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Scope of counterbalancing public policy and execution of foreign arbitral awards in India

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Abstract: Public policy is an essential consideration in international arbitration, as well as domestic arbitration. In contrast to the latter, the former is becoming an increasingly restricted approach internationally, particularly in the context of enforcement of foreign arbitral awards. International arbitral tribunals should be cognizant of the problem, even if it is difficult while pronounce the judgement, because different jurisdictions may prioritize different aspects of public policy for a variety of reasons. This study will examine the many ways in which domestic courts have used the public policy concept in evaluating this exemption for the protection of state sovereignty in cases when a foreign award is incompatible with the law of the enforcing nation. Lastly, the author believes that the New York Convention of 1958's pro-enforcement bias can be strengthened by this paper's transnational perspective, which urges public policy to be justifiably compatible with the global public policy of a large community of nations. This perspective can also serve as a safety valve to ensure the effective enforcement of meritorious arbitral grants.

Keywords: Arbitration. Foreign Arbitral Awards. Public Policy.

1 Introduction

Arbitration for the purpose of resolving disputes based on the previous alignment of the parties' wills is well recognised and has a long history. The

parties' faith in this method of conflict resolution has allowed it to endure for so long. They have consistently turned to arbitration to settle their disagreements. Modern times have given rise to the normative regulation of conflict resolution via international business arbitration. Arbitration, as a non-conventional means of conflict resolution, is increasingly accepted and used on a global scale.[1] Since the commencement of Arbitration Laws in India in 1940, it has been at the forefront of legal development. The current arbitration legislation in India is an amalgamation of many proclamations and ordinances enacted by the government in response to the country's periodic economic changes. The Act of 1996 governs most aspects of Indian arbitration law. A statute enacted to harmonies the various jurisdictions' legislation governing the conduct of and the enforcement of arbitration both at home and abroad. Some substantial changes were made in 2015 and 2019 in an effort to make international commercial arbitration the dominant technique for resolving business disputes and to make India a hub for such arbitration. A significant number of similar adjustments have been enacted in the past, with the most recent ones being proposed in 2019.

The concept of arbitration in modern financial dealings is constantly developing. The legislation gives the parties the option to participate in business agreements with the knowledge that, in the event of a disagreement, they may save the time and expense of going to court by referring the matter to arbitration. An arbitral decision cannot be challenged in court. However, an arbitral ruling may be cancelled only in cases where the underlying arbitration agreement is unlawful; a party lacks the legal ability to enter into a contract, the arbitrator's independence and impartiality are in question, the process was unjust, etc. International arbitration is based on the principle of party independence. However, it does have certain restrictions. Arbitrability and *"Doctine of Public Policy"* are two of the most important things that can limit the freedom of a party. Throughout this article, the authors seek to clarify the scope of Public Policy in India and the extent to which it may impede the execution of foreign arbitral judgements in a variety of contexts.[2]

2 Doctrine of Public Policy: Meaning and Interpretation

Since public policy may be a reason for refusing to recognise and enforce not only foreign court judgements but also foreign arbitral awards, it is an important topic of discussion in the area of international commercial arbitration. The New

[1] Wulff, Erik, & Kiran Lingam, "Franchising In India: A Brave New Frontier: Economic Policy Reform Paves the Way", 29 (4) Franch. Law J. 248, 249-50 (2010).

[2] Nazzini, Renato, "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context", 66 (3), Am. J. Comp. L., 603, 612-14 (2018).

York Convention of 1958 allows for the rejection of foreign awards for reasons of public policy. Everything that must be safeguarded by the state and its legal system is included in this definition of public policy.[3] All citizens are entitled to be shielded from the potentially detrimental consequences of foreign legislation by their own country's public policy ideas, objectives, values, and regulations. As a result, the public policy serves as a check on the power of any state to implement its laws.

2.1 Meaning and Scope

Public policy, according to Percy H. Winfield, "before the advent of the equitable system in common law and was in use even then, whether intentionally or not".[4] When issuing fresh writs, courts once gave thought to the public good.[5] The Dyer's Case of 1414[6] can be often credited to be one of the first case to use the term "encounter common ley, which refers to anything harmful to a community or the Commonwealth and serves as the foundation of the idea of public policy".[7]

Most countries have long recognised "order public" limitations to the enforcement of foreign judgement.[8] In addition, private international law treaties and local laws sometimes recognise public policy as an exception. Thus, the incorporation of public policy into international arbitration does not represent a novel concept, but rather an ancient concept that has been adapted to the setting of international conflict resolution. Considerations of public policy have never really left the sphere of private international law. The notion of a public policy exemption grew increasingly prevalent in international law in the twentieth century, despite the fact that it was not included in the Hague Conferences on Private International Law in 1893. It was adopted by all subsequent international and regional agreements, such as the Brussel Convention, the Rome Convention, the UNCITRAL Model Law on Procurement of Goods, Construction, and Services, etc.[9]

