegality, error, and perversity remain indistinct, enabling inconsistent application of Section 34(2A).

A primary difficulty lies in distinguishing patent illegality from a mere error of law. While the statutory framework excludes interference based on the erroneous application of law, courts have often treated incorrect legal interpretation as a ground for setting aside awards¹³. This blurs the line between manifest illegality and legal error, thereby expanding the scope of judicial intervention beyond legislative intent.

This ambiguity is further compounded by the incorporation of the perversity standard. Findings based on no evidence, ignoring material evidence, or conclusions that no reasonable person would reach, have been treated as patent illegality. However, such grounds inevitably require reassessment of evidence, encroaching upon the domain of factual adjudication and indirectly permitting a merits review.

A related concern arises from the overlap between patent illegality and the public policy of India. Despite legislative attempts to distinguish between these grounds, judicial reasoning often invokes them interchangeably, diluting doctrinal clarity and expanding the scope of intervention. This instability is most evident in the continued re-examination of evidence, notwithstanding statutory prohibition. Courts frequently interfere on the basis of ignored evidence or unreasonable conclusions, reflecting an underlying appellate tendency and transforming supervisory reviews into substantive scrutiny.¹⁴

This issue is particularly pronounced in contractual interpretation, where courts have intervened despite the settled position that such matters fall within the arbitral domain. Thus, patent illegality operates as a flexible and indeterminate ground, eroding the distinction between supervisory and appellate reviews and undermining predictability in arbitral jurisprudence.

IV. JUDICIAL OVERREACH AND THE APPELLATE TRANSFORMATION OF SECTION 34

¹² Saket Bhalotia & Bhavika Agrawal, *Critical Analysis of the Ground of Patent Illegality in Setting Aside an Arbitral Award*, The Arbitration Digest (date if available), <https://thearbitrationdigest.com/critical-analysis-of-the-ground-of-patent-illegality-in-setting-aside-an-arbitral-award/>.

¹³ Sebastian, T., & Arya, G. B. (2013). Critical Appraisal of ‘Patent Illegality’ as a Ground for Setting Aside an Arbitral Award in India. *Bond Law Review*, 24(2). <https://doi.org/10.53300/001c.5596>

¹⁴ Palak & Aditya, *The Illusion of Finality: Patent Illegality as a Backdoor for Judicial Overreach in Section 34*, Indian Rsch. Ctr. Const. L., <https://www.irccl.in/post/the-illusion-of-finality-patent-illegality-as-a-backdoor-for-judicial-overreach-in-section-34>.

The Act introduced “patent illegality” as an independent ground for setting aside domestic arbitral awards. However, despite its statutory incorporation, the term “patent illegality” has not been expressly defined in the Act. Consequently, its contours have been shaped through judicial interpretation, with courts adopting varied and sometimes inconsistent approaches to delineate its scope.

The doctrine originated in *ONGC Ltd. v. Saw Pipes Ltd.*¹⁵, where the Supreme Court expanded “public policy” to include patent illegality as a ground for setting aside awards. While this marked a significant shift, the Court did not clearly delineate the scope of the term, thereby introducing a degree of doctrinal ambiguity. This ambiguity was further reflected in *Phulchand Exports Ltd. v. OOO Patriot*¹⁶, where patent illegality was extended to the enforcement of foreign awards. However, this approach was subsequently overruled in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*¹⁷, confined the public policy ground in foreign awards to a narrower standard, thereby excluding patent illegality.

The doctrinal framework was further elaborated in *Associate Builders v. Delhi Development Authority*¹⁸, where the Court identified categories such as contravention of substantive law, violation of the Arbitration Act, absence of reasons, and disregard of contractual terms.⁵ While this provided structure, it also broadened the scope of review by incorporating elements that overlapped with merits-based scrutiny.

A corrective shift was observed in *Ssangyong Engineering & Construction Co. Ltd. v. NHAI*¹⁹, where the Court confined patent illegality to errors going to the root of the matter and excluded re-appreciation of evidence. This restrictive approach was reiterated in *Patel Engineering Ltd. v. Northeastern Electric Power Corporation Ltd.*²⁰, emphasizing that interference is justified only when the award is perverse or represents a view that no reasonable person could adopt. Similarly, in *Reliance Infrastructure Ltd. v. State of Goa*²¹, the Court reaffirmed that patent illegality must be apparent on the face of the award and cannot be established through the re-evaluation of evidence.

At the High Court level, the doctrine has been applied to procedural fairness. In *Zakir Hussain v. Sunshine Agrisystem Pvt. Ltd.*²², refusal to admit material evidence on procedural grounds was held to constitute patent illegality, as it violated the principles of natural justice. These developments reveal a doctrine that oscillate between restriction and expansion, with its undefined contours enabling both judicial restraint and intervention.

¹⁵ (2003) 5 SCC 705.

¹⁶ (2011) 10 SCC 300.

¹⁷ (2014) 2 SCC 433.

¹⁸ (2015) 3 SCC 49.

¹⁹ (2019) 15 SCC 131.

²⁰ (2020) 7 SCC 167.

²¹ 2023 SCC OnLine SC.

²² O.M.P. (COMM) 249/2021 & I.As. 10593/2021 & 634/2022.

