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ON THE TOPIC

"ARBITRATION AND PUBLIC POLICY IN INDIA"

Under the Guidance and Supervision of

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CERTIFICATE

This is to certify that **Ms. AISWARYA AJITH**, Register No**. LM0123001** has submitted her dissertation titled "**ARBITRATION AND PUBLIC POLICY IN INDIA**," which is a record of research work done by her during the academic year **2023-2024** under my supervision in partial fulfillment of the requirement for the award of Degree of Master of Law in Constitutional and Administrative Law. It is also affirmed that the dissertation she submitted is original, bona fide, and genuine.

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DECLARATION

I do hereby declare that the dissertation titled **"ARBITRATION AND PUBLIC POLICY IN INDIA,"** researched and submitted by me to the National University of Advanced Legal Studies, Kochi, in partial fulfillment of the requirement for the award of Degree of Master of Law in Constitutional and Administrative Law, under the guidance and supervision of **Dr. NANDITA NARAYAN** is an original, bonafide and legitimate work. It has been pursued for academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree from this University or any other University.

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LIST OF ABBREVIATIONS

A.C.	Appeal Cases
A.I.R.	All India Reporter
AA	The Arbitration Act
ADR	Alternative Dispute Resolution
aff'd.	Affirmed
ALB. L. REV.	Albany Law Review
All E.R.	All England Law Reports
AM. REV. INT'L ARB.	American Review of International Arbitration
Anr.	Another
Arb LR	Arbitration Law Reports
Bom LR	Bombay Law Report
Cal.	Calcutta
CARDOZO L. REV.	Cardozo Law Review
Ch	Chancery Division
CIETAC	China International Economic and Trade Arbitration Commission
COLUM. L. REV.	Columbia Law Review
Cowp.	Cowper's Reports
D.C. Cir.	District of Columbia Circuit Court of Appeals
Dist.	District
DLT	Delhi Law Times
E.R.	All England Reports
Eq.	Equity Reports
F. Supp.	Federal Supplement
F.2d	Federal Reporter, Second Series
H.L.C	House of Lords Cases
i.e.,	that is
IAA	The International Arbitration Act
Ibid.	ibidem
ICC	International Chamber of Commerce
Ind Cas	Indian Cases
INT'L & COMP L.Q.	International and Comparative Law Quarterly
INT'L ARB. L. REV.	International Arbitration Law Review
INT'L TAX & BUS. LAW.	International Tax and Business Lawyer Journal

J INT'L ARB.	Journal of International Arbitration
J.L. & Com.	Journal of Law and Commerce
K.B.	King’s Bench
L.Ed.2d	Lawyer's Edition, Second Series
L.M.C.L.Q.	Lloyd's Maritime and Commercial Law Quarterly
Lah.	Lahore
Lloyd’s L.R.	Lloyd’s Law Reports
Mad.	Madras
Mys	Mysore
N.Y.U. J. INT'L & POL.	New York University Journal of International and Policy
No.	Number
Ors.	Others
Para	Paragraph
Pvt. Ltd.	Private Limited
Q.B.	Queen’s Bench
S.C.C	Supreme Court Cases
S.D. Tex.	Southern District of Texas
SC	Supreme Court
SGCA	Singapore Court of Appeal
SIAC	Singapore International Arbitration Centre
SLR	Singapore Law Reports
SLR(R)	Singapore Law Reports (Reissue)
TUL. L. REV.	Tulane Law Review
U. PA. J. INT'L ECON. L.	University of Pennsylvania Journal of International Economic Law
UN Doc.	United Nations document
UNCITRAL	United Nations Conference on International Trade Law
UT	Union Territory
Vol.	Volume
YALE J. INT'L L.	Yale Journal of International Law

CHAPTER 1

INTRODUCTION

Arbitration and Public Policy in India

"Discourage litigation, persuade your neighbors to compromise whenever you can point out to them how the normal winner is often a loser in fees, cost, and time. As a peacemaker, the lawyer has a superior opportunity of being a good man".

- Abraham Lincoln[1]

1.1 INTRODUCTION

Conflict is a fact of life; indeed, imagining a society without conflict of interests is difficult.[2]Human conflicts result in disputes. If elemental human behavior and disposition are kept in mind, it can be said that disputes are unavoidable.[3]However, disputes need to be resolved judiciously, and indeed, such resolution of disputes is essential for societal peace, amity, comity and harmony, and easy access to justice.[4] This emphasizes the necessity of a sufficient and efficient dispute resolution process, a necessary precondition for maintaining a welfare state and a civilized society.

Alternative Dispute Resolution [5]refers to an assortment of dispute resolution procedures that primarily serve as alternatives to litigation.[6] And are typically carried out with the support of an impartial and unbiased third party. The primary rationale of ADR, as the expression implies, is to resolve disputes outside the conventional judicial system. Therefore, during the entire process of appreciation of ADR, the baseline remains to be litigation. ADR procedures have

[1] Notes for a Law Lecture, in *Home Book of American Quotations* 226 (Dodd 1967).
[2] Pruitt describes conflict as an episode in which one party tries to influence the other or an element of the common environment, and the other resists.
[3] Scott Pettersson, *e=mc3/ADR*, 1(6) The Indian Arbitrator 5 (July 2009).
[4] Jitendra N. Bhatt, *Round Table Justice through Lok Adalat (People's Court) – A Vibrant ADR in India*, 1 SCC (J.) 11 (2002).
[5] Hereinafter referred to as ADR.
[6] Bryan A. Garner (Ed.), Black's Law Dictionary 112-113 *Black's Law Dictionary* 112-13 (West Publishing Company, St. Paul, Minnesota, 8th Edn., 2004).

thus emerged as distinct alternatives to the courts established under the writ of the state; hence, the epithet 'alternative' has been coined.[7] The National Alternative Dispute Resolution Advisory Council, Australia, defines ADR as "an umbrella term for processes, other than judicial determination, in which an impartial person assists those in a dispute to resolve the issues between them."[8] ADR processes are conducted with the assistance of a neutral, unbiased, independent, and impartial third party in no way connected with the dispute. They help the disputant parties resolve their disputes by using various well-established dispute-resolution processes.[9]

Cooperation is vital to ADR since it is one of its fundamental tenets. The final goal of the process is for the parties to work together and reach a compromise to resolve the dispute. The ADR is neutral and will assist in this endeavor. ADR methods aim to blunt the adversarial attitude and encourage more openness and better communication between the parties, leading to a mutually acceptable resolution.[10] ADR methods are more cooperative and less competitive than adversarial litigation.[11] The ADR methodology focuses on purging the adversarial constituent from the dispute resolution process, steering the parties to appreciate their mutual interests, dissuading them from adopting rigid positions, and persuading them towards a negotiated settlement. The parties control the dispute resolution process and the outcome of the process and are responsible for finding an effective, practical, and acceptable solution to the dispute.[12]The emphasis in ADR, which is informal and flexible, is on "helping the parties to help themselves."[13]

Since ADR is essentially an alternative to litigation, which is more than adjudication by a court of law, ADR procedures are non-adjudicatory. Non-adjudicatory ADR methods include mediation, conciliation, and conflict resolution through Lok Adalats. These methods get legitimacy from the parties' desire for an amicable settlement that satisfies both sides. Conversely, adjudicatory ADR methods, such as arbitration, entail a final and binding

[7] Sarvesh Chandra, ADR: Is Conciliation the Best Choice, Alternative Dispute Resolution: What It Is and How It Works in P. C. Rao and William Sheffield .
[8] Available at http://www.nadrac.gov.au.
[9] Ashwanie Kumar Bansal, Arbitration and ADR (Universal Law Publishing Co. Pvt. Ltd., Delhi, 2005).
[10] Alexander Bevan, Alternative Dispute Resolution 2 (Sweet and Maxwell, London, 1992).
[11] S.N.P. Sinha and P.N. Mishra, A Dire Need of Alternative Dispute Resolution System in a Developing Country like India, XXXI (3 & 4) Indian Bar Review (2004).
[12] Michael Tsur, ADR – Appropriate Disaster Recovery, 9 Cardozo J. Conflict Resol. (2008).
[13] K. S. Chauhan, Alternative Dispute Resolution in India, in *Alternative Dispute Resolution: What It Is and How It Works* (P.C. Rao & William Sheffield eds., 2009). Dushyant Dave, Alternative Dispute Resolution Mechanism in India, XLII (3 & 4) ICA Arb. Q. 22 (Oct. – Dec. 2007 & Jan. – Mar. 2008).

determination of the factual and legal aspects of the dispute by the ADR neutral. The parties' desire for an ADR neutral to decide their rights outside the traditional litigation process gives adjudicatory procedures their sacred status.

The only female founder of the American Arbitration Association, Frances Kellor, in her book, 'American Arbitration: Its History, Functions and Achievements' has put it pithily when she said,

"*Of all mankind's adventures in search of peace and justice, arbitration is amongst the earliest. Long before laws were established, or courts were organized, or judges formulated principles of law, men had resorted to arbitration for the resolving of discord, the adjustment of differences, and the settlement of disputes."* [14]

Arbitration is a concept that has been introduced previously in India. Even before the British arrived, conflicts arising in the community were usually resolved by village elders or "panchayats." While describing the concept of arbitration, Chief Justice A. Marten, in the case Chanbasappa Gurushantappa v. Baslinagayya Gokurnaya Hiremath[15] observed as follows:

"It is indeed a striking feature of ordinary Indian life. And I would go further and say that it prevails in all ranks of life to a much greater extent than is the case in England. To refer matters to a panch is one of the natural ways of deciding many a dispute in India. It may be that in some cases, the panch more resembles a judicial Court because the panch may intervene on the complaint of one party and not necessarily on the agreement of both, e.g., in a caste matter. But there are many cases where the decision is given by agreement between the parties"

The Indian Arbitration Act of 1899, modeled after the English Arbitration Act of 1899, was India's first codification of arbitration law. It was further standardized in Schedule II of the Code of Civil Procedure, 1908, which expanded the application of arbitration laws to different regions of British India. After that, several acts governed arbitrations in India, i.e., the Arbitration (Protocol and Convention) Act, 1937; the Indian Arbitration Act, 1940, dealing with domestic arbitration; and the Foreign Awards (Recognition and Enforcement) Act, 1961, which

[14] Frances Kellor, "American Arbitration: Its History, Functions and Achievements, New York: Harper and Brothers", (1948), p.3.
[15] AIR 1927 Bom. 565 (FB).

dealt with recognition and enforcement of foreign awards made under the New York Convention and the Geneva Protocol and Convention respectively.

Later, the Arbitration and Conciliation Act of 1996, designed after the UNCITRAL Model Law on International Commercial Arbitration, repealed the three previous statutes and unified Indian arbitration law. The Act was anticipated to boost a prompt and affordable dispute settlement method through arbitration when it went into effect during India's economic liberalization and intended internationalization. It was praised for updating Indian arbitration laws to better suit contemporary requirements and anticipating judicial and arbitral processes working together while limiting judicial meddling.

India had a boom in corporate expansion following economic liberalization and investment attraction initiatives, which was unavoidably followed by increased disputes. Litigation stopped being the primary means of resolving conflicts as other approaches gained momentum. Since arbitration was the only other form of conflict resolution that could legally bind the parties, it was natural that parties in disagreement would favor it. The legislature made several changes to the existing legislation to bring arbitration regulation in India up to par with those in other countries.

Arbitration as a conflict resolution method has recently become more widely accepted. It is becoming a primary means of settlement. Arbitration is now a successful method of resolving disputes due to technological advancements and global economic growth. Because alternative conflict resolution is more informal and flexible than the legal system, it gives the parties in dispute hope. The parties are granted autonomy in certain areas, such as selecting the arbitrators, determining the seat of arbitration, and finalizing a set of procedural guidelines and applicable laws. Furthermore, minimal court intervention is mandated by both international and national legislation. The Arbitration and Conciliation Act of 1996 restricts the grounds on which the judiciary may intervene in arbitral proceedings. The agreement safeguards the party's right to settle their difference through arbitration, a recognized form of conflict settlement, and this shouldn't be impeded by unwarranted judicial intervention.

Regarding arbitration, especially international arbitration, the strongest argument for entering into an arbitration agreement rather than pursuing litigation is party autonomy and minimal court intervention. However, several reasons could prevent the arbitration from working, including "arbitrability and public policy." National courts are free to exercise discretion in determining the boundaries of arbitrability and public policy, as stipulated by the United

Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, which gives signatory states the option to refuse recognition and enforcement of foreign arbitral awards. The idea of public policy is frequently modified to accommodate the shifting demands of society, encompassing political, social, cultural, moral, and economic aspects.

Nonetheless, the notion of party autonomy is not unrestricted; domestic and international law limits the concept of party autonomy. Both domestic and international arbitration involve significant public policy considerations. Due diligence should be done because public policy concerns may make it difficult for a foreign arbitral award to be recognized or enforced in the courts of the relevant nation. There is uncertainty around implementing international arbitral rulings due to the public policy exception, especially as contracting States have different approaches to public policy concerns. Without a definite, agreed-upon interpretation, the concept of public policy has come to mean different things in other jurisdictions. The definition of public policy is dynamic and has changed over time. The English House of Lords described the public policy as "that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public or against public good."[16]

This study focuses on public policy concerns related to domestic and international arbitral rulings in India being recognized or enforced. In this study, the researcher will discuss the idea of "public policy," which restricts party autonomy and the extent of judicial intervention. This dissertation will examine and evaluate India's public policy approach to domestic and international arbitration to show how public policy has evolved.

1.2 STATEMENT OF PROBLEM

One form of alternative conflict resolution is arbitration. The parties chose it because of its unique qualities, which include limited court intrusion and party autonomy. An arbitration agreement's parties may choose the laws that apply to the dispute's subject matter and the arbitration's procedural rules. However, the concept of "public policy" restricts party autonomy and minimal court interference because, in the end, the validity and enforcement of the arbitral award depend on the laws in effect where the party seeks enforcement. As long as there is no set definition for the word "public policy," interpretations change from state to state.

[16] David St. John Sutton, Judith Gill, and Matthew Gearing. "Russell on Arbitration", 21st Ed., London: Sweet & Maxwell Thomas Reuters, (2007), 230.