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3 New York Convention 1958, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York", June 10, 1958; entered into force, June 7, 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959). available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

4 Percy H. Winfield, "Public policy in the English Common Law", 42 Harv. L. Rev. 76 (1928): "One is the unconscious or half-conscious use of it which probably pervaded the whole legal system when the law had to be made in some way or other, and when there was not much statute law and practically no case law at all to summon to the judges' assistance. The other is the conscious application of public policy to the solution of legal problems, whether bore the name by which it is now known or -was partly concealed under some other designation which, however, really expressed the same thing".

5 Percy H. Winfield, "Public policy in the English Common Law", 42 Harv. L. Rev. 76 (1928).

6 Dyer's Case Y.B. 2 Hen. 5, fol. 5, pl. 26 (1414).

7 W.S.W. Knight, "Public Policy in English Law", 38 L.Q.R. 207 (1922).

8 Garry B. Born, International Commercial Arbitration, commentary and material, 223 (Kluwer Law International and Transnational Publishers, Inc., The Hague, Netherlands, 1st ed, 2001).

9 Farshad Ghodoosi, International Dispute Resolution and the Public Policy Exception 205-06 (Routledge, London & New York, 1st ed, 2017).

In Article V of the New York Convention 1958,[10] "public policy" relates directly to the state's public policy when implementation of the verdict is sought. It is also important to note that courts need to consider whether implementing an arbitration award would violate public policy. However, the New York Convention of 1958 does not in any way define public policy. Rather than having a single, universally accepted definition, the idea of public policy has evolved via a process of the localised, evolving agreement. Dynamic in nature, the understanding of public policy has developed through phases. The House of Lords explained the public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good".[11] It can be considered as a "moral, social or economic principle so sacrosanct... as to require its maintenance at all costs and without exception".[12]

Because of the lack of clarity and expansive interpretation of the term "public policy" in the New York Convention, parties in a number of countries have been able to use this ground for denying and setting aside a foreign award.

2.2 International Public Policy vis-à-vis Domestic Public Policy: Study of the Comparative Jurisprudence

International jurists are almost unanimous in their belief that the term "international public policy," as used in Article V (2) of the New York Convention, has a more limited scope than "domestic public policy". Therefore, "public policy" in domestic issues is distinct from "public policy" in foreign issues. Legislation and judicial decisions frequently cite international public policy in the context of enforcing an arbitral result. The question of what comprises international public policy, however, is one for a national court to resolve.

The violation of public policy is a notion that courts have expressed in a variety of ways, some exclusive to civil law states and others to common law ones. In case of the former, the interpretation of public policy is often, but not always, articulated in terms of the unnamed underlying beliefs or values upon which society is founded. But under common law regimes, the term usually refers to more specific but still relatively broad ideals like justice, fairness, and morality.

Courts in certain countries, including the UK, have been hesitant to provide a clear definition of public policy, instead using general principles, stating that: "[c]

[10] Article V of the New York Convention 1958, "Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York", June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959). available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

[11] Egerton v. Brownlow, 4 HLC 1 (1853).

[12] Chesire & North, Private International Law, 123 (Butterworths,13th ed.1999).

onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".[13] Public policy, on the other hand, has been given a somewhat broader definition in India, and even an Indian court may choose not to follow a foreign arbitral ruling on the grounds of public policy if it would be in conflict with: "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[14]

Domestic public policy refers to the rules of law and morality that are established by a state's constitution or other sources of law. Transgression of these norms is unacceptable even in international affairs, yet public policy somewhere at an international scale is a representation of the justice-seeking sentiment of a community. Few nations have made clear commitments to the idea of international public policy in connection to enforcement cases. Public policy's underlying philosophies are often those of the nation where enforcement is being wanted. Article V(2)(b) of the New York Convention of 1958 makes this point clear when discussing situations in which the award's acceptance or enforcement would be "against the national policy of that country".[15] Some nations, such as France and Switzerland, draw a line separating domestic and foreign public policy and include arbitral verdicts as a component of international public policy.[16]

The public policy exception has been used by domestic courts to prevent the implementation of foreign arbitration awards, as shown in the case of "*Hardy Exploration & Production (India), Inc. v. the Government of India"*.[17] For instance, in this case, the United States strictly adheres to the public policy notion to preserve foreign sovereignty, which prohibits the particular execution of an international arbitral decision in any nation that does not acknowledge U.S. arbitration, hence the US District Court in the District of Columbia declined to implement the ruling.[18]

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[13] Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v R'as al-Khaimah National Oil Company 1 AC 295 (1990).