V. EROSION OF PARTY AUTONOMY

The expanding judicial interpretation of “patent illegality” under Section 34(2A) has significantly undermined the principle of party autonomy, which is the cornerstone of arbitration. The legislative framework of the Act was designed to ensure minimal judicial interference, thereby allowing parties to resolve disputes through a forum of their own choosing, with finality attached to arbitral awards. However, judicial practices have increasingly deviated from this objective²³.

The Supreme Court has consistently recognized the centrality of party autonomy in the Arbitration Agreements. In *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*²⁴, affirmed that arbitration derives legitimacy from party agreement. Similarly, in *Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc.*²⁵, party autonomy was described as the “brooding and guiding spirit” of arbitration law. Contemporary analyses reveal that courts have increasingly employ patent illegality as a gateway for extensive merits review, particularly in matters involving contractual interpretation and evidentiary evaluation. This has resulted in what has been described as an “appellate-style scrutiny” under the guise of supervisory jurisdiction, effectively converting Section 34 proceedings into a *de facto* appeal.²⁶

A notable manifestation of this trend is the re-evaluation of contractual terms and factual findings, where courts scrutinize arbitral reasoning to determine whether conclusions are “reasonable” or whether material evidence has been ignored. Such an approach directly contradicts the legislative mandate that prohibits re-appreciation of evidence and confines intervention to the illegality apparent on the face of the award.

Furthermore, the broad application of concepts such as perversity and unreasonable interpretation has enabled courts to substitute their own reasoning for that of the arbitral tribunal. This results in a functional displacement of arbitral authority, thereby diluting the finality of awards and undermining the consensual foundation of arbitration.

From a structural perspective, this shift transforms arbitration into an intermediate stage preceding judicial adjudication rather than a final and binding dispute resolution mechanism. As observed in recent scholarship, such judicial overreach risks eroding confidence in arbitration and discouraging parties from relying on it as an effective alternative to litigation.

VI. RECONCILING PATENT ILLEGALITY WITH ARBITRAL FINALITY

²³ Singh, P., & Malipatil, A. (2024). Empirical insights into the legal quicksand: the case of patent illegality in Indian arbitration. *Arbitration International*, 41(2), 327–347. <https://doi.org/10.1093/arbint/aiae038>.

²⁴ (2017) 2 SCC 228.

²⁵ (2012) 9 SCC 552.

²⁶ *The Illusion of Finality: Patent Illegality as a Backdoor for Judicial Overreach in Section 34* (IRCCL Blog, 2025).

The doctrine of patent illegality, although conceived as a narrow safeguard, has evolved into an expansive ground for judicial intervention. The challenge lies not in discarding it but in reconciling it with arbitral finality and party autonomy, requiring a recalibrated judicial approach aligned with statutory intent.

Patent illegality must be confined to manifest and self-evident errors apparent on the face of the award, without necessitating a detailed evidentiary review. This includes instances where the tribunal contravenes substantive law, disregards contractual terms, or exceeds its jurisdiction. Any expansion risks converting Section 34 into a merits review mechanism.

The scope of perversity must also remain limited in the regards. While it addresses irrational or evidence-less findings, it should not permit the re-evaluation of facts. Courts must confine their application to exceptional cases to preserve arbitral fact-finding.

Similarly, contractual interpretation must remain within the arbitral domain of the parties. Where two views are possible, the arbitrator's view must prevail. Judicial interference should arise only where the interpretation is wholly unreasonable failing which, it amounts to a substitution of judicial reasoning.

Institutionally, courts must reaffirm the supervisory nature of Section 34, shifting away from an appellate mindset and focusing on legality rather than correctness of the decision. Further, alignment with international standards such as the UNCITRAL Model Law and the New York Convention, both embodying a pro-enforcement approach, would enhance predictability and strengthen India's arbitration framework.²⁷

Finally, the development of clear judicial guidelines delineating the scope of patent illegality would reduce interpretive inconsistencies. Interference must be limited to cases where illegality is evident without a detailed inquiry, ensuring that arbitral autonomy and finality are preserved.

VII. CONCLUSION

The evolution of patent illegality under Section 34(2A) reflects a broader tension within Indian arbitration law between ensuring legality and preserving arbitral finality. While the 2015 amendment sought to confine judicial intervention within narrow limits, its application reveals a continuing tendency towards expansion, driven by doctrinal ambiguity and an enduring judicial inclination to scrutinize arbitral reasoning.

The resulting jurisprudence oscillates between restraint and intervention, creating uncertainty and undermining arbitration efficiency. More critically, the expansive application of patent illegality erodes party autonomy, which constitutes the normative foundation of arbitration. When courts revisit findings of fact or

²⁷ Mody, Z., & Jayasimha, S. (2012). *Recent Indian Developments Relating to International Arbitration* (pp. 298–309). Brill Nijhoff. https://doi.org/10.1163/9789004231269_019.

reinterpret contractual terms, they effectively displace the authority of the arbitral tribunal, transforming arbitration into a preliminary stage of litigation rather than a final adjudicatory mechanism.

The current trajectory of patent illegality reflects a form of disguised appellate review, inconsistent with both statutory design and arbitral principles. The absence of a clear doctrinal framework has enabled the courts to blur the distinction between illegality and error, thereby expanding the scope of intervention beyond its intended limits. The way forward lies not in eliminating judicial oversight, but in disciplining its exercise. Patent illegality must remain confined to manifest and self-evident errors, ensuring that arbitration continues to function as a credible and effective alternative to litigation.