The lack of a precise definition for the term "public policy" has allowed parties to assert this defense in several jurisdictions, leading to the annulment of domestic and international arbitral verdicts. The environment has become hazardous and slick, particularly for our global partners, due to an inconsistent interpretation of public policy. Insofar as India is concerned, this is adverse to economic cooperation and globalization. This public policy issue negatively impacts India's corporate emotions and prospects for globalization. As we move forward, we must address the worries of the international partners and the sector.

Since there is no comprehensive definition of "public policy" in the Act or any convention, it is difficult to interpret, and judges have the discretion to determine how it should proceed. Therefore, the issues related to this need to be studied.
Hence, the research problem for the present study is:
"Whether the concept of public policy as defined under Section 34 and Section 48 of the Arbitration and Conciliation Act, 1996 upholding the true spirit of arbitration?"

1.3 RESEARCH QUESTIONS

- How is public policy mentioned under Section 34 and Section 48 of the Arbitration and Conciliation Act, 1996, interpreted by the courts concerning domestic and foreign arbitration?
- Do the different interpretations the courts give to the concept of public policy affect party autonomy and promote judicial intervention?

1.4 OBJECTIVES OF THE RESEARCH

This research study has the following objectives-

- To study the definitional expansion and limitation of the term public policy concerning the Arbitration and Conciliation Act, 1996.
- Examining public policy notions in India concerning domestic and foreign arbitral awards.
- To conduct a critical analysis of the evolution of the concept of public policy as courts had interpreted it.
- To discuss the fundamental changes brought by the various amendments to the 1996 legislation regarding the notion of public policy.

- To examine and assess the restrictions on the application of public policy theory in the execution of both domestic and international arbitral awards.
- To discuss the international best practices about the concept of public policy.
- To draw conclusions and suggestions based on the research study.

1.5 RESEARCH HYPOTHESIS

Based on the objectives mentioned above, the following hypothesis is formulated:

The court's interpretation of the concept of public policy in Section 34 and Section 48 of the Arbitration and Conciliation Act of 1996 affects minimal court intervention and limits party autonomy in arbitration in India.

1.6 RESEARCH METHODOLOGY

The methodology adopted for conducting this research is Doctrinal. The doctrinal study is based on collecting data from primary and secondary sources.

- The primary data sources used in this study include treaties, arbitral awards, Court decisions at national or international levels, and arbitration rules.
- The secondary data sources used are books, dictionaries, encyclopedias, journals, newspapers, and websites.

The researcher intends to include the following in this study:

- An analysis of judicial rulings and interpretations about public policy.
- An Analysis of provisions in the Arbitration and Conciliation Act, 1996, relating to enforcement of foreign awards vis-à-vis public policy.
- Examine academic publications that offer viewpoints on how courts understand public policy and how that policy applies to law enforcement of arbitral decisions.

1.7 SOURCES OF THE RESEARCH

- **National sources**: includes the following-

  Various national arbitration legislations –

  • The Indian Arbitration Act, 1940;

• The Arbitration Act, 1996;

• The Arbitration Amendment Act, 2015; and

• The Arbitration Amendment Act, 2019.

Various reports –

• 76th Law Commission Report;

• 176th Law Commission Report; and

• 246th Law Commission Report.

- **International sources**: includes the following international instruments –
  - UNCITRAL Model Law;
  - The Geneva Protocol on Arbitration Clauses of 1923;
  - Geneva Convention of 1927;
  - The New York Convention 1958; and
  - The New York Convention on the Recognition and Enforcement of Foreign Awards, 1961.
- **Judicial Decisions / Arbitral Awards**
- **Expert opinions in the field are exhibited in textbooks, research papers, articles, blogs, etc.**

1.8 CHAPTERISATION

This dissertation work consists of the following chapters-

- **CHAPTER 1 - INTRODUCTION**

This chapter provides a general overview of arbitration and public policy. It outlines the research problem and the research questions involved in the study. Different objectives concerning which the study shall be conducted are also provided in this chapter. Further, it gives the research hypothesis and the methodology that shall be adopted by the author in her dissertation. Lastly, the literature review is also listed in this chapter.

- **CHAPTER 2 – ORIGIN AND DEVELOPMENT OF THE CONCEPT OF PUBLIC POLICY**

This chapter traces the origin and development of the concept of public policy at the national and international levels. It analyzes how the concept of public policy is dealt with in various international instruments.

- **CHAPTER 3 – PUBLIC POLICY IN ARBITRATION: THE INDIAN PERSPECTIVE AND LEGAL LANDSCAPE**

This chapter intends to look into the different interpretations given to the concept of public policy by various courts in India while considering the enforceability of domestic and foreign arbitral awards.

- **CHAPTER 4 – EXPLORING INTERNATIONAL PERSPECTIVE: LEGISLATIVE AND JUDICIAL APPROACH TOWARDS THE CONCEPT OF PUBLIC POLICY – U S, ENGLAND, HONG KONG AND SINGAPORE**

The fourth chapter attempts to look into different approaches (both legislative and judicial) of the countries, namely, the U.S., England, Hong Kong, and Singapore, towards the notion of public policy. It also focuses on the innovative interpretations given by the foreign courts to the idea of public policy to sync with the needs of the hour and how that has helped it to reach the status of being a global hub for arbitration.

- **CHAPTER 5 – FINDING, IMPLICATIONS AND RECOMMENDATIONS OF THE STUDY**

The final chapter deals with the recommendations and suggestions drawn from the research study.

1.9 LITERATURE REFERRED

M.S. Rawat, *International Commercial Arbitration and Transnational Public Policy*, 49 JOURNAL OF THE INDIAN LAW INSTITUTE 60-75 (2007).

The author outlines the concepts of international public policy and transnational public policy. In this article, the author points out that public policy needs expansion and modification to cope with the growing needs of international commercial arbitration. The author states that public policy imports uncertainty and fluctuation, varying with the people's changing economic needs, social customs, and moral aspirations.

O.P. Malhotra, ***The Scope of Public Policy under the Arbitration and Conciliation Act, 1996,*****19 STUDENT BAR REVIEW 23-29 (2007).**

The author of this paper investigates the actual meaning of public policy as it relates to annulling arbitral verdicts under the 1996 Arbitration and Conciliation Act. The writer also examines divergent court rulings and upholds the highly criticized ruling of the Supreme Court in *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd*.[17]

Louis Del Duca, Nancy A. Welsh, ***Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States,*** **THE AMERICAN JOURNAL OF COMPARATIVE LAW, Vol. 62, 69-95 (2014)**

This paper concisely overviews American courts' acknowledgment and enforcement of foreign arbitration agreements and arbitral awards. Commencing with an analysis of the extent of reciprocity and commercial reservations established by the United States, it delves into the situations in which the Panama Convention supersedes the New York Convention. Shifting the focus to enforcing arbitration agreements and clauses, the paper scrutinizes the American courts' interpretations of the Convention's mandate for a written agreement and the conditions that could render an arbitration agreement "null and void" or "impossible to perform." Furthermore, it outlines the courts' approach to claims of waiver and lack of awareness concerning the presence of arbitration clauses.

Regarding the enforcement of arbitral awards by American courts, this paper examines the specific defenses stipulated by the Convention, such as the inability to present the case, inadequate notification, absence of binding effect on the parties, and contravention of public policy. Additionally, it explores other defenses stemming from applying the U.S. Constitution and federal procedural rules, including lack of personal jurisdiction and forum non conveniens. Lastly, the paper distinguishes the circumstances permitting various judicial actions: annulment of arbitral awards, enforcement or refusal to enforce arbitral awards, and postponement or suspension of arbitral awards.

[17] 2003 SCC OnLine SC 545.

Jahnavi Sindhu, *Public Policy and Indian Arbitration: Can the Judiciary and the Legislature Rein in the 'Unruly Horse'?*, *58* JOURNAL OF THE INDIAN LAW INSTITUTE 421-446 (2016).

In India, having access to justice is almost the same as having justice itself. Judicial review is considered an essential component of the Constitution's fundamental framework, meaning that legislation cannot waive it. Paradoxically, as specialty courts and tribunals proliferate to facilitate access and speed up the legal process, the number of appeals channels from these forums also rises, negating the intended outcome. The notion that an arbitral tribunal will have the final say in a business dispute in such a setting seems counterintuitive and stands out. Through the creation of new grounds, like patent illegality, or by characterizing the acknowledgment of these mistakes as violations of India's fundamental policy, parties have over time successfully attempted to persuade the Indian judiciary and other stakeholders that an award based on incorrect reasoning on merits must be reviewed under the grounds of public policy. The 2019 Arbitration and Conciliation Amendment Act is the last attempt to correct the judicial overreach that has been progressively undermining the idea of party autonomy. The Act presently has extraordinary guidelines for the types of matters that a court may or may not review. However, there are still grounds for skepticism. To comprehend it, the paper explores the evolution of the term "public policy," showing that the issue is not limited to interpretation alone but stems from underlying attitudes towards arbitration as a substitute. This underscores the challenging work the judiciary still has to do, even in the wake of legislative intervention.

Dharmendra Rautray, Wolters Kluwer Principles of Law of Arbitration in India (2018).

This book stands out as a unique resource in the field of arbitration law. Rautray's book emphasizes the principles of arbitration law in India. It doesn't merely dissect legal provisions but guides practitioners through the practical aspects of conducting arbitration proceedings. The book is structured around the stages of an arbitration proceeding, mirroring the real-world experience of lawyers handling arbitrations. Rautray meticulously supports the legal principles with case laws from various Indian courts. Users don't need to wade through entire case law sections; they can directly apply the principles to real-world scenarios. In summary, Rautray's "Principles of Law of Arbitration in India" fills a crucial gap by focusing on principles and practical application. It's an indispensable resource for anyone navigating the complex arbitration landscape in India.

CHAPTER 2

ORIGIN AND DEVELOPMENT OF THE CONCEPT OF PUBLIC POLICY

The Interim Report of the International Law Association[18] states, *"it is notoriously difficult to provide a precise definition of public policy (in context of enforcement of arbitral award)."*

2.1 INTRODUCTION

The concept of public policy has long been a pivotal consideration in the domain of arbitration, shaping how arbitral awards are recognized and enforced across different jurisdictions. Rooted in the idea of protecting the fundamental principles of a state's legal and moral framework, public policy serves as a safeguard against the enforcement of awards that may contradict a nation's core values and legal principles. This chapter delves into the origins and development of the concept of public policy, examining its classification and the nuances of its application in various international instruments such as the Geneva Protocol of 1923, the Geneva Convention of 1927, the UNCITRAL Model Law, and the New York Convention.

2.2 CONCEPT OF PUBLIC POLICY

"Public policy" is a jurisprudential concept deeply rooted in common law. In the past, courts have considered the principle of public policy while determining whether to carry out a transaction or contract that would benefit private parties but be detrimental to the public. Courts have also applied this standard in deciding which arbitration awards to sustain or reject; those that violate public policy are set aside. In domestic and international arbitration, public policy is commonly used to determine the legitimacy of the arbitral award. It is also a common exception to award enforcement and setting aside the award.

[18] International Law Association, *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (London Conference, 2000).

Public policy is how the state maintains the rule of law. It indicates what is advantageous to the majority of people. The idea discusses the moral, social, and economic tenets that form the foundation of a society's laws and act as a common theme. The exact meaning of public policy, however, is rarely straightforward. As a result, common law judges have cautioned against giving the idea undue weight since the nineteenth century. Public policy has most notably been compared to an "unruly horse on a run" because of its unpredictability and the possibility that an excessive dependence on it could deviate from sound law.

The term "public policy" was most likely first used by Lord Mansfield in the case *of Holman* v. *Johnson*[19] where his Lordship stated, "*The principle of public policy is this: Ex dolo malo non-oritur action*. *No Court will lend its aid to a man who founds his cause of action on an immoral or illegal act."* Quoting from *Downer Connect Ltd*. v. *Pot Hole People Ltd*.,[20] , the Court of Appeal, Singapore has articulated its opinion that public policy "*should operate only in instances where the upholding of an arbitral award would 'shock the conscience'...."*

Getting an award is one thing; successfully enforcing it is quite another. This is said because public policy is undeniably one of the arbitration industry's main obstacles. Public policy considerations of foreign judicial systems are significant in an era of globalization. Courts are taking the initiative to act as "gap-fillers" and get involved in arbitration processes due to the lack of clarity surrounding public policy principles.

Public policy was recognized in English law as early as the fifteenth century. [21] It originated in the field of conflict of laws. Vital international transactions are said to be the reason behind the creation of conflict rules. The judge had to decide which law applied first when dealing with a matter involving international facts. Every country created its own conflict rules during the previous centuries to identify which law would apply in situations involving foreign countries. Most of the time, even though the foreign law should have been used by the forum court's own conflict rules, the court could refuse its application if it found that the foreign law constituted an obligation detrimental to local morality and social order. The underlying reason for public policy development is that "no country can afford to open its tribunals to the legislature of the

[19] Homan v. Johnson, (1775) 1 Cowp. P 341.
[20] Downer Connect Ltd. v. Pot Hole People Ltd., CIV 2003-409-002878, (C. A., May 19, 2004).
[21] Knight, *Public Policy in English Law*, 38 L. Q. Rev. 207 (1922).

world without reserving for its judges the power to reject foreign law that is harmful to the forum."[22]

The primary function of public policy is to override the impact of foreign laws or court decisions. The primary purpose of public policy is to enable the forum's court to reject foreign laws incompatible with the forum's morality and social order. It has long been believed that contracts for prostitution, the purchase of an enslaved person, and incestuous marriage are voidable due to their transgression of fundamental moral principles that everyone widely acknowledges. However, as ethical standards are subject to change, national courts seldom reject foreign laws solely based on moral repugnancy.[23]

Preventing injustice in dire situations is yet another function of public policy. The court rejects foreign law because of the unpleasant outcome of applying it in a specific case, not because it is morally repugnant. This is referred to as "residual discretion" in common law jurisdictions, and it is utilized in specific situations to prevent an unfair or unacceptable outcome. In private international law, "residual discretion" is not a widely recognized concept. Only in situations when applying foreign law will result in a severe hardship in the case does "residual discretion" come into play.[24]

Due to its ambiguity and vague meaning, the judiciary has long acknowledged the potential of misusing public policy in practice. National judges can render arbitrary rulings illegal in the name of national policy. It has been stated that "the principal vice of the public policy concepts is that they provide a substitute for analysis."[25] Legal scholars and practitioners have attempted to provide a specific definition of public policy to prevent arbitrary application. Nonetheless, "one of the most elusive and diverse notions in the world of juridical science" is public policy.[26] Since public policy deals with place and temporal issues, it is exceedingly challenging to define it objectively.[27]

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[22] Bodenheimer, The Public Policy Exception in Private International Law: A Reappraisal in the Light of Legal Philosophy, 12 Seminar 51, 64 (1954).
[23] Murphy, *The Traditional View of Public Policy and Order Public in Private International Law*, 1 1 Ga, J. Int'l & Comp, L. 591 (1981).
[24] Martin Nygh, *Foreign Status, Public Policy and Discretion*, 13 Int'l & Comp. L. Q. 39, 49 (1964).
[25] Monrad G. Paulsen & Michael I. Sovern, *Public Policy in the Conflict of Laws*, 56 Colum. L. Rev. 969, 1016 (1956).
[26] J. Horsmans, *L ' arbitrage et ' Order Public Interne Beige*, 2 Rev. Arb.79, 80 (1978).
[27] Karl-Heinz Bockstiegel, Public Policy and Arbitrability, in *Comparative Arbitration: Practice And Public Policy In Arbitration* 177, 181 (Pieter Sanders ed. 1987).