[14] Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

[15] "Article V(2)(b) of the New York Convention 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959)". Available at: https://www.euroarbitration.org/resources/en/nyc_convention_en.pdf.

[16] Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

[17] Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Nat. Gas, 314 F. Supp. 3d 95 (D.D.C. 2018).

[18] "The parties were in dispute regarding the seat of arbitration. Their agreement stated that the place of arbitration was Malaysia, which contended that the place of arbitration meant the place of the hearings. Thus, they had different views on the competent authority referred to in Art. V(1)(e) of the Convention. India initiated annulment proceedings and Hardy sought enforcement of the award in Delhi. The High

Although the court acknowledged that Hardy had one legitimate claim, it said that it would not execute an award that required particular performance in a nation beyond the United States, namely India. The court's goal was to find a middle ground between the United States public policy of recognising the sovereignty of a foreign state and the real international public policy concerns surrounding the implementation of a judgement from an arbitrator. When deciding the scope of what constitutes a violation of public policy, the court relied on statutes and national judgements that explicitly prohibit certain acts of performance directed against a different country. In light of this stipulation, the court came to the conclusion that it was against the public interest of the United States to enforce a specific performance award in a state that is not its own. The court also stated that it would be a violation of the principles of soft international law if a court in the United States were to impose a specific performance by a foreign state on the territory of that state, and that the United States never had surrendered its sovereign immunity with regard to specific performance in commercial matters.

2.3 Global Perspectives on Substantive and Procedural Public Policy

The courts in which recognition and execution of an arbitral judgement are sought apply Article V(2) of the New York Convention, which mandates consideration of both the substantive consequences of the decision and the process leading up to the award.[19] Mandatory and basic laws, public order as well as morality, and the national interest all make up a country's substantive public policy. It addresses inconsistencies between the subject matter of the award and the state's basic norms and values that will be used to uphold the award. For a state to recognise law as basic to its domestic control, the state must determine that the disagreement could not have been resolved under any other law. For the sake of a basic rule, the limited scope of public policy for international conflicts is therefore, irrelevant.

Numerous international legal rulings have barred the use of awards because they go against the morals of the relevant state. This benchmark is very

Court of Delhi held that the contract did not define the place of arbitration clearly and interpreted the seat of arbitration to be outside India and decided that the court did not have jurisdiction. India appealed this decision before the Supreme Court of India. While these proceedings were pending, Hardy sought enforcement before the U.S. courts and the U.S. Court rendered its decision on refusal of enforcement before the Indian courts. After the U.S's decision, the Supreme Court of India decided that the jurisdiction to hear the annulment lawsuit of the award lies with the Courts of India and the order of the High Court of Delhi was set aside".

[19] "New York Convention 1958, Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York, June 10, 1958; entered into force, June 7 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959)". Available at: https://www.euro-arbitration.org/resources/en/nyc_convention_en.pdf.

context-dependent. Therefore it fluctuates considerably from one state to another. For example, in USA *Productions et al v Women Travel*,[20] due to a breach of contract dispute, the China International Economic and Trade Arbitration Commission issued an award that was not recognised by Chinese courts. The Chinese government's failure to enforce this stems from the fact that allowing the band to play would have been seen as anti-nationalistic and offensive to the Chinese people. To determine whether or not to enforce foreign judgments, courts often weigh the notion of national interest. Again in *United World Ltd Inc v Krasny Yakor*,[21] the Russian Federal Court refused to uphold an arbitral ruling because it feared the insolvency of Krasny Yakor, a state-owned corporation that produced items of national security, would have a chilling effect on the country's social and economic stability. Although parties sometimes contend that a state's international relations should play a role in the implementation of arbitral rulings, this argument is rarely upheld. In the case of *Dalmia Dairy Industries Ltd v National Bank of Pakistan*,[22] the English court did not buy the claim that the citizens of the two nations in question were at war, hence the award was enforced.

The shortcomings in the laws that regulate arbitration are addressed by procedural public policy, which encompasses a wide range of topics such as corruption and fraud due process, res judicata, and dissolution at the site of arbitration. The court also considered a breach of public policy when they realised that the fundamental right of being heard was violated. When a tribunal provided a remedy that was not sought by the parties, for instance, the Canadian courts declined to recognise and enforce the award on the grounds that it was in violation of the *"principle of audiatur et altera pars".* Applications to reject recognition and enforcement on the grounds of procedural public policy must meet a high hurdle to be granted when based on substantive public policy. In *Osuuskunta METEX Andelslag v Tiirkiye Electrik Kurumu Genel Miidirliigii General Directorate*,[23] the Turkish Supreme Court refused to recognise the validity of a Swiss law-governed arbitration ruling on the grounds that it ran afoul of Turkish public policy by failing to adhere to the exacting standards set out by Turkish law. The international community as a whole has panned this decision for many reasons, including the fact that the procedural legislation chosen by the parties ultimately had no bearing on the result of the case.