Public policy is a concept followed by every nation around the globe. Every nation has a unique legal system because of its economic system, social structure, and traditions. For instance, most nations' national legal systems can be broadly classified into common law nations and civil law nations. National legal systems might differ even in common law or civil law nations. Something that might be considered against the public policy of one nation might not be considered against the public policy of another. However, a comparable public policy can emerge in a particular regional community that adheres to the same standards and values.

Also, public policy is a concept that is very much dependent on time. The values and morals a society follows may not be stable; they change and develop. Marx observed that the national legal system of a country always reflects its morality, economics, legal tradition, and politics.[28] Thus, a country's legal system changes with changing morals, economics, and other social characteristics. It is not unpredictable that a specific action once seen as violative of public policy could suddenly be considered acceptable in a nation. Regarding domestic arbitration, the principle of public policy has evolved for various reasons, including changes in the political and legal framework, the country's participation in international trade, policy changes regarding foreign investment, etc. International developments like the New York Convention, the country's increasing acceptance of arbitration, and the expansion of infrastructure have all contributed to a similar shift in international arbitration over time.

2.3 PUBLIC POLICY – DOMESTIC, INTERNATIONAL, & TRANSNATIONAL

Over time, the theory of public policy has evolved, taking on various forms and accommodating varying views of academicians and practitioners. Relativity is an umbrella term that unites two main factors that led to the development of the concept of public policy, i.e., time and contribution of the legal community. Also, relativity leads to the continuous growth of public policy in various legal communities and on the global stage. The distinction between domestic, international, and transnational public policy also grew out of it. When the concept of public policy first emerged, it was solely domestic. However, as globalization and the unification of legal principles and values occurred, it gave rise to international public policy.

[28] Karl Marx, 2 Florilegium of Marx, 176 (2d ed., 1989).

And later, as nations started to integrate their legal systems, transnational public policy was created.

There are three levels of public policy: domestic, international, and transnational.[29] When the parties to the arbitration are nationals of the same country, i.e., when only one nation is participating in the arbitration, then domestic public policy, that nation's laws and norms are applicable. Generally, domestic public policy is understood as the primary and core morals and principles that the government of a nation applies to decide the issues that are solely domestic and fall well within its purview. These morals and principles can be seen to be included under state legislation, and they are intended to safeguard the public interests of the state as a whole and not the interests of any private party.

When an international component is involved, whether because of the nature of the transaction or the nationality of the parties involved in the arbitration, that is when the concept of international public policy comes into play; the idea is all about applying national public policy guidelines in an international setting. International public policy may include two or more domestic public policies. Generally speaking, international public policy is more liberal than domestic public policy. Adapting a country's domestic public policy guidelines to an international setting is known as international public policy. However, courts usually take into account several other factors other than public interest in the case of international public policy. The international public policy of a nation does not always have to be the same as its domestic public policy. The court will weigh the requirements of international commerce with the interest of its domestic public policy. Every state has different levels of restrictions, and sometimes, it may seem that the necessity to manage and limit the arbitral process could be at odds with the significance of global trade.

When different nations unite and take the initiative to work toward unification or share legal doctrine, transnational public policy will happen. Essentially, this concept refers to a set of rules and principles, including standard norms and customs widely accepted and adhered to by the global community. Transnational public policy is said to be violated when these rules, principles, and guidelines are violated.

[29] Kenneth Michael Curtin, *Redefining Public Policy in International Arbitration of Mandatory National Laws*, 64 Def. Couns. J., 271, 275, 281 (1997).

International public policy is different from transnational public policy as international public policy is based on the laws, rules, and regulations of specific countries. In contrast, transnational public policy reflects the global agreement on recognized standards of conduct.

According to Article V(2) (b) of the New York Convention, an arbitral award may be rejected or set aside if "it is contrary to public policy." Article V(2)(b) does not, however, specifically mention any public policy. It is widely acknowledged that the New York Convention was only meant to challenge based on international public policy. In international arbitration, public policy is analyzed in light of the New York Convention, which recognizes the state courts' authority to define what may be regarded as public policy inside their borders. Public policy, by nature, "is a dynamic concept that develops continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions; when society or the situation of a state changes, public policy adapts.[30]

Transnational public policy differs from the public policy of any specific state. It typically involves policy considerations that extend beyond state boundaries, primarily encompassing norms derived from public international law, such as jus cogens and international customs, as well as universally recognized rules of private international law to a lesser extent.

2.4 GENEVA PROTOCOL ON ARBITRATION CLAUSES, 1923, AND GENEVA CONVENTION ON EXECUTION OF FOREIGN ARBITRAL AWARDS, 1927

The Geneva Protocol on Arbitration Clauses and the Geneva Convention on Execution of Foreign Arbitral Awards were the two major multilateral treaties governing international commercial arbitration before the enactment of the New York Convention.

The international community's initial move towards unifying international commercial arbitration on a global scale was the adoption of the Geneva Protocol. Its main goal was to make arbitration agreements and arbitral rulings more widely recognized and more accessible to enforce in signatory nations. Article I of the Geneva Protocol stipulates that each contracting state must acknowledge the validity of an arbitration agreement to the extent that the subject

[30] Loukas Mistelis, *Keeping the Unruly Horse in Control or Public Policy as a Bar to Enforcement of Foreign Arbitral Awards*, 2 Int'l L. F. Du Droit Int'l 248, 252 (2000).

matter can be arbitrated under its law.[31] There is no provision in the Geneva Protocol stating whether or not each signatory state is required to enforce arbitral awards passed in other countries. Instead, the signatory country must enforce an arbitral award on its territory.[32] The majority of foreign arbitral awards cannot be enforced under the provisions of the Geneva Protocol as arbitrations usually do not take place in the nation where the party seeking enforcement is requesting it. Furthermore, the Geneva Convention merely states that the enforcement of an arbitral award must adhere to provisions of national law of the enforcement country. The Protocol does not outline the appropriate judicial review standards that should be applied by the national courts when dealing with foreign arbitral awards.

Later, the Geneva Convention was enacted, which helped somewhat address some of these issues. According to the Geneva Convention, an arbitral award covered by the Geneva Protocol shall be recognized as binding and shall be enforced if made in any contracting state. As a result, the enforcement duty extends beyond arbitral awards made within the territory of the enforcing country. The provisions in the Geneva Convention also point out the situations in which a foreign arbitral award may be enforced.

The standards of judicial review laid down by the Geneva Convention are pretty strict. Specific provisions are disadvantageous to the parties attempting to enforce an arbitral award. Firstly, according to the Geneva Convention, an arbitral award can only be enforced if it satisfies specific requirements. Those conditions include: (1) the arbitration agreement is valid under the applicable law; (2) the subject matter is arbitrable under the law of enforcing states; (3) the constitution of the arbitral tribunal is by the parties' agreement and the law governing the arbitration procedure; (4) the award has become final in the country where it has been made; (5) the recognition or enforcement of the award is not contrary to the public policy or the principles of law of the enforcing state."[33] Second, even if the conditions mentioned above have been satisfied, national courts shall refuse to enforce an arbitral award if it is found that the award has been set aside by the country in which it was made, the losing party was not allowed to present his case, or the arbitrators exceeded the scope of matters submitted for arbitration.[34] Third, the onus of establishing the arbitral award’s finality, legality, and the arbitral tribunal's correct constitution rests on the party seeking enforcement.

[31] Geneva Protocol, 1923, art I, 1923.
[32] Geneva Protocol, 1923, art III, 1923.
[33] Convention on the Execution of Foreign Arbitral Awards, 1927 Article I, 1927 .
[34] *Id.*

Due to these flaws, the Geneva Protocol and Geneva Convention were not accepted as instruments to enforce foreign arbitral awards.

2.5 THE UNCITRAL MODEL LAW ON INTERNATIONAL ARBITRATION, 1985

The UNCITRAL Model Law on International Commercial Arbitration 1985 ("the UNCITRAL Model Law") states that "The court shall not intervene in the arbitral proceedings except provided in this law.[35] Thus, the national court will interfere in the arbitral proceedings only if there are grounds listed in the Model Law. Such grounds concern the appointment and removal of arbitrators, [36]the ordering of interim measures of protection in aid of arbitration,[37] and the ordering of the parties to take any evidence necessary for the proceedings.[38]

Concerning the arbitrability issue, the UNCITRAL Model Law authorizes the court to refuse the recognition and enforcement of an arbitral award in case the court finds that "(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of that state, and (ii) the recognition or enforcement of the award would be contrary to public policy of the state.[39]

Apart from this, Article 34 (2) (b) provides that "the court may set aside an arbitral award only if (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of this state, or (ii) the award conflicts with the public policy of this state."[40]

Article 34 (2) (i) (ii), 36 (1) (b) (i) (ii) of the UNCITRAL Model Law and Article V (2) (a) (b) of the New York Convention are almost identical. Thus, countries that are not contracting states[41] of the New York Convention may refuse the arbitral award based on the same grounds as countries adopting the UNCITRAL Model Law. However, each country has a particular standard for applying laws and precedents to tackle arbitrability. UNCITRAL Model Law does

[35] The UNCITRAL Model Law. art. 5, 1985.
[36] The UNCITRAL Model Law. art 11, 1985.
[37] The UNCITRAL Model Law. art 9, 1985.
[38] The UNCITRAL Model Law. art 27, 1985.
[39] The UNCITRAL Model Law. art 36(1)(b), 1985.
[40] The UNCITRAL Model Law. art 34(2), 1985.
[41] As of 2024, there are 172 parties to the New York Convention. Available at https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2 (last visited May 2024).

not contain any definition or limitation of which disputes are arbitrable and also authorizes the state to determine which disputes are arbitrable and which are not freely.[42]

Thus, the New York Convention and the UNCITRAL Model Law guide the contracting parties regarding arbitrability and public policy. Also, the courts have the authority to reject the defense and allow the enforcement of the arbitral award. A dispute arbitrable in one country may not be arbitrable in another country. There is no standard form of public policy. The concept has been interpreted differently by different countries at various times.

2.6 THE NEW YORK CONVENTION

After the Second World War, the globalization of the world economy called for uniform standards to enforce arbitration agreements and arbitral awards at the international level and to liberate international commercial arbitration from the stringent control of national courts. Eventually, the United Nations Economic and Social Council created drafts of a multilateral convention to encourage the enforcement of arbitration agreements and arbitral awards in signatory countries and create unifying standards by which arbitral awards can be enforced.[43] This draft was later promulgated as the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1958. The New York Convention was so successful that it was accepted by over one hundred countries, including all significantly developed countries worldwide.[44]

Compared with the Geneva Protocol and Geneva Convention, the provisions of the New York Convention are more favorable to international commercial arbitration. The New York Convention imposes upon contracting states an obligation to enforce arbitral awards made in any other signatory country. [45] It also reduces and simplifies the procedure and requirements for the party seeking recognition and enforcement of an award. [46]

[42] The UNCITRAL Model Law, art 1(5) (1985).
[43] Albert J. Van Den Berg, *The New York Arbitration Convention of 1958* 6, 7-8 (1981).
[44] Zhao Xiuwen, *Guoji Jingji Maoyi Zhongcai Fa (International Economic and Trade Arbitration Law)* 322 (1995).
[45] The New York Convention, art I, 1958.
[46] The New York Convention, art IV, 1958.

The New York Convention offers a more straightforward and effective means of getting recognition and enforcing foreign arbitral awards. The pro-enforcement philosophy is the greatest accomplishment of the New York Convention. Under the New York Convention, it shall be the duty of the contesting party to establish the presence of the grounds for rejecting an arbitral award as listed in Article V of the Convention.

Article V of the New York Convention reads as follows:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought proof that:

(a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or the arbitration proceedings or was otherwise unable to present his case or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that if the decisions on the issues submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the country's public policy.

The New York Convention explicitly recognizes public policy as grounds for refusing the recognition or enforcement of a foreign arbitral award, similar to the Geneva Convention.
As per Article V (2) (b) of the Convention, an arbitral award that is regarded to be against the public policy of the enforcing country may be refused recognition and enforcement by the courts of that country. Even though the Article only speaks about the execution of the national public policy of the country where enforcement is sought, there are other provisions that suggest that the public policy of other contracting nations may also be considered. Article II(3) states that "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[47] Even where there is an arbitration agreement, any of the parties may still approach the court in their home nation, and the court may take jurisdiction over the matter and invalidate the arbitration agreement on the grounds of violating public policy. In addition to that, Article V(1)(e) states that the court of a nation may refuse to recognize and enforce an arbitral award if the award has not yet become final or it has been set aside or suspended by an authority of the country in which the award was made. [48]In order to prevent the arbitral award from being enforced, the losing party may approach the court in the nation where the arbitration was held, requesting that the award be set aside. Nevertheless, the legal system of individual states has the jurisdiction to lay down procedures for nullifying an arbitral award, and the New York Convention is silent on the conditions under which the national courts may do so. However, most countries have their own arbitration laws, which empower their courts to set aside an arbitral award on the grounds of violating public policy. Therefore, the recognition and enforcement of an arbitration agreement

[47] The New York Convention, art II (3), 1958.
[48] The New York Convention, art V (1) (e), 1958.

or arbitral award may be affected by the public policy norms of the country where enforcement is sought, the nation where the arbitration was held, or the nation likely to assume jurisdiction over the dispute.

Even though international commercial arbitration may touch upon the public policy of any contracting state, the extent of public policy exemption in the New York Convention cannot be read out clearly from its textual language. Also, different versions of the Convention further complicate the explicit interpretation of public policy. While the French version of the New York Convention uses the term "ordre public," the English version employs the term "public policy." "Ordre public" in civil law jurisdiction has a broader connotation than "public policy" in common law jurisdiction. However, the creators of the New York Convention aimed to restrict the purview of public policy exemption as much as possible. [49] A comparison of the same exception contained in the Geneva Convention and the New York Convention also reveals that national courts should narrowly interpret the public policy exception. Article 1(e) of the Geneva Convention provides that an arbitral award will be enforced if "the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."[50] However, the New York Convention permits national courts only to annul arbitral awards on the grounds of public policy. Generally, the concept of "principles of the law of the country" is broader than that of public policy. Consequently, a foreign arbitral award that contravenes the legal principles of the enforcing state may still conform to its public policy regulations. The absence of reference to the principles of the law of the enforcing state in the New York Convention indicates an intention to circumscribe the public policy exemption.

This interpretation aligns with the pro-enforcement philosophy of the New York Convention and its objective to facilitate the global integration of international arbitration, which an expansive interpretation of the public policy exemption in the Convention could hinder.[51]

Article V (1) of the New York Convention outlines five grounds under which the national court of a country can refuse to recognize and enforce an arbitral award at the request of any of the parties. The grounds under Article V(1) pertain to the arbitration process. Article V(2) empowers the enforcing state court to reject an arbitral award based on a lack of arbitrability

[49] G. Haight, *Convention on the Recognition and Enforcement of Foreign Arbitral Awards-Summary Analysis of Record of the United Nations Conference May/June* 1958 71 (1958).
[50] The Geneva Convention, art 1 (e), 1927.
[51] Qian, Mingqiang, *Public Policy Defense in International Commercial Arbitration*, Digital Commons @ University of Georgia School of Law, (2000).

of the subject matter or violation of public policy, even if the party does not raise the same. Article V (1) outlines certain essential principles of justice and fairness for international commercial arbitration that are rooted in notions of public policy. The public policy exception that can be seen in Article V (2) (b) is considered a residual provision that allows a national court to set aside an arbitral award based on other grounds that are not covered under Article V (1). However, it is imperative to note that Article V (1) and Article V (2) of the New York Convention serve different purposes.

Article V (1) of the New York Convention is meant to render justice to parties of international commercial arbitration and provide judicial relief to a party who has suffered from an unfair arbitration process. On the other hand, the public policy exemption enshrined under Article V (2) (b) not only helps prevent injustice in a specific arbitration but also aids the enforcing state in safeguarding its fundamental social and legal order.

The public policy exception in the New York Convention allows national courts to invoke this exception on their initiative to safeguard national interests. However, interpreting this exception as a residual provision to Article V(1) could lead to potential misuse by national courts. They might refuse to enforce awards simply because they perceive them as products of unfair arbitration rather than recognizing that enforcement would genuinely violate the moral and legal principles of the enforcing state. This approach could significantly undermine the integrity of international commercial arbitration, as noted by some commentators.

Moreover, the term ‘may’ in Article V suggests that the national courts have discretion in deciding whether a foreign arbitral award is enforceable, even if it is against public policy norms of the enforcing state.

Furthermore, incorporating public policy defense into the New York Convention is a crucial political instrument, encouraging the hesitant member states to join the Convention. Professor Behr contends that the requirement of public policy is indispensable in enforcing foreign judgments. Furthermore, maintaining an ultimate safeguard against unforeseen disparities between domestic law and the laws of various jurisdictions is deemed prudent in the long term.[52]

[52] Volker Behr, Enforcement of United States Money Judgements in Germany, 13 J.L. & COM. 211, 224 (1994).

2.7 CONCLUSION

The concept of public policy has undergone significant transformation since its early mentions in the Geneva Protocol of 1923 and the Geneva Convention of 1927, evolving through various international frameworks such as the UNCITRAL Model Law and the New York Convention. Initially broad and somewhat ambiguous, the interpretation of public policy has gradually become more refined, aiming to strike a balance between protecting fundamental national interests and promoting the efficacy and finality of arbitral awards. The classification of public policy into domestic and international realms has further helped delineate its scope and application, reducing the potential for inconsistent enforcement of awards. As arbitration continues to be a preferred method of dispute resolution globally, understanding and narrowing the application of the public policy exception remains crucial. The international instruments discussed provide a foundation for this understanding, guiding jurisdictions toward a more harmonized and predictable approach. Ultimately, this refined approach to public policy safeguards national interests and fosters a more reliable and efficient global arbitration framework.

CHAPTER 3

PUBLIC POLICY IN ARBITRATION: THE INDIAN PERSPECTIVE AND LEGAL LANDSCAPE

3.1 INTRODUCTION

The concept of public policy has played a crucial role in shaping the enforceability of both domestic and foreign arbitral awards in India. With its origins in common law, public policy has been interpreted and applied by Indian courts in diverse ways, influencing the arbitration landscape significantly. This chapter delves into the multifaceted interpretations of public policy as articulated by the Indian judiciary, particularly in the context of the Arbitration and Conciliation Act of 1996. By examining critical judicial decisions such as the *Renusagar* case, *Saw Pipes* case, and *Ssangyong* case, alongside legislative developments like the 2015 Amendment and insights from the 246th Law Commission Report, this chapter aims to elucidate the evolving boundaries of public policy in India.

Until 1990, India had a closed economy, and foreign investments were limited. It was only in 1991 that India adopted an economic liberalization strategy and opened its economy to foreign investors and transnational transactions.[53] The changing business environment in India required it to be complemented with an efficient arbitration framework, notably because past attempts to create a predictable and stable arbitration framework had failed.[54] Against this backdrop, India introduced a comprehensive legislative enactment dealing with domestic and international arbitrations in 1996, that is, the Act. The Act is modeled principally on the UNCITRAL Model Law on International Commercial Arbitration and implements the New York Convention in India.[55]

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[53] Tracy S. Work, India Satisfies Its Jones for Arbitration: New Arbitration Law in India, 10 Transnat'l Law. (1997), https://scholarlycommons.pacific.edu/globe/vol10/iss1/10 (accessed on 30 December 2023).

[54] Krishna Sarma et al., Development and Practice of Arbitration in India – Has it Evolved as an Effective Legal Institution, CDDRL Working Paper 103 (2009).

[55] UNCITRAL Model Law on International Commercial Arbitration 1985, https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration, (accessed on 30 December 2023).

The public policy doctrine today is truly versatile and is applied across numerous avenues of the law, including in contract, arbitration, property, service, administrative, and constitutional law.[56] This doctrine has evolved within each area of law where it has been applied independently. However, at its core, this principle has been developed by English courts over centuries and is a part of common law. In the beginning, courts in India applied the doctrine of public policy to decide whether to enforce specific transactions or not. Agreements deemed opposed to the public policy were not implemented and were invalidated.

Some fundamental facets of the public policy doctrine developed under common law. The doctrine was ordinarily taken to mean what is best for the community's common good.[57] The principle was applied not only to harmful acts but also to harmful tendencies. [58]However, the doctrine was to be invoked only in clear cases of incontestable harm to the public.[59] It was established that public policy was not a branch of any law which was to be extended.[60] The doctrine was governed by precedent; heads of public policy were identified and crystallized by courts in cases of harm to public interest. Courts were not permitted to invent new heads of public policy. Therefore, the heads of public policy soon came to be considered immutable. [61]Where a contract did not fit into one or the other heads of the existing public policy, courts were directed to exercise 'extreme reserve' in holding it to be void as against public policy.[62]

Based on precedents, in India, the following issues were included under the head of public policy:

- agreements considered harmful to the State and its international relations,
- agreements that tend to abuse legal process or interfere in the course of justice,[63]
- agreements tending to injure public service,[64]
- agreements pertaining to maintenance and champerty,[65]
- agreements that affect the freedom or security of marriage, and marriage brokerage agreements,

[56] Sudha v. Sankappa Rai, A.I.R 1963 Mys 245.
[57] Egerton v. Brownlow, (1853) 4 HLC 1 (U.K. H.L.).
[58] Fender v. St. John-Mildmay, (1938) A.C. 1.
[59] *Id.*
[60] *Id.*
[61] Janson v. Driefontein Consolidated Mines Ltd., (1902) A.C. 484.
[62] Monkland v. Jack Barclay Ltd., (1951) All E.R. 714.
[63] Sudhindra Kumar Rai Chaudhari & Ors. v. Ganesh Chandra Ganguli, AIR 1938 Cal. 840.
[64] Rattan Chand Hira Chand v. Askar Nawaz Jung & Ors., (1991) 3 SCC 67 (infra).
[65] Venkata Graru v. Poosapati Garu & Ors, AIR 1924 P.C. 162.

- agreements tending to create monopolies,[66]
- agreements in restraint of trade,
- agreements that create an interest against duty,[67]and
- agreements which are *contra bonos mores.*

3.2 THE ROLE OF PUBLIC POLICY IN CONTRACT LAW: PERSPECTIVE FROM THE INDIAN CONTRACT ACT, 1872

The Indian Contract Act of 1872 granted legal recognition to public policy doctrine within the purview of contract law. Under Section 23 of the Contract Act, if the object or consideration of an agreement is immoral or opposed to public policy, then the agreement will be declared void. The word 'object' is not defined in the Section but has been interpreted to mean 'purpose' or 'design' of the contract.[68]

Similarly, the words 'immoral,' 'public policy,' or 'opposed to public policy' have not been defined and have been left to judicial interpretation. In India, the meaning of 'immoral' under Section 23 is understood to mean only sexual immorality, for example, a contract relating to prostitution.[69]

Indian courts were initially reluctant to liberally construe the meaning of the term 'public policy' in the context of Section 23. Therefore, a 'narrow' interpretation of public policy was initially expounded. In numerous cases, the Indian High Courts repeatedly held that no court could invent a new head of public policy. [70] As stated by the Oudh Judicial Commissioner's Court in 1924 in *Bansi Dhar & Or*s *v. Ajudhia Prasad & Ors*,[71] the courts considered that the paramount public policy was the principle that one must not interfere with the freedom to contract.[72]

Until the 1950s, this legal position persisted. However, in 1959, a three-judge bench of the Supreme Court, in *the Gherulal Parakh case,* adopted a slightly more comprehensive

[66] Devi Dayal v. Narain Singh & Ors, A.I.R. 1928 Lah. 33.
[67] Manikka Moopanar & Ors. v. Peria Pandithan, AIR 1936 Mad. 541.
[68] Chandra Sreenivasa Rao v. Korrapati Raja Rama Mohana Rao, AIR 1952 Mad. 579.
[69] Gherulal Parakh v. Mahadeodas Maiya & Ors, AIR 1959 S.C. 781.
[70] Govind v. Pacheco, (1902) 4 Bom L.R. 948; Bhagwan Dei v. Murari Lal & Ors., (1916) 36 Ind. Cas. 259; Kamala Devi v. Gur Dial, (1916) 36 Ind. Cas. 319; Shrinivasdas Lakshminarayan v. Ramchandra Ramrattandas, A.I.R. 1920 Bom 251; Dhirendra Kumar Bose v. Chandra Kanta Roy & Ors., AIR 1923 Cal. 154; Dharwar Bank Ltd v. Mahomed Hayat, A.I.R. 1931 Bom. 269; and Bhagwant Genuji Girme v. Gangabisan Ramgopal, A.I.R. 1940 Bom. 369.
[71] A.I.R 1925 Oudh 120.
[72] Printing and Numerical Registering Company v. Sampson, (1875) 19 Eq. 462.

approach, holding that it was permissible to evolve a new head of public policy under exceptional circumstances of a changing world. The court, however, cautioned that it is advisable in the interest of society's stability to avoid attempting to discover new heads these days.

In 1974, relying on *Gherulal Parakh*, the Supreme Court further relaxed and widened the scope of the public policy doctrine in *Murlidhar Aggarwal & Anr v. State of Uttar Pradesh & Anr*.[73] After *Murlidhar Aggarwal,* judicial trends shifted to expanding the scope of public policy to include new transactions that were not previously addressed by precedent. This significant change was noticeable in the Supreme Court's 1986 decision in *Central Inland Water Transport Corpn & Anr v. Brojo Nath Ganguly & Anr.*[74] In this case, the service rules of a government company allowed for the termination of permanent employees, without providing reasons, on giving three months' notice or payment in lieu thereof. The Supreme Court observed that there was an imbalance of bargaining power between the employer and the employee, resulting in an unfair contract. Consequently, the court invalidated the offending portion of the service rule because it was arbitrary, unconscionable, contrary to public policy, and violated Article 14 of the Constitution of India, which ensures equality before the law. Notably, the court approved the practice of expanding, modifying, and developing new aspects of public policy, when necessary, in the public interest.

This view persisted until the early 1990s. In September 1990, a five-judge bench of the Supreme Court in *Delhi Transport Corporation v. DTC Mazdoor Congress & Ors*,[75]echoed its reasoning in *Brojo Nath Ganguly*. J. K Ramaswamy, in his concurring opinion, held that when there is no specific public policy addressing a case, 'the court must in consonance with a public conscience and in keeping with public good and public interest invent new public policy and declare such practice or rules that are derogatory to the Constitution to be opposed to public policy.'