[20] Productions et al. v. Women Travel, Supreme People's Court of the P R of China, Jing Ta No. 35 (1997).
[21] United World v. Krasny Yakor, Federal Arbitrazh Court of the Volgo -Vyatsky Region, Russia, A43-10716/02-27-10 (2003).
[22] Dalmia Dairy Industries Ltd v. National Bank of Pakistan, 2 Lloyd's Rep 223 (1978).
[23] Osuuskunta METEX Andelslag v. Tiirkiye Electrik Kurumu Genel Miidirliigii General Directorate, Decision of the 15th Civil Chamber, No. 16-17-1052 (1976).

3 Scope of Section 34 of the Arbitration and Conciliation Act, 1996 (India): Setting aside an Arbitral Award

In ancient and mediaeval India, it was common to practice having a neutral third party arbitrate a dispute. If any party to a legal disagreement is dissatisfied with the outcome, he or she may file an appeal to the Law Court and, if necessary, with the King. The Regulations drafted by that the East India Company gave the courts the authority to submit cases to arbitration, marking the beginning of the current law of arbitration.[24]

The English Arbitration Act of 1889 served as the model for the first Indian Arbitration Act of 1899. After the Indian Arbitration Act of 1940, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (1985) served as the basis for the Arbitration and Conciliation Act of 1996 (the "Act"), which was passed by Parliament. Section 34 of the 1996 Act makes reference to both Section 30 of the Arbitration Act of 1940 and Article 34 of the UNCITRAL (United Nations Commission on International Trade Law) Model Law on the subject of annulling an arbitral judgement.

3.1 Overview of the Statutory Provision

The grounds for appealing against an arbitral ruling issued according to Section 31 of the Arbitration and Conciliation Act of 1996 are laid forth in Section 34. The goal of a set aside is to alter the reward in whole or in part. A challenge to an award under Section 34 is possible, but only within a certain time frame; in this case, three months after receiving the award (this time frame may be extended by an additional 30 days). In "*Municipal Corp. of Greater Mumbai v. Prestress Products"* (2003),[25] the court ruled that the 1996 Act was established with the deliberate intention of restricting judicial intervention, but Section 34 can be found to be otherwise.[26]

The Court may vacate an arbitral award for a variety of reasons, including the parties' incapacity to arbitrate, the agreement's invalidity, the lack of notice to the other party, and the dispute's expansion into a subject outside the scope of the arbitration clause, as listed in Section 34(2)(a) of the Arbitration and Conciliation Act, 1996. Any agreement made between persons who are below the age of majority or minors is null and void. Any award rendered under such circumstances

[24] Sindhu, Jahnavi, "Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse?", 58 (4) JILI, 421, 430-35 (2016).
[25] Municipal Corp. of Greater Mumbai v. Prestress Products, (3) BomCR 117 (2003).
[26] Municipal Corp. of Greater Mumbai v. Prestress Products, (3) BomCR 117 (2003).

may be set aside by the court, and the agreement itself will be null and invalid.[27] For instance, A lady afflicted with schizophrenia, a mental condition, may ask for an award to be withheld on her behalf. The reasons for the incompetent party's incapacity, however, will be erased if the incompetent party wants a guardian for arbitral proceedings in accordance with Section 9 of the arbitration act.[28]

Similarly, a contract is not legally binding until all of its necessary conditions are satisfied. In the event that the contract is invalid, the arbitration clause will be nullified as well, and the arbitral ruling might be challenged.[29] In *Adarsh Kumar Khera v. Kewal Kishan Khera* (2007),[30] since the arbitral award was reached without the parties being given an opportunity to be heard, it was declared null and invalid, and the parties sought to have it reversed. Also, if the party who filed the application for arbitration did not get timely notice of the arbitrator's appointment or the arbitral processes, or if he was prevented from doing so for any other reason, the award rendered by the arbitrator will be null and void.[31] If the arbitral award addresses a matter not covered by the arbitration agreement or if it includes rulings on matters not covered by the arbitration agreement, it will be susceptible to appeal. In addition, only the part of the arbitral award, including decisions on issues not referred to arbitration, may be set aside if it can be shown that the arbitrator erred in making the determination.[32] In *India Yamaha Motor Pvt. Ltd. v. Divya Ashish Jamwal* (2019).[33] The arbitral judgement was overturned because it violated the terms of the contract, did not consider pertinent information on file, and was predicated on conjecture. Further, in "*Rulia Mal Amarchand v. Hindustan Petroleum Corporation Ltd.* (2019),[34] it was decided that the arbitrator ought to have kept his decision-making to the issues and settlement that were submitted for arbitration".