The Supreme Court took an equally bold view in February 1991 in the *Rattan Chand Hira Chand* case. In this unusual case, Sajjid Yar Jung requested that the plaintiff use his influence with government authorities to help Sajjid Yar Jung secure his claim to a share of the estate of

[73] (1974) 2 SCC 472.
[74] A.I.R. 1986 1571.
[75] 1991 Supp. (1) SCC 600.

Nawab Salar Jung III, who had died in 1949, in exchange for a portion of the estate's proceeds. Sajjid Yar Jung eventually succeeded in his claim. When the plaintiff later sought to enforce Sajjid Yar Jung's obligations under their agreement in the trial court, the suit was dismissed because the agreement was deemed opposed to public policy and, therefore, unenforceable. On appeal, the Andhra Pradesh High Court in the *Rattan Chand Hira Chand*[76] case (decided in 1975) agreed with the trial court, declaring the contract void due to its conflict with public policy. The High Court applied an existing public policy principle, "Agreements tending to injure public service," but also noted that the idea of limiting public policy in favor of contractual freedom was becoming outdated and that it was essential to remain open to new public policy considerations.

Ultimately, the plaintiff's appeal to the Supreme Court was dismissed in February 1991. The Supreme Court upheld the High Court's decision. It noted that even if a court created a new public policy to nullify practices that undermine or bypass the law, such judicial activism was not only justified but also necessary.

Right after the *Rattan Chand Hira Chand* decision, in March 1991, the Supreme Court held in *Gurmukh Singh v. Amar Singh.* [77], that a contract between builders to jointly bid in a public auction for the sale of immovable property was not against public policy. This was because there was no intent to manipulate the price or defraud the government. The Court reiterated that public policy is not static but evolves with society's times and needs, emphasizing that "the march of law must match with the fact situation."

By 1991, a broader and more liberal interpretation of the public policy doctrine had been firmly established. Courts were now permitted to create new principles of public policy not covered by precedent when the circumstances required it.

3.3 UNDERSTANDING THE DISTINCTION: DOMESTIC AND INTERNATIONAL ARBITRATION UNDER THE ARBITRATION AND CONCILIATION ACT

The Arbitration and Conciliation is divided into four parts. Part I (Article 1-43) applies to arbitration seated in India, while Part II of the Act (Section 44-60) relates to the enforcement

[76] A.I.R. 1976 A.P. 112.
[77] (1991) 3 SCC 79.

and recognition of foreign awards under the New York Convention and also the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 ('Geneva Convention'). [78] Part III of the Act is specific to conciliation, and Part IV contains certain supplementary provisions relating to the court's power to make rulings, among others. Public Policy Defence can be seen under both Part I [Section 34 (2)(b)(ii), for domestic awards] and Part II [Section 48 (2)(b), for foreign awards] of the Act, as a ground to set aside and refuse enforcement to awards respectively.

The division between Part I and Part II of the Act is crucial, most notably because it restricts the application of domestic standards of judicial intervention to only domestic awards. However, despite the separation between Part I and Part II of the Act, the issue of whether the provisions contained in Part I of the Act apply to foreign-seated arbitration and awards has been a highly debated topic in India. The question of whether the provision of Part I of the Act applies to foreign seated arbitration was first dealt with in 2002 in the case of *Bhatia International v. Bulk Trading*, wherein the Supreme Court of India held that 'the provisions of Part I of the Act would also apply to international commercial arbitrations seated outside India unless the parties have expressly excluded the same.'[79]This decision was problematic and rightfully received criticism from the international community as it allowed Indian courts to set aside foreign awards under Section 34 of the Act.[80] The consequences of *Bhatia* were manifest in *Venture Global Engineering v. Satyam Computers Services*, wherein the Supreme Court while dealing with a foreign award rendered in a London-seated arbitration, ruled that Part I of the Act applied to foreign awards and Indian courts would have jurisdiction to set them aside.[81]After that, in *Indtel Technical Service Pvt Ltd v. WS Atkins Plc*, the Supreme Court again intervened in a foreign-seated arbitration to appoint arbitrators using its powers under Section 11 of the Act.[82]

In 2012, the Supreme Court of India overruled the precedent set in *Bharat Aluminium Co v. Kaiser Aluminium Technical Services* ('*Balco*') in its landmark judgment of

[78] Geneva Convention on the Execution of Foreign Arbitral Awards 1927, https://www.arbitrationindia.com/geneva_convention_1927.html.
[79] Bhatia Int'l v. Bulk Trading, A.I.R. 2002 S.C. 1432.
[80] Martin Hunter & Ranamit Banerjee, Bhatia, BALCO and Beyond: One Step. Forward, Two Steps Back 24(2) Nat'l L. Sch. India Rev. (2013), http://docs.manupatra.in/newsline/articles/Upload/FB2433EA-E193-4EAC-BE78-8F2CB06A2086.pdf (accessed on 24 Apr. 2024).
[81] Venture Global Eng'g v. Satyam Computers Services, (2008) 4 SCC 190.
[82] Indtel Technical Service Pvt Ltd v. WS Atkins Plc, (2008) 10 SCC 308.

Bhatia and *Venture Global*.[83] The Court observed that Part I of the Arbitration and Conciliation Act does not apply to foreign-seated arbitrations. This decision is widely known as a pivotal moment in Indian arbitration law, signaling a shift towards a more arbitration-friendly and pro-enforcement outlook. Through the *Balco* decision, the Supreme Court intended to correct past errors and idiosyncratic rulings and to align Indian arbitration practices with the objectives and principles of the UNCITRAL Model Law and the New York Convention.

The *Balco* decision had a prospective effect, meaning it applied to arbitration agreements entered into after the decision was rendered. However, in the case of *Jindal Drugs Limited v. Engineering Chur AG*, the Supreme Court ruled that even arbitration agreements and awards made before *Balco* could not apply Section 34 of the Arbitration and Conciliation Act to set aside foreign awards in India. [84] In short, the *Balco* established a clear separation between Part I and Part II of the Act, making it sure that foreign awards could not be set aside in India under the provisions of Part I.

Even though the judgment in *Bhatia* and *Balco* did not directly deal with the issue of public policy, the distinction between Part I and Part II of the Act has been instrumental in the evolution of the public policy defense in India. Going by the *Bhatia* ruling, courts in India applied the same interpretation of public policy to both domestic and foreign awards. However, the clear differentiation between Part I and Part II, as laid down in *Balco*, has allowed the courts to develop a distinct and narrower definition of public policy for foreign awards. This distinction has promoted India as a favorable jurisdiction for arbitration by ensuring that foreign awards are subject to a more consistent and internationally accepted standard of review.

3.4 THE RENUSAGAR DOCTRINE: THREE FOCUSED FACETS OF PUBLIC POLICY

In Indian arbitration law, the concept of public policy began to take shape in the early 1990s. India was a party to the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards, which dates back to the earlier decades of the 20th century. So, these international agreements imposed on the contracting states their obligation to affirm and recognize the private arbitration agreements and the foreign

[83] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services, (2012) 9 SCC 552, 198–200.
[84] Jindal Drugs Ltd. v. Eng'g Chur AG, Civil Appeal No. 8607 of 2010 (2020).

arbitration awards done in any other member states. In pursuance of these obligations, India passed the Arbitration (Protocol and Convention) Act, a 1937 Act intended to implement the Geneva Protocol and the Geneva Convention in Indian law. This was a grotesque overhauling exercise to bring India's arbitration into line with international standards and to ensure it did not confiscate the enforcement of foreign arbitral awards by the Indian courts.

In July 1940, India enacted the Arbitration Act 1940, which codified and consolidated domestic arbitration laws. This legislation aimed at standardizing and streamlining the arbitration process within the country by providing a comprehensive legal framework for resolving disputes through arbitration. It is important to note that while the 1940 Act addressed domestic arbitration issues, it did not include provisions governing foreign arbitration awards. In spite of the advancements in domestic arbitration law, a separate legal mechanism to handle the recognition and enforcement of arbitration outside India was still required.

In June 1958, India signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, leading to its ratification in July 1960. The New York Convention substituted and replaced the Geneva Protocol and Geneva Convention, both of which ceased to affect contracting states, on contracting states becoming bound by the New York Convention.[85]

India introduced the Foreign Awards (Recognition and Enforcement) Act in 1961 to accomplish its obligation under the new international instrument. This legal framework was specifically designed to implement the provisions of the New York Convention within India. After that, the Arbitration (Protocol and Convention) Act of 1937 ceased to affect foreign awards to which the Foreign Awards Act applied, i.e., awards covered by the New York Convention.[86]

Adhering to Article V(2)(b) of the New York Convention, Section 7 of the Foreign Awards (Recognition and Enforcement) Act, 1961, provided that a foreign arbitral award could be refused enforcement in India if the court found that enforcing the award would be contrary to 'public policy.' This provision ensured that foreign awards conflicted with the fundamental principles and moral standards of Indian law and society would not be recognized.

Likewise, the earlier Arbitration (Protocol and Convention) Act of 1937 contained a comparable provision in its Section 7, consistent with Article 1(e) of the Geneva Convention.

[85] New York Convention, art VII, 1958.
[86] Foreign Awards Act, 1961, Section 10, 1961.

The earlier legislation provided that a foreign award could be set aside or denied enforcement because it violated public policy. However, both legislations reflected India's commitment to international arbitration standards by ensuring that only those foreign arbitral awards in sync with Indian public policy would be enforceable within its jurisdiction, safeguarding India's national legal principles.

Although the term 'public policy' as it pertains to foreign arbitral awards has been in the statute books since 1937, it wasn't until 1993 that the Supreme Court provided a definitive interpretation. This landmark interpretation occurred in the seminal case of *Renusagar Power Co Ltd v. General Electric Co*.[87] The decision given in *Renusagar* marked a noteworthy moment in Indian legal history, as it was the first time the apex court in India addressed and clarified the scope and meaning of 'public policy' in the context of enforcing foreign arbitral awards. This case set a precedent and delivered much-needed guidance on how the public policy defense should be applied in such matters and in the case of *Renusagar,* a three-judge bench of the Supreme Court dealt with a challenge to enforcing a foreign arbitral award under the Foreign Awards Act. *Renusagar Power Co. Ltd.,* the appellant, produced and sold electric power. Following negotiations, it entered into a contract with General Electric Co., a U.S.-based corporation, the respondent, which agreed to supply equipment and power services for setting up a thermal plant.

As the appellant delayed the payment of certain installments, the respondent initiated arbitration proceedings under the umbrella of the International Chamber of Commerce's International Court of Arbitration, seeking interest payment on the overdue installments. The arbitral tribunal issued an award upholding the respondent's claim for interest in September 1986.

Consequently, the respondent filed a petition before the Bombay High Court under the Foreign Awards Act to enforce the arbitral award. The petition was allowed by a single and a division bench of the High Court. However, dissatisfied with the decision of the High Court, the appellant preferred an appeal to the Supreme Court.

One of the arguments raised by the appellant objecting to the enforcement of the award was that it goes against public policy under Section 7(1)(b)(ii) of the Foreign Awards Act for various reasons. As a result, the court framed two legal questions regarding this objection:

[87] 1994 Supp. (1) SCC 644.

(1) Does Section 7(1)(b)(ii) of the Foreign Awards Act prevent the enforcement of the award if it contradicts the public policy of New York State?

(2) What exactly does 'public policy' under Section 7(1)(b)(ii) of the Foreign Awards Act refer to?

Regarding the first question, the court determined that the term ‘public policy’ in Section 7(1)(b)(ii) of the Foreign Awards Act exclusively means public policy of India. Therefore, the refusal to enforce the award cannot be based on the fact that it was against the State of New York's public policy.

In answering the second question, i.e., the meaning of the term ‘public policy’ under Section 7(1)(b)(ii) of the Foreign Awards Act, the Supreme Court referred to its earlier decisions and acknowledged that there are two views, a ‘broad’ view, and a ‘narrow’ view; and that later judgments had favored the broad view.[88] However, in the context of enforcement of foreign arbitration awards, the court pointed to judgments of English courts which exercised jurisdiction in setting aside arbitration awards on the ground of public policy only with extreme reserve;[89] and to judgments of US courts, which:

(1) had narrowly interpreted the public policy exception given the pro-enforcement bias of the New York Convention and its supersession of the Geneva Convention,[90]and

(2) had disapproved of parochial refusal by courts of one country to enforce international arbitration agreements.[91]

After a detailed discussion on the meaning of ‘public policy’ in the context of private international arbitration, the court held that the public policy exception to enforcement of a foreign arbitration award must be construed narrowly, restricting it to three facets.

The three facets were:

(1) the fundamental policy of Indian law,

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[88] Murlidhar Aggarwal, Brojo Nath Ganguly*, and* Rattan Chand Hira Chand.

[89] Vervaeke v. Smith & Ors*.,* [1983] 1 A.C. 145; Dalmia Dairy Industries v. Nat’l Bank of Pakistan, (1978) 2 Lloyd’s L.R. 223; Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah Nat’l Oil Co., (1987) 2 All E.R. 769.

[90] Parsons & Whittemore Overseas Co. In.c v. Societe Generale De L’Industrie Du Papier (Rakta) & Anr*.,* 508 F 2d 969 (1974).

[91] Fritz Scherk v. Alberto-Culver Co., 417 US 506 (1974); Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc., 87 L. Ed. 2d 444.

(2) the interests of India, and

(3) justice and morality.

An award could be set aside if it was contrary to any of these three grounds.

In the judgment, the grounds were not expressly defined, leaving them open for judicial interpretation. The court observed that infringing the Foreign Exchange Regulation Act, 1973 and ignoring orders from superior courts in India would be considered contrary to the fundamental policy of Indian law. However, despite this, the more liberal approach to contracts that had developed up until the early 1990s was abandoned in favor of a more informed and pro-enforcement stance towards foreign awards. The principles established in the *Renusagar* case were subsequently upheld in numerous rulings by the Supreme Court and various High Courts.[92]

Section 48(2)(b) of the Arbitration and Conciliation Act provides that enforcing a foreign award in India may be refused if the court finds that enforcing the award would be against Indian public policy. In *Renusagar,* the core issue before the court was whether India should adopt the broader concept of public policy as applicable in municipal law or the narrower concept of public policy as applied in international law.