Other than the reasons listed in Section 34(2)(b) of the Arbitration and Conciliation Act of 1996, the court may reverse an arbitral judgement if it determines that the subject matter is covered by another act or legislation and does not comply with Indian public policy. The Court inferred in *Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd.*,[35] 2003, that The Court was seen as an appellate/revision court with wide powers in the event of an application under Section 34 to vacate an award. It was also said that "public policy" refers to anything that is for the benefit

[27] §34(2)(a)(i) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[28] §9 of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[29] §34(2)(a)(ii) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[30] Adarsh Kumar Khera v. Kewal Kishan Khera, Delhi High Court Case No. O.M.P. 643 (2007).
[31] §34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[32] §34(2)(a)(iv) of the Arbitration and Conciliation Act, 1996, No. 26, Acts of Parliament, 1996 (India).
[33] India Yamaha Motor Pvt. Ltd. v. Divya Ashish Jamwal, Delhi High Court, O.M.P. 1107/2012.
[34] Rulia Mal Amarchand v. Hindustan Petroleum Corporation Ltd. Delhi High Court, O.M.P. 505/2006.
[35] Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd., AIR 2003 SC 2629.

and advantage of the general population. However, there is no way to claim that the judgement serves the public interest, given its obvious violation of the law. The justice system is likely to be impacted by such an outcome or judgement.

3.2 Distinction between Domestic and Foreign Awards

In the Section 34 of the Arbitration and Conciliation Act, 1996, the reasons for setting aside a domestic arbitral judgement are outlined, while in Section 48, grounds for setting aside an international arbitral award are outlined. Sections 34 and 48 of the Act are identical in wording, scope, and intent. The Indian Apex Court, in "*Renusagar Power Co v General Electric*,[36] stated that a distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law, and a matter involving conflict of laws. The application of this doctrine in the field of conflict of laws is more limited, and the courts are slower to involve public policy in the cases involving a foreign element than when a purely municipal legal issue is involved".[37]

In "*Oil and Natural Gas Ltd v Saw Pipes Ltd*,[38] For reasons of public policy, the Supreme Court has further clarified the boundary between domestic and foreign arbitrations". Following the distinction established by Renusagar, the Court introduced another basis on which enforcement may be refused: the ground of patent illegality, much to the dismay of the international community. As a result of this ruling, courts may now look at the facts of a case before deciding whether or not to enforce a judgement if it finds that the award is fundamentally at odds with Indian law. However, only domestic arbitrations were eligible for this extension's benefits. This verdict brought various criticisms, and hence it was amended in "*Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc"*.[39] Subsequently, the Amendment Act was passed, and Section 34 was revised such that it no longer applied to foreign business arbitrations. It has also been made clear that, in the event of a Section 48 application, the court will not examine the merits of the case beyond the issue of patent illegality. In "*Associate Builders v. Delhi Development Authority"*,[40] the Supreme Court has ruled that domestic arbitration verdicts may only be overturned in extreme circumstances, such as where they are capricious, unreasonable, or otherwise violate the court's sense of morality.

[36] Renusagar Power Co v General Electric,1994 AIR SC 860 at para 51, 1994 SCC Supl (1) 644.
[37] Renusagar Power Co v General Electric,1994 AIR SC 860 at para 51, 1994 SCC Supl (1) 644.
[38] Oil and Natural Gas Ltd v Saw Pipes Ltd AIR 2003 SC 2629, (2003) 3 SCR 691.
[39] Bharat Aluminium Co v. Kaiser Aluminium Technical Services Inc., Civ App 3678 of 2007.
[40] Associate Builders v. Delhi Development Authority 4 Arb LR 307 (SC) (2014): 3 SCC 49 (2015).

In light of this, the current legal framework significantly restricts the influence of public policy on domestic and foreign arbitrations, bringing them into line with globally recognised norms.

4 Disjunct between Theory and Practice: Public Policy and Indian Arbitration through Judicial Interpretations

Public policy in India originally included just the country's core policy, its interests, and issues of morality and justice, but this definition was later broadened. The issues for India began with the conflict of *Renusagar Power Co. Ltd v. General Electric Co*.[41] According to the Supreme Court's decision in "*Renusagar Power Co. Ltd. v. General Electric Company*, a foreign award's implementation might be blocked if it's deemed against public policy if that enforcement is against:

- fundamental policy of Indian law, i.e., if foreign arbitral award involves a violation of Indian law or non-compliance with the court's order. However, the bar of limitation will not operate as a bar of public policy.
- Justice or morality".[42]

Since it lacks a precise definition, Indian interest automatically connotes a broad concept. In the instance of "*COSID Inc v. Steel Authority of India"*,[43] the award was revoked on the grounds that there was an emergency scarcity of coils in India at the time, and the government had restricted their export. The clarification to Section 48 of the 1996 Arbitration and Conciliation Act makes this clear.