The Supreme Court concluded that the concept of public policy applicable to foreign awards under the New York Convention must be narrowly interpreted in consonance with its application in private international law. The court observed that merely violating an Indian law will not attract the bar of public policy. At the same time, a foreign award would be refused enforcement on the grounds of violation of public policy only if such enforcement would be contrary to (i) the fundamental policy of Indian law, (ii) the interests of India, or (iii) principles of justice or morality. Applying this interpretation, the Supreme Court ruled that enforcing the award in *Renusagar* would not be contrary to India's public policy.

To support its interpretation, the Supreme Court referred to arbitration practices in several pro-arbitration jurisdictions, such as France and the USA. The court specially cited the American case of *Parsons & Whittemore Overseas Co.* to highlight that enforcing a foreign arbitral award

[92] Smita Conductors Ltd. v. Euro Alloys Ltd*,* 2001 (7) SCC 728 (Supreme Court); Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain (India) Co., 2008 (4) Arb. L.R. 497 (Delhi High Court); and Penn Racquet Sports v. Mayor Int'l Ltd*,* (2011) 122 D.L.T. 117 (Delhi High Court).

only must be denied where its enforcement would violate the forum state's most basic notions of morality and justice.

The Supreme Court also recognized the difference between international public policy and national public policy, as acknowledged under the French Code of Civil Procedure.[93] Moreover, the court observed that it could not classify public policy applicable to foreign awards in India as international public policy because it needed a workable definition of global public policy.

The decision given in *Renusagar* was notably progressive for its time, as it brought the interpretation of public policy in India in accordance with international practices commonly accepted in advanced arbitration jurisdictions such as the USA and France. However, *Renusagar* was followed by several judgments that interpreted public policy more broadly and widely, leading to extensive judicial scrutiny of foreign awards in India.

3.5 SECTION 34 POST-SAW PIPES: LEGAL INTERPRETATIONS AND CONSEQUENCES

In 2003, a division bench of the Supreme Court looked into the scope and meaning of the term 'public policy of India' as defined under Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996, in the case of *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd.*[94] The court based its observation on previous decisions where a more expansive interpretation given to public policy was applied in the context of Section 23 of the Contract Act. The court found that the narrow interpretation adopted in the *Renusagar* case applied specifically to enforcing a foreign award that has attained finality.

The court observed that under Section 34, the term 'public policy of India' must be interpreted in the context of the court's jurisdiction, where the award's validity is challenged before it becomes final and enforceable. The court held that a more comprehensive and broader interpretation of India's public policy is required in this context.

On examining the merits, the court concluded that the award went against the terms of the contract and, thus, contravened sub-Sections (2) and (3) of Section 28 of the 1996 Act. The Supreme Court, therefore, introduced a new facet to the test established in the *Renusagar* case, termed 'patent illegality.' The court ruled that an award could be challenged on the grounds of

[93] France—Code of Civil Procedure—Book IV—Arbitration 1981, Article 1498, https://mitchellhamline.edu/wp-content/uploads/sites/18/2016/05/DOC-9-French-Code-of-Civil-Procedure.pdf., (accessed on 30 January 2024).
[94] (2003) 5 SCC 705.

patent illegality if it violates the provisions of the Act, any other substantive law governing the parties, or the terms of the contract. Nonetheless, it clarified that the illegality must affect the core of the matter and shock the court's conscience; a trivial illegality would not be sufficient to invalidate the award on the grounds of conflict with public policy.

The *Saw Pipes* case marked a notable shift in the landscape of judicial interference in domestic awards, quoting patent illegality as grounds for such intervention. The judgment faced significant and warranted backlash from both the Indian and international arbitration communities. This reproval stemmed from the fact that the expansion of the ambit of 'public policy' to incorporate 'patent illegality' was against one of the underlying objectives of the 1996 Act, i.e., to confer finality to the awards and reduce court intervention.

Furthermore, *Saw Pipes* deviated from the doctrine of precedent insofar as it added a fourth facet to the three facts mentioned in *Renusagar* despite being bound by the decision given by a three-judge bench in *Renusagar.* This move made way for disapproval due to the violation of established legal canons. However, the silver lining in the *Saw Pipes* ruling was that it was in the context of a domestic award being challenged under Section 34 and not in the context of a foreign award of which enforcement was sought under Section 48 or Section 57.[95] Nevertheless, owing to the wording of the 1996 Act, the unintended consequence of the judgment was its application to awards arising from Indian-seated international commercial arbitration as well.

In summary, while the *Saw Pipes* case brought about a pivotal change in the interpretation of the Arbitration and Conciliation Act of 1996, it also sparked debates and controversies within the legal and arbitration communities regarding its implications for the intended objectives of the Act.

It is essential to take note of the unique approach followed by the Supreme Court in drafting the judgment of the *Saw Pipes* case. Diverging from the conventional format, the Supreme Court structured its decision in two distinct parts. In contrast to its usual practice of first discussing the facts and then addressing the legal aspect, the court, in *Saw Pipes*, first deliberated and resolved the legal issue and then applied the legal conclusion to the factual circumstances of the case. The initial segment of the judgment involved the Supreme Court's examination of the following legal issue:

[95] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.

Court's Jurisdiction under Section 34 of the Arbitration and Conciliation Act, 1996.

> *[W]hether the Court would have jurisdiction under Section 34 of the Act to set aside an award passed by the Arbitral Tribunal which is patently illegal or in contravention of the provisions of the Act or any other substantive law governing the parties or is against the terms of the contract?*

After extensive deliberation on the matter, the Supreme Court concluded that an award exhibiting patent illegality cannot be sanctioned enforcement and must be held invalid. In the court's own words, a "patently illegal award is required to be set at naught; otherwise, it would promote injustice."[96] Without an explicit expression under Section 34 of the Act, the Supreme Court inferred the principle of patent illegality under the public policy head. If an arbitral award is patently illegal, it would be considered a counter to India's public policy and, therefore, must be invalidated by the court.

To understand the Supreme Court's observation, citing the critical part in paragraph 30 of the decision would be beneficial. The court held that:

> *[I]n our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be said that the concept of public policy connotes some matter which concerns the public good and the public interest. What is for the public good or in the public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award, which is, on the face of it, patently in violation of statutory provisions, cannot be said to be in the public interest. Such award/judgment/decision is likely to affect the administration of justice adversely.*

The Court, after that, referred to its earlier decision in *Renusagar Power Co. v. General Electric Co.* and held:

[*H]ence, in our view, in addition to the narrower meaning given to the term "public policy" in [the] Renusagar case, it is required to be held that the award could be set aside if it is patently illegal. [The] result would be that [an] award could be set aside if it is contrary to:*

> *(a)a fundamental policy of Indian law; or*
>
> *(b)the interests of India; or*

[96] Saw Pipes*, s*upra note 95, para. 29.

(c)justice or morality, or

(d)in addition to if it is patently illegal.

The Court further added:

Illegality must go to the root of the matter, and if the illegality is of a trivial nature, it cannot be held that the award is against public policy. The award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such an award is opposed to public policy and is required to be adjudged void.

The decision laid down in *Saw Pipes* set a precedent that exerted influence on several subsequent judgments of the Supreme Court, including in *Hindustan Zinc Ltd v. Friends Coal Carbonisation* in April 2006,[97] in 2008 in *Delhi Development Authority v. RS Sharma*[98] ; and in two 2011 decisions in *JG Engineers Pvt Ltd v. Union of India & Anr*[99] and *Union of India v. Col LSN Murthy*[100]; all of which were cases of challenges to domestic awards under Section 34.

Through its two judgments rendered in May 2006, viz, *Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd*[101]and *McDermott International Inc v. Burn Standard Co Ltd*,[102] The Supreme Court observed that the decision in *Saw Pipes* bound them, although it was subject to criticism.

The question of whether the interpretation of 'public policy of India' under Section 34(2)(b)(ii) given in the case of *Saw Pipes* is also applicable to 'public of India' under Article 48(2)(b) was thought about for the first time by a division bench of the Supreme Court in the case of *Phulchand Exports Ltd v. OOO Patriot.* [103]The court, in this case, without going into the reasoning given in *Saw Pipes,* directly applied the broader interpretation of public policy in Section 34(2)(b)(ii) to Section 48(2)(b). The court did not consider the distinction made under the *Saw Pipes* decision between a foreign award, which has become final and executable, and a domestic award that is still yet to attain finality under Section 34. The court also did not take

[97] 2006 (4) SCC 445.
[98] (2008) 13 SCC 80.
[99] (2011) 5 SCC 758.
[100] (2012) 1 SCC 718.
[101] (2006) 11 SCC 245.
[102] (2006) 11 SCC 181.
[103] (2011) 10 SCC 300.

notice of the *Renusagar* judgment, which had previously developed a narrow interpretation of 'public policy' concerning foreign awards.

However, *Phulchand* was overruled by a three-judge bench of the Supreme Court in 2014 in the *Shri Lal Mahal Ltd*. case. The court, in this case, held that the principles stated in *Renusagar* concerning Section 7(1)(b)(ii) of the Foreign Awards Act should equally apply to Section 48(2)(b) of the 1996 Act. Consequently, it was observed that the enforcement of a foreign award may be refused under Section 48(2)(b) only if such enforcement is contrary to

(1) the fundamental policy of Indian law or

(2) the interests of India, or

(3) justice or morality;

It was clarified that the broader interpretation given to 'public policy of India' under Section 34(2)(b)(ii) in the case of *Saw Pipes* did not apply when objecting to the enforcement of foreign awards under Section 48(2)(b).

This pro-arbitration stance towards foreign-seated arbitrations was further reinforced in another judgment in 2014, *World Sport Group (Mauritius) Ltd v. MSM Satellite (Singapore) Pte Ltd*[104]. In this case, the Supreme Court held that under Section 45 of the 1996 Act, before referring parties to arbitration, a court must only assess whether an arbitration agreement covered by the New York Convention is null and void, inoperative, or incapable of being performed. The court found the Bombay High Court's decision—that the arbitration clause was against public policy under Sections 23 and 28 of the Contract Act as erroneous.

3.6 THE LAW COMMISSION'S 246TH REPORT AND WESTERN GECO ANALYSIS

In August 2014, the Law Commission of India released its 246th Report on 'Amendments to the Arbitration and Conciliation Act 1996[105]. The report proposed significant changes to the entire framework of the 1996 Act. These amendments aimed to reinforce the Act's emphasis

[104] (2014) 11 SCC 639.

[105] Law Commission of India, Supplementary to Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996 – 'Public Policy' – Developments post Report No. 246, (Feb. 2015), http://lawcommissionofindia.nic.in/reports/Supplementary_to_Report_No._246.pdf (accessed 8 Apr. 2024).

on fairness, speed, and cost-effectiveness in dispute resolution through arbitration, align Indian arbitration practices with international standards, and minimize excessive judicial intervention in arbitration matters.

Among other recommendations, the 246th Report suggested several critical amendments to Sections 34, 48, and 28 of the 1996 Act after reviewing the decisions in *Renusagar, Saw Pipes, and Shri Lal Mahal*:

Limiting Public Policy Grounds: In line with the *Renusagar* decision, the Commission recommended restricting the scope of 'public policy' under Sections 34 and 48. An award could only be annulled on public policy grounds if it was opposed to the 'fundamental policy of Indian law' or conflicted with 'the most basic notions of morality or justice.' The Commission specifically excluded the 'interests of India' as a ground, considering it too vague and prone to interpretational misuse.

Introducing Section 34(2A): Reflecting on the *Saw Pipes* case, the Commission proposed adding a new subsection (2A) to Section 34. This subsection would allow a domestic arbitration award (excluding international commercial arbitration awards) to be set aside on the ground of 'patent illegality' visible on the face of the award.

Clarifying Section 34(2A): A proviso was suggested to be added to Section 34(2A) to clarify that an award could not be set aside merely because of an erroneous application of the law or by re-evaluating the evidence.

Amending Section 28(3): The Commission proposed substituting the words 'in accordance with' with 'having regard to' in Section 28(3). This amendment aimed to overturn the *Saw Pipes* ruling to the extent that it held any violation of the contract terms would render the award in breach of Section 28 and thus against public policy.

In September 2014, just a month after the Law Commission's 246th Report was published (and before any action was taken), the Supreme Court in ONGC Ltd v. Western Geco International Ltd. delivered a crucial judgment. A three-judge bench of the Supreme Court interpreted the expression 'fundamental policy of Indian law'—the first facet of the public policy test established in *Renusagar*—quite expansively in this case. In its analysis, the Supreme Court

held that the expression "fundamental policy of Indian law" had, in the context of the present case, to be interpreted to mean the three principles:

(1) The duty to adopt a judicial approach.
(2) Compliance with the principles of natural justice, especially the requirement to apply one's mind and record reasons for decisions.
(3) The decision should not be so perverse or irrational that no reasonable person would have arrived at it, which aligns with the Wednesbury principle of unreasonableness.[106]

The *Western Geco* judgment was perceived to have expanded the arena for judicial intervention in arbitration by including the Wednesbury principle as part of the 'fundamental policy of Indian law.' This was seen as an insidious slide backward from India's pro-arbitration and pro-investment stand. Two, when viewed from a larger perspective, it was considered a step backward from India's striving to emerge as a critical seat for international commercial arbitration (on par with hubs such as London, Paris, Hong Kong, or Singapore)[107].

Two years post *Western Geco*, in November 2014, the Supreme Court in *Associate Builders v. Delhi Development Authority*[108] upheld the decision of *Western Geco* and gave an elaborate interpretation to the heads of India's public policy under Section 34. The Supreme Court briefly stated that the interference in the arbitration award on the grounds of "public policy" under Section 34 of the Act can be categorized as follows:

'The fundamental policy of Indian law': The court expounded on the concept of the 'fundamental policy of Indian law,' emphasizing that failure to adhere to a superior court's judgment would contradict this principle, along with violations of substantive law and disobedience of orders from higher courts in India. *Western Geco's* decision further delineated this fundamental policy's three components. By referencing previous cases, the court outlined a tripartite assessment for the 'perversity or irrationality' aspect, stipulating that a ruling would be deemed irrational if it lacks evidential support, includes irrelevant considerations, or overlooks crucial evidence. It was underscored by the court that, when applying the 'public

[106] Associated Provincial Picture Houses Ltd v. Wednesbury Corp., (1947) 2 All E.R. 680 (C.A).
[107] White & Case LLP, 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration, (Oct. 6, 2015), https://www.whitecase.com/publications/insight/2015-international-arbitration-survey-improvements-and-innovations (accessed Apr. 10, 2024).
[108] (2015) 3 SCC 49.

policy' criterion, it does not function as an appellate body; thus, factual inaccuracies or differing interpretations by the arbitrator are not subject to correction.

‘Interests of India’: This head was to be developed case-by-case.

‘Justice’: An award would be against justice only if it shocks the court's conscience.

‘Morality’: In the context of Section 23 of the Contract Act, the court interpreted morality as primarily about sexual morality. In arbitration, this would mean an immoral award, such as one enforcing a contract for prostitution, which would need to shock the court's conscience.

‘Patent illegality’: The court endorsed three sub-heads under this category: (a) contravention of the substantive law of India, (b) contravention of the 1996 Act itself, and (c) contravention of Section 28(3) of the 1996 Act. Each of these would constitute patent illegality.

In February 2015, in response to the *Western Geco* and *Associate Builders* judgments, the Law Commission published a Supplementary Report to its 246th Report.[109] The Commission critically noted that *Western Geco's* inclusion of the Wednesbury test of unreasonableness within the 'fundamental policy of Indian law' effectively allowed the review of arbitration awards on their merits. This, the Commission argued, would undermine confidence in Indian arbitration and diminish India’s attractiveness as a venue for domestic and international commercial arbitration. To prevent public policy challenges from leading to a review of the merits of an award, the Commission recommended adding the following 'Explanation 2' to Section 34(2)(b)(ii) and Section 48(2)(b)(ii): 'For the avoidance of doubt, the test as to whether there is infringement with the fundamental policy of Indian law shall not entail a review on merits'.

3.7 2015 AMENDMENT AND SSANGYONG PRECEDENT

Based on the suggestions put forth by the Law Commission's 246th Report and its Supplement, the Indian government undertook significant measures to revise the Arbitration and Conciliation Act of 1996. In October 2015, the government put forward the Arbitration and Conciliation (Amendment) Ordinance, 2015 ('Ordinance'). This Ordinance encompassed nearly all of the amendments proposed by the Law Commission to Sections 34, 48, and 28.

[109] Law Commission of India, supra note. 107.

Nevertheless, it introduced slight alterations to the language of section 28(3). After this, the Arbitration and Conciliation (Amendment) Bill 2015 was presented in Parliament and effectively cleared both chambers in December 2015, thereby enacting the 2015 Amendment into legislation.

Despite implementing the 2015 Amendment, the Supreme Court initially maintained allegiance to the principles delineated in *Associate Builders* in two legal rulings of 2018: *Venture Global Engineering LLC v. Tech Mahindra Ltd.*[110] and *Sutlej Construction Ltd v. State (UT of Chandigarh)*[111].

Nevertheless, a re-evaluation of the extent of the public policy exception under Sections 34 and 48 was carried out by a panel of judges from the Supreme Court in May 2019, specifically in the matter involving *Ssangyong Engineering & Construction Co. Ltd v. National Highways Authority of India.*[112] When considering the annulment of a domestic arbitration decision, the judiciary acknowledged the impact of the 2015 Amendment:

(1) The term 'fundamental policy of Indian law,' as found in Sections 34 and 48, should return to the restrictive interpretation established in *Renusagar*, thus avoiding the broad perspective.
(2) The absence of embracing a 'judicial approach,' a category within the 'fundamental policy of Indian law' as discussed in *Western Geco*, can no longer serve as a basis for annulling an award under Sections 34 or 48, as it would entail scrutiny of the award's substance.
(3) Reasons for contesting an award due to the failure to adhere to principles of natural justice, as articulated in Sections 18 and 34(2)(a)(iii) of the 1996 Act, remain legitimate.
(4) The 'interest of India' rationale has been entirely excluded.
(5) The foundation of 'justice and morality' is presently constrained to disputes involving the 'most fundamental concepts of morality or justice,' thus allowing for the annulment of arbitral awards only in cases where they intensely shake the court's conscience of justice.
(6) The 2015 Amendment incorporated Explanation 2 into Sections 34(2)(b)(ii) and 48(2)(b)(ii), making it clear that assessing a violation of Indian law's fundamental

[110] (2018) 1 SCC 656.
[111] (2018) 1 SCC 718.
[112] (2019) 15 SCC 131.

policy should not entail a reevaluation of the merits. As a result, the rationality test (Wednesbury test) established in *Western Geco* is no longer relevant.

(7) A fresh, restricted ground of 'patent illegality' on the face of the award was introduced for domestic awards (excluding those from international commercial arbitrations) through sub-section (2A) of Section 34. Nevertheless, this ground does not encompass mere incorrect application of the law or breaches of statutes unrelated to public policy or public interest.

(8) Following the revision made to Section 28(3), the primary responsibility for interpreting contract terms lies with the arbitrator, except in cases where such interpretation is deemed unreasonable.

(9) While the concept of perversity no longer serves as a basis for challenge under the 'public policy of India' as per Explanation 2, it can still be considered as clear illegality according to sub-section (2A) of Section 34. This encompasses instances where decisions are made without any supporting evidence, essential evidence is disregarded, or information from undisclosed documents is used, all of which would be classified as patent illegality.

By embracing these elucidations, the court endeavored to rationalize and enhance the construal of public policy rationales, ensuring that judicial interference is kept to a minimum and that arbitration processes uphold their effectiveness and conclusiveness, consistent with the statutory objectives of the 2015 Amendment.

Following the 2015 Amendment, it is noteworthy that the Supreme Court, in the case of *Ssangyong*, permitted a restricted examination of perversity within the realm of domestic awards to be indirectly applied, notwithstanding its explicit rejection of the Wednesbury standard. The Bombay High Court subsequently validated this construal in the matter of *Union of India v. Recon* [113]The court dismissed a challenge to a domestic award on grounds of perversity and patent illegality. When discussing the legal stance after the *Ssangyong* case, the High Court acknowledged this interpretation:

17.4 This yields the following result:

...

[113] Arbitration Petition (L) No. 1293 of 2019.

(iv) In interpreting the contract, the arbitral view must be fair-minded and reasonable. If the view is one that is not even possible, or if the arbitrator wanders beyond the contract, that would amount to a 'patent illegality'.

(v) 'Perversity' as understood in Associate Builders is now dishoused from 'fundamental policy' (where Western Geco put it) and now has a home under 'patent illegality'. This includes:

(A) a finding based on no evidence at all;

(B) an award that ignores vital evidence and

(C) a finding based on documents taken behind the back of the parties.

I believe this is not an exhaustive listing.

Combining (iv) and (v) above, therefore, while the explicit recognition or adoption of the Wednesbury unreasonableness standard (introduced in Western Geco) is probably done away with, there is even yet a requirement of reasonableness and plausibility in matters of contractual interpretation. If the interpretation of the contract is utterly unreasonable and totally implausible — the view taken is not even possible — a challenge lies. Therefore, an award that was impossible either in its making (by ignoring vital evidence, or being based on no evidence, etc.) or in its result (returning a finding that is not even possible), then a challenge on the ground of 'perversity' lies under Section 34(2-A) as a dimension of 'patent illegality.'

In 2019, additional changes to the Arbitration and Conciliation Act of 1996 were brought in through the Arbitration and Conciliation (Amendment) Act, 2019 ('2019 Amendment'). However, these amendments did not significantly alter the provisions of Sections 34 and 48.

3.8 CONCLUSION

Examining public policy in the Indian arbitration framework reveals a dynamic and evolving jurisprudence that balances national legal principles with the need for an efficient and reliable arbitration system. Indian courts, through landmark cases such as *Renusagar, Saw Pipes, and Ssangyong*, have progressively refined the contours of public policy, impacting the enforceability of arbitral awards. The distinctions drawn between Part I and Part II of the Arbitration and Conciliation Act of 1996 underscore the different considerations at play in domestic versus foreign award enforcement. Legislative interventions, particularly the 2015 Amendment and recommendations from the 246th Law Commission Report, have further

aimed to narrow the public policy exception, aligning India more closely with international standards. By continuing to develop a more predictable and restrictive application of public policy, India can enhance its standing as a favorable arbitration hub, encouraging both domestic and international parties to engage in arbitration within its jurisdiction confidently.

CHAPTER 4

EXPLORING INTERNATIONAL PERSPECTIVE: LEGISLATIVE AND JUDICIAL APPROACH TOWARDS THE CONCEPT OF PUBLIC POLICY – U S, ENGLAND, HONG KONG AND SINGAPORE

4.1 INTRODUCTION

The concept of public policy plays a pivotal role in the realm of arbitration, often serving as a critical determinant in the enforcement of arbitral awards. This chapter delves into the legislative and judicial approaches toward public policy in four prominent jurisdictions: the United States, England, Hong Kong, and Singapore. By exploring the judicial interpretations and landmark judgments in these jurisdictions, this chapter aims to elucidate how courts have navigated the complex terrain of public policy in arbitration.

The chapter begins with an overview of the legislative frameworks governing arbitration in the U.S., England, Hong Kong, and Singapore, setting the stage for a deeper analysis of judicial approaches. It examines the pivotal role that public policy considerations play in arbitration, particularly in the enforcement and annulment of arbitral awards. Through a detailed examination of landmark judgments, the chapter illustrates how courts in these jurisdictions have consistently adopted a narrow interpretation of public policy, thereby fostering a pro-enforcement bias that aligns with international arbitration norms.

The United States, with its robust arbitration framework and extensive jurisprudence, provides a rich tapestry of cases where the courts have grappled with public policy defenses. Similarly, England's common law tradition and its status as a leading arbitration hub offer valuable insights into judicial restraint and deference to arbitral autonomy. As a prominent arbitration center in Asia, Hong Kong and Singapore also present a unique perspective, balancing its common law heritage with the demands of a dynamic international arbitration landscape.

4.2 PUBLIC POLICY CONSIDERATIONS IN U.S. ARBITRATION: A LEGAL OVERVIEW

The United States has consistently adhered to a uniform approach in recognizing and enforcing awards from both domestic and international arbitrations.[114] This consistency can be attributed mainly to the U.S. policy strongly supporting arbitration agreements within its legal realm. Such a policy is in accordance with the prevailing notion that arbitration serves as a highly productive mechanism for settling conflicts arising from global commercial transactions, offering myriad preferable alternatives to conventional court adjudication.[115]

A noteworthy feature of U.S. arbitration policy is the propensity of American judicial bodies to exhibit a higher readiness in recognizing and enforcing foreign arbitral awards than judgments from foreign courts. This pro-arbitration standpoint underscores the nation's dedication to cultivating a climate conducive to arbitration, rendering it a desirable venue for resolving international disputes.

Three primary legal instruments govern the recognition and enforcement of arbitral awards within the U.S. legal framework.[116]. These include:

- The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the "New York Convention."
- The 1975 Inter-American Convention on International Commercial Arbitration[117], referred to as the "Panama Convention."
- The U.S. Federal Arbitration Act (FAA).

The enactment of the Federal Arbitration Act by the U.S. Congress in 1925 was driven by the principal objective of instituting a standardized legal structure for arbitration. The primary intention behind the creation of the FAA was not to restrict arbitration but rather to promote the utilization of arbitration as a means for parties to address their conflicts. Despite persistent

[114] Pedro J. Martinez Fraga, *The American Influence on International Commercial Arbitration, Doctrinal Developments and Discovery Methods* (2009), at 6.
[115] Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards under the New York Convention - Practice in U.S. Courts*, 3 INT'L TAX & BUS. LAW.249,249(1986).
[116] George A. Bermann, *Domesticating' the New York Convention: The Impact of the US Federal Arbitration Act,* in INTERNATIONAL ARBITRATION: DIFFERENT FORMS AND THEIR FEATURES 381, 381-97 (Giuditta Cordero-Moss ed., 2013).
[117] Robert B. von Mehren, *The Enforcement of Arbitral Awards under Conventions and United States Law*,9 YALE J.INT'L L.342, 346 (1983).

disputes within judicial circles concerning arbitration, the FAA was pivotal in diminishing animosity towards arbitration agreements in the United States.[118]

In 1970, the United States incorporated the New York Convention into its legal system by enacting Chapter 2 of the FAA, which codified the Convention. This integration brought about a significant transformation in the arbitration landscape within the United States. The U.S. Supreme Court underscored the principal objective behind the nation's embrace and execution of the Convention, emphasizing its goal to enhance the acknowledgment and enforcement of commercial arbitration agreements within international contexts and, establish uniformity in adhering to arbitration agreements and enforcing arbitral decisions among participating nations. This alignment with global norms has played a crucial role in consolidating the United States' favorable position towards arbitration, positioning it as a preferred jurisdiction for settling cross-border commercial disputes.

The notion of public policy as a basis for rejecting arbitral awards, as delineated in the New York Convention, is enshrined in Article 207 of the FAA.[119] Article 207 declares, “A court is obligated to uphold the award unless a ground for refusal or postponement of recognition or enforcement of the award as outlined in the [New York] Convention is identified.” This particular provision renders the public policy exemption, as delineated in Article V(2)(b) of the New York Convention, directly relevant within the United States.

Although the FAA itself does not explicitly define "public policy," American courts have acknowledged it as a principle in common law for declining enforcement of arbitral awards. Article V(2)(b) of the New York Convention stipulates: “Recognition and enforcement of the award can be declined if ... the award would run counter to the public policy of that particular country.” Even though the Convention does not specify the criteria for what constitutes being "contrary to the public policy of that country," judicial precedents in the United States have established a comprehensive body of rulings on this issue.