A basic element of due process, which is a matter of public policy, is that all parties be given a fair and impartial hearing. According to this rule, all interested parties must have been given a fair chance to participate. However, if a party is advised of the arbitration but then refuses to participate or does nothing, that party will be seen as if he knowingly waived his right to participate. This was upheld in the case of "*European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd".*[44] by the High Court of Bombay, where the respondent claimed that the arbitrator did not take into account the export ban on the items at issue, the judgment would be in contradiction to the public policy. This defence was shot down by the high court, which reasoned that the defendant should have brought up the issue before the arbitrator and prevented them from doing so by not showing up to the hearing.[45]

[41] Renusagar Power Co. Ltd v. General Electric Co., Supp. 1 SCC 644 (1994).
[42] Renusagar Power Co. Ltd v. General Electric Co., Supp. 1 SCC 644 (1994).
[43] Cosid Inc v. Steel Authority of India AIR (1986) Del 8.
[44] European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd AIR 1983 Bom 36.
[45] European Grain & Shipping Ltd. (U.K.) v. Seth Oil Mills Ltd AIR 1983 Bom 36.

In another case of, "*Hindustan Zinc Ltd. v. Friends Coal Carbonisation"*,[46] the court reiterated the importance of public policy, stating that any award that ran counter to the law, the Arbitration and Conciliation Act of 1996, or the conditions of the contract would be invalid and against India's national policy, and if it affected the parties' rights, the court could intervene under s. 34 (2) of the 1996 Act. In the case of "*Cruz City 1 Mauritius Holdings v. Unitech Limited",*[47] the Delhi High Court suggested a balancing test for public policy grounds to prohibit the implementation of a foreign arbitral judgement. The Cruz City Court reviewed whether declining to implement a foreign award that violates public policy may violate "public policy" further. The Court further stated that although the power to prevent the implementation of an arbitral judgement is restricted, courts might accept the contentions provided adequate reasons are established.[48] Again, in the case of "*Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL",*[49] However, the Supreme Court found that the ground of fraud, bribery, the essential policy of Indian law, basic notions of justice, and morality cannot be used as an excuse for refusing to follow a foreign ruling.

In the UK case of "*Minmetals Germany Gmbh v. Ferco Steel Ltd.,*[50] it has been decided that *considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement but of all surrounding circumstances which are material to the English Court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary*".[51]

In the issue of "*Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan",*[52] according to the United Kingdom's highest court, there is no basis for a court to use its discretion to enforce an arbitral judgement in the lack of a valid arbitration agreement, even if reasons for rejection of enforcement are made clear. In "*Yukos Oil Co v. Dardana Ltd.,* the Court of Appeal has *held that the word may in Article V of the New York Convention suggests that even if one or more grounds are made out, the right to rely on them had been lost, by for example another agreement or estoppel*".[53]

[46] Hindustan Zinc Ltd. v. Friends Coal Carbonisation, Case No. Appeal (civil) 3134 of 2002.
[47] Cruz City 1 Mauritius Holdings v. Unitech Limited, SCC Online SC 3619 (2018).
[48] Cruz City 1 Mauritius Holdings v. Unitech Limited, SCC Online SC 3619 (2018).
[49] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, SCC OnLine SC 177 (2020).
[50] Minmetals Germany Gmbh v. Ferco Steel Ltd., 1 All E.R. (Comm.) (1999).
[51] Minmetals Germany Gmbh v. Ferco Steel Ltd., 1 All E.R. (Comm.) (1999).
[52] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, EWCA Civ 543 (2002).
[53] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan, EWCA Civ 543 (2002).

The concept of violation of "fundamental policy of Indian law" is usually considered beyond mere statutory contradictions. In "*Renusagar*, the Court stated that *Article V(2)(b) of the New York Convention left out the reference to principles of the law of the country in which it is sought to have relied upon*[54] while reinstating the Geneva Convention of 1927". It was decided that breaking the law is insufficient to trigger the public policy exception and that more misconduct is required. This is so because the phrases "and the law of India" that follow such a statement cannot cover all that is meant by "public policy." Once again, the nature of the transaction determines what is contrary to public policy. Courts may elaborate on and use these principles as they see fit because they have been crystallised under several headings. The executive branch cannot create new directions in public policy at will via subordinate legislation.

5 Recent Developments of Arbitration Laws in India

The 246th report from the Law Commission looked at how the courts have broadened the definition of public policy. Multiple sections of the 1996 Act, including Section 34, were targeted for revision in the study. The 2015 revision is based on this suggestion. According to the commission's recommendations, the attitude expressed in the Renusagar verdict should be maintained and implemented in the event of any judgments rendered in international arbitration. Since the "interest of India" might be interpreted in several ways, this law limited the scope of public policy, particularly in the context of international arbitration awards. It is important to keep the "patent illegality" premise but to give it a narrower interpretation than the one used in the Saw Pipes case.[55]

In response to this report's recommendations, India's arbitration system was updated with the passing of the Arbitration and Conciliation Act 2015 (Amendment). Therefore, the ordinance restricted judicial overreach by allowing the nullification of an international award on the grounds of public policy if the award is contaminated by corruption or fraud or if it does not adhere to the core policy of Indian law, or if it is contrary to the essential principle of morality and equality. Only domestic awards may be revoked for patent violations under Section 34(2A).

The President signed the 2019 Amendment to the Arbitration and Conciliation Act on August 9, 2019. Based on the Shrikrishna Committee Report, Section 87 of the Act put an end to the debate over whether or not the Arbitration and Conciliation Act of 2015 should apply retroactively by specifying that it applies only to court

[54] Renusagar Power Electric Company v. General Electric Company, AIR 1994 SC 860.

[55] Sindhu, Jahnavi, "Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse?", 58 (4) JILI, 421, 435-37 (2016).

proceedings involving arbitration that began after the Act was introduced, rather than to arbitration proceedings that began before it. In "*Hindustan Construction Company Limited v. Union of India*" (2019), the court ruled that the Arbitration and Conciliation Act 2015 applies to all court actions, whether they are new or ongoing and whether they occur before, on, or after the Act's implementation. It was argued that enacting Section 87 would run counter to the goals of the 2015 amendment by lengthening the time it takes to complete arbitration processes and increasing the amount of court intervention in them. In *NAFED v. Alimenta*, for example, the Supreme Court didn't issue its ruling until 2020, over three decades after the judgement was issued.

6 Transnational Public Policy: Need of the hour

The current topic seeks to establish such ideas that constitute an international/universal agreement and acceptable standards that would supersede national public policy at the international/universal level. A harmonious interpretation of regional and international norms is essential for the successful acceptance and enforcement of arbitral agreements as well as awards. This is only conceivable if the arbitration agreement has the force of law and an award is enforceable under the laws of the relevant jurisdictions. This would be a huge boost for the growth of international business arbitration as a method of settling legal conflicts. One may go to France as an example since the New French Code of Civil Procedure has two distinct categories of public policy-one rooted in internal and domestic policy and the other, *"ordre public,"* for international arbitrations.

The enforcement of awards requires more standardised legal frameworks across jurisdictions. The concept of creating standardised arbitration rules has evolved and improved greatly. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards has been ratified by over 123 nations. In addition, several countries have taken into account the UNCITRAL Model Rules (1985) on International Commercial Arbitration, whose purpose was to help nations adopt uniform laws on international arbitration when passing their own domestic arbitration statutes.[56] However, a more practical and pleasant condition has yet to be attained, and this may be done by putting more effort into the regulations governing the arbitration process. Due to concerted efforts, standardised arbitration procedures now exist. When arbitration rules are unified in this way, they may be harmonised as much as possible. However, progress is painfully sluggish. Not because of any flaw in the laws themselves but because of the nature

[56] Poon, Nicholas, "Striking A Balance Between Public Policy And Arbitration Policy In International Commercial Arbitration: Aju V. Ajt", 12, Singap. J. Leg. Stud., 185, 188-90 (2012).

of the international system itself.[57] When everyone is operating from the same set of foundational concepts, only then can we see the benefits of a unified legal framework.

A "Transnational Public Policy" is not the same as an international public policy. The former is nationalistic and arbitrary, whereas the latter is universal. A transnational public policy is a set of guiding principles that reflect a global agreement on fundamental values and established norms of behaviour. Fundamental laws of global justice, jus cogens in public international law, and the basic moral standards acknowledged by what are called civilised countries are all believed to make up this idea. For the objectives of harmonising and standardising the arbitration process, this interpretation appears to make the greatest sense. The term "public policy" refers to a set of guiding principles for governing the behaviour of individuals and businesses for the common benefit. It is in the global community's best interest that the domestic or state concept of the phrase "public policy" be expanded and embraced. There is a growing movement toward "transnational public policy," and states would be well to align their domestic laws with this trend by recognising as "public policy" only those reasons that do not hamper the expansion of international commerce and commercial arbitration.[58]

If arbitrators determine that strict adherence to the terms of a certain legislation would lead to an unfair decision, they are empowered under the concept of amiable compositeur to reject such rules. It is consequently suggested that arbitrators be given the authority to determine as a pacific compositeur. If arbitrators are given wide latitude, they might disregard regulations that seem too restrictive or unjust. Amicable compositeur gives arbitrators greater leeway to make decisions that are more in accordance with international public policy. Unless the arbitrator has the *ex acquito et bono* authority to determine in justice and moral conscience, which would allow him or her to disregard the application of the rules of law, the rules of law must be followed. The arbitrator, who is nonetheless constrained by the terms of the agreement and by national public policy, needs more authority. Limitations on this are possible only in exceptional cases.

The lack of consensus among the arbitrators and judges on the issue of arbitrability is reflected in this. Only if the UNCITRAL Model Rules explicitly list the types of disputes that cannot be resolved by arbitration will the idea of transnational public policy be fully operational and effective. Different countries have different legislation in place that permit challenges to arbitral awards. More importantly, a petition to have an award nullified must comply with the laws of the

[57] Advani, Hiroo H., Public Policy, 21 (2), Nlsir, 55, 59-60 (2009).

[58] Nazzini, Renat, "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context", 66 (3), Am. J. Comp. L., 603, 620-24 (2018).

jurisdiction in which it was filed.[59] This would allow disputes to be settled more quickly and lessen the likelihood that more cases would be brought to national courts. However, before giving arbitrators more power in this area, it is important to assess their level of expertise.

7 Conclusion

It's important to proceed carefully when dealing with local opposition to the execution of international awards. Since India is a party to the New York Convention of 1958, it is important to consider whether or not the enforcement of a foreign award would run counter to Indian law. India has declared a sovereign commitment to honouring foreign awards, with the exception of the restrictions set out in Article V of the New York Convention.

Under the auspices of UNCITRAL, a governing body, such as a recognised institution of arbitrators, is advocated for. Standardised course topics, training standards, a code of conduct, etc., would also be established, as well as the minimum credentials for arbitrators, membership/fellowship rules, and more. Now more than ever, professionalism must be the standard. Thus this is really crucial. Training programmes for arbitrators are now organised by a variety of arbitral organisations, although they do not always align with the requirements of modern-day international commercial arbitration. This proposed body would be in charge of developing and researching standardised educational resources for this area of expertise. This will comply with transnational public policy and better enable unification in arbitral rulings. The sole basis for annulling an international arbitral judgement should be a change in what is now called "transnational public policy," and this is something that Indian law has to be brought in line with. As previously noted, consistent criteria for putting aside and refusing to enforce international awards would be introduced by transnational public policy, whose reach would be limited in comparison to the evaluation of domestic public policies.

India must work to improve confidence in arbitration. To foster an arbitration-friendly environment, it is necessary to maintain some oversight over the implementation of the arbitration ruling; however, this oversight should be restricted, and the arbitration processes should be as impartial as feasible. The court must choose where to draw the line and strike a fair compromise between limiting its own involvement and ensuring that justice is done.

[59] Kolkey, Daniel M, "Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations", 22 (3), The International Lawyer, 693, 702-04, (1988).

References

Advani, Hiroo H., Public Policy, 21 (2), NIsir, 55, 59-60 (2009).

Chesire & North, Private International Law, 123 (Butterworths,13th ed.1999).

Farshad Ghodoosi, International Dispute Resolution and the Public Policy Exception 205-06 (Routledge, London & New York, 1st ed, 2017).

Garry B. Born, International Commercial Arbitration, commentary and material, 223 (Kluwer Law International and Transnational Publishers, Inc., The Hague, Netherlands, 1st ed, 2001).

Kolkey, Daniel M, "*Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations"*, 22 (3), The International Lawyer, 693, 702-04, (1988).

Nazzini, Renato, "*Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context"*, 66 (3), Am. J. Comp. L., 603, 612-14 (2018).

New York Convention 1958, "*Convention on the Recognition and Enforcement of Foreign Arbitral Awards Done at New York"*, June 10, 1958; entered into force, June 7, 1959 United Nations, Treaty Series, vol. 330, 38, No. 4739 (1959).

Percy H. Winfield, "*Public policy in the English Common Law",* 42 Harv. L. Rev. 76 (1928)

Poon, Nicholas*, "Striking A Balance Between Public Policy And Arbitration Policy In International Commercial Arbitration: Aju V. Ajt"*, 12, Singap. J. Leg. Stud*.,* 185, 188-90 (2012).

Sindhu, Jahnavi, "*Public Policy And Indian Arbitration: Can The Judiciary And The Legislature Rein In The 'Unruly Horse*?", 58 (4) Jili, 421, 430-35 (2016).

W.S.W. Knight, "*Public Policy in English Law"*, 38 L.Q.R. 207 (1922).

Wulff, Erik, & Kiran Lingam, "*Franchising In India: A Brave New Frontier: Economic Policy Reform Paves the Way",* 29 (4) Franch. Law J. 248, 249-50 (2010).

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