The primary principle derived from these legal cases underscores the necessity of constraining the reach of the public policy exception to avert the undermining of arbitration's fundamental goals: the efficient resolution of disputes and the avoidance of prolonged and expensive

[118] Thomas E. Carbonneau, *Arbitration Fundamental: The Assault on Judicial Deference*, 23 AM. REV. INT'L ARB. 417 (2012).
[119] Stewart E. Sterk, *Enforceability of Agreement to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481(1981).

litigation.[120] It is a consistent stance in U.S. jurisprudence that "public policy" and "national policy" do not hold synonymous connotations, implying that an arbitral decision could be enforced notwithstanding its divergence from U.S. foreign policy.[121] Disputes involving foreign policy issues with other nations are deemed insufficient to supersede the overarching objective of ensuring the consistent enforcement of international arbitral rulings. This perspective is upheld even when enforcement might clash with U.S. sanctions.[122]

In essence, the legal framework in the United States, as delineated by the FAA and its construal of the New York Convention, advocates for a narrow interpretation of the public policy exception to bolster the efficiency and reliability of arbitration in adjudicating international commercial conflicts.

The decision of the Second Circuit of the United States Court of Appeals in the Parsons case[123] stands out as the most frequently referenced instance concerning public policy within the realm of arbitral award enforcement. In this significant judicial pronouncement, the court articulated that the validation of foreign arbitral awards could only be refused on grounds of public policy in situations where such validation would transgress the fundamental moral and judicial principles of the jurisdiction in question. This doctrine, which was set forth by the U.S. judiciary, has not only played a crucial role within the United States but has also been alluded to by various judicial bodies globally in their deliberations on public policy exemption.

Recent legal proceedings have reiterated this position, underscoring that the public policy defense becomes applicable when a ruling is deemed unenforceable due to being " repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.[124]" This criterion establishes a rigorous standard, guaranteeing that the public policy defense can be effectively raised solely under the most extreme circumstances, where implementing a judgment would fundamentally undermine the fundamental ethical and judicial tenets of the jurisdiction enforcing it.

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120 Ameropa AG (Switz.) v. Havi Ocean Co. LLC (UAE), No. 10CIV.3240 (TPG), 2011 U.S. Dist. LEXIS 12831 (S.D.N.Y. Feb. 9, 2011).

121 Antco Shipping Co. Ltd. V. Sidermar S. P. A., 417 F. Supp. 207, 209 (S.D.N.Y. 1976).

122 National Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 819-20 (D. Del. 1990).

123 Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA), 508 F.2d 969 (2d Cir. 1974).

124 Tahan v. Hodgson, 662 F.2d 862, 864 (D.C. Cir. 1981).

Additionally, U.S. courts construe Article V(1) of the New York Convention as including a "public policy gloss.[125]" This construal signifies that, under specific circumstances, courts have declined to enforce foreign arbitral awards by employing a public policy assessment concerning Article V(1) of the Convention. U.S. courts have effectively integrated a public policy provision within Article V(1) through this methodology.

Moreover, a notable intersection exists between the concepts of arbitrability and public policy within the realm of arbitration practice.[126]Arbitrability pertains to the legality of submitting a particular subject matter to arbitration.[127] In instances where a subject matter is considered essential to public welfare, defenses based on public policy may be raised. In the United States, issues related to arbitrability have frequently emerged in areas such as antitrust law, securities law, and patent law.[128] Historically, there has been a discussion regarding the authority of arbitral tribunals to adjudicate statutory claims within these domains.

4.2.1 GROUNDS FOR REFUSING ENFORCEMENT OF ARBITRAL AWARDS IN U.S.

Although U.S. federal courts generally interpret the concept of public policy narrowly, the specific facts of each case must be considered in the interpretation. Despite the global practice of arbitrating international commercial disputes, national courts are still essential for enforcing arbitral awards. Substantive public policy matters are intricately linked to the validity of arbitral awards and can encompass a diverse array of rationales. These rationales encompass infringements on foreign policy, such as violations of U.S. sanctions, criminal culpability, the imposition of exorbitant interest rates, breaches of competition regulations, violations of securities laws, and antitrust statutes. Each of these substantive concerns has the potential to form the basis for a public policy defense in the context of arbitral award enforcement. Various important factors form the procedural grounds for invoking public policy. These factors include annulling an arbitral award, instances of duress, and violations of fundamental procedural rules. Allegations of fraud, lack of impartiality among arbitrators, absence of reasons for the award,

[125] Reed L. Freda J., *Narrow Exceptions: A Review of Recent U.S. Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention*,25 J. INT'L ARB. 656 (2008).
[126] Karl-Heinz Bockstiegel, Public Policy, and Arbitrability, in COMPARATIVE ARBITRATION: PRACTICE AND PUBLIC POLICY IN ARBITRATION 181 (Pieter Sanders ed., 1987).
[127] Heather R. Evans, The Non-arbitrability of Subject Matter Defense to Enforcement of Foreign Arbitral Awards in United States Federal Courts, 21 N.Y.U.J. INT'L L. & POL. 329 (1989).
[128] William W. Park, National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration, 63 TUL. L. REV. 647 (1989).

and blatant disregard of the law are also considered procedural grounds. Each of these aspects can influence the enforcement of an arbitral award, highlighting the significance of procedural fairness and integrity in arbitration proceedings.

4.2.2 SUBSTANTIAL GROUNDS

- Foreign policy: violation of U.S. Sanctions

The *Parsons* case serves as a prominent illustration of how the judiciary in the United States applies the public policy exception. Within this particular case, an American company known as Parsons & Whittemore (Overseas) engaged in a contractual agreement with an Egyptian firm, Societe Generale de L'industrie du Papier (RAKTA), for the establishment and management of a paper manufacturing facility in Egypt. Following the emergence of a dispute, RAKTA brought the issue to an arbitral tribunal in accordance with the regulations set forth by the International Chamber of Commerce (ICC Rules), aiming to obtain compensation for the contractual violation. The arbitral tribunal ultimately sided with RAKTA, and a U.S. federal district court subsequently upheld the decision. Overseas, however, lodged an appeal contending that upholding the ruling would contravene the United States public policy.

The United States Court of Appeals for the Second Circuit rejected Overseas' appeal, emphasizing a narrow interpretation of the public policy provision in Article V(2)(b) of the New York Convention. The court articulated a frequently cited standard: "Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."[129]

Another illustration of this principle can be found in the case of *Ameropa AG*. The company Havi Ocean, originating from the United Arab Emirates (UAE), raised a defense based on public policy against implementing an arbitral decision, asserting that the decision breached U.S. sanctions. Ameropa, a Swiss entity, had engaged in a contractual agreement with Havi Ocean for the distribution of Iranian sulfuric acid. Upon the emergence of a disagreement, Ameropa commenced arbitration proceedings, resulting in a favorable ruling by the arbitral tribunal. Subsequently, Ameropa attempted to enforce the decision in the UAE without success and thus turned to the U.S. judiciary for enforcement.

[129] Parsons & Whittemore v. Société Générale, at 974.

Havi Ocean objected to the enforcement, contending that the decision contravened U.S. and New York public policy due to the involvement of Iranian sanctions. Nevertheless, the Federal Court for the Southern District of New York determined that matters concerning foreign policy, including potential breaches of U.S. sanctions, do not surpass the threshold of violating the fundamental concepts of morality and justice in the forum state. Additionally, the court emphasized that Ameropa, as a Swiss entity, was not bound by U.S. sanctions. Therefore, the hypothetical breach of U.S. sanctions did not present an adequate violation of public policy to impede the enforcement of the arbitral decision.

These case laws show the U.S. Court's approach to the public policy exception, focusing on giving it a narrow interpretation and thereby upholding the principles of arbitration.

- Excessive Interest Rate

In the case of *Laminoirs v. Southwire Co.*[130], the Federal District Court for the Northern District of Georgia was tasked with addressing the matter of enforcing an arbitral award encompassing compensatory and punitive damages. The conflict arose when Southwire declined to remunerate a specific standard of steel wire, leading Laminoirs to present the case to the ICC for arbitration. The arbitral tribunal sided with Laminoirs, directing Southwire to recompense for the increased world market price and interest. More precisely, the tribunal stipulated two forms of interest: one set at the French rate for the granted sums and an additional 5% annually for delays in receiving said sums.

Upon Laminoirs' endeavor to uphold the award in the United States, Southwire objected, contending that the French interest rate was excessively high and thus breached public policy. Despite the French rate surpassing those in Georgia, the court concluded that an elevated interest rate in itself did not amount to a transgression of the "forum's most basic notions of morality and justice." Nevertheless, the court scrutinized the supplementary 5% interest rate more meticulously, deeming it punitive rather than compensatory.

The court determined that the extra 5% interest, although in line with French legislation, did not correspond reasonably to the damages incurred by Laminoirs due to the delay. Subsequently, the court classified this interest rate as punitive rather than compensatory. The

[130] Laminoirs v. Southwire Co., at 1068, 1069

court held that the function of interest lies in recompensing for the deprivation of the awarded amount over time, and such compensation should be rational and mirror the actual damages.

Ultimately, the court concluded that the judgment partly conflicted with public policy and could only partially be executed. It permitted the application of the original French interest rate but refused to apply the additional 5% interest rate. This particular case is noteworthy as a rare occurrence where U.S. courts declined to uphold a section of a foreign arbitral decision. Several analysts found the ruling to be unexpected, indicating that the court's rationale was not entirely persuasive.

- Criminal Liability

In the matter of *AO Techsnabexport v. Globe Nuclear Services*[131], the U.S. court examined an issue regarding criminal responsibility, whereby the party contesting enforcement contended that the arbitral award inappropriately relied on and approved the findings of foreign prosecuting bodies. The court ultimately rejected this argument, determining that incorporating the results of a foreign criminal proceeding in an arbitral award did not contradict the notion of public policy.[132]

The case centered around the validity of a contract, which was unsettled by the results of a related criminal investigation in Russia. The Arbitral Tribunal, responsible for determining the contract's validity, issued a final award in favor of Techsnabexport (Tenex) after the Russian criminal proceedings found the contract invalid under Swedish law. The tribunal's decision was based on the evidence presented and did not involve an assessment of criminal law, nor did it cite Russian criminal law directly.

When Tenex endeavored to enforce the award in the United States, the judiciary scrutinized whether the arbitral tribunal's inclusion of evidence from the Russian criminal inquiry jeopardized the credibility of global arbitration. The judiciary ultimately determined that the tribunal's actions did not contradict the principles of public policy.[133] It posited that the tribunal did not serve as a mere extension of the Russian criminal court but considered pertinent evidence during the arbitration process. Consequently, the judiciary ascertained that the

[131] AO Techsnabexport v. Globe Nuclear Services and Supply GNSS Ltd., No. 09-2064, 2010 WL 4137050 (5th Cir. Dec. 15, 2010).
[132] Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987).
[133] International Bar Association Subcommittee, Recognition, and Enforcement of Arbitral Awards: Study on Public Policy, Country Reports, INT'L B. ASS'N.

determination made by the arbitral tribunal did not subvert the public policy objective of upholding the credibility of global arbitration.

- Antitrust Laws

The central issue in the *Mitsubishi v. Soler* [134]case was whether antitrust claims arising from an international commercial transaction could be subject to arbitration. Mitsubishi, a Japanese automobile manufacturer, had entered into an agreement with Soler, a distributor, permitting Soler to distribute Mitsubishi vehicles in specific areas. When Soler failed to fulfill the minimum sales obligations outlined in the contract, Mitsubishi canceled specific purchase orders. Despite Soler's attempt to market vehicles in the United States and Latin America, Mitsubishi declined the proposal and commenced arbitration by taking the disagreement before the U.S. District Court.[135]

The arbitration provision within the contract specified that arbitration proceedings would adhere to the regulations of the Japan Commercial Arbitration Association, while Swiss law would govern the terms of the contract. Mitsubishi's allegations encompassed outstanding payments for stored vehicles, penalties for storage, warranty damages, and other contract violations. In response, Soler raised objections asserting that Mitsubishi had contravened antitrust regulations and fair trade laws. Soler contended that the dispute could not be settled through arbitration due to the involvement of antitrust matters related to public policy.

Following a sequence of contradictory rulings issued by the district and circuit courts, the lawsuit was ultimately presented to the U.S. Supreme Court. The Supreme Court affirmed the arbitrability of antitrust claims, highlighting the significance of the parties' "freely negotiated contractual choice-of-forum provisions." The Court emphasized the robust federal policy that favored the resolution of disputes through arbitration and stressed that national courts should uphold the concept of arbitrability in cross-border transactions.

The Court embraced a restrictive stance towards international public policy, favoring commercial arbitration. It recognized that although antitrust laws are rigorously enforced in the United States and such matters are generally deemed non-arbitrable due to public policy concerns, the global nature of the conflict rendered it suitable for arbitration. The Court

[134] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985).
[135] *Id.*

clarified that antitrust disputes would not be ideal for arbitration in a purely domestic scenario; however, the international aspect of the disagreement validated the use of arbitration.

Additionally, the Court highlighted concerns of international comity and the need for predictability in resolving international commercial disputes, reinforcing the parties' agreement even if a different outcome might be expected in a domestic context.[136].

- Securities

In 1953, the decision rendered by the U.S. Supreme Court in *Wilko v. Swan*[137] decreed that disputes arising from the Securities Act 1933 were not subject to arbitration. The Court emphasized the statutory prohibition on relinquishing judicial recourse in exchange for arbitration, asserting that arbitration was not a viable avenue for resolving matters concerning securities. Nevertheless, the Court later altered its position in subsequent legal proceedings.

In the case of *Scherk v. Alberto-Culver Co.*[138], a scenario unfolded where Alberto-Culver, an American Corporation, initiated legal action against Fritz Scherk, a German national, based on allegations of deceitful presentations under the Securities Act of 1934. The transaction contract entailed the conveyance of Scherk's business entities to Alberto-Culver. After discovering encumbrances on the trademarks, Alberto-Culver moved to annul the agreement due to the misrepresentations and proceeded to prosecute against Scherk for compensatory damages. Scherk, in response, contended that the court lacked jurisdiction and advocated for resolving the dispute through arbitration.

Although the District Court dismissed Scherk's claim, the Supreme Court later ruled that "a contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achieving the orderliness and predictability essential to any international business transaction.[139]" This decision marked a significant step for U.S. courts, recognizing that parties to international contracts have the right to independently determine the entire structure of their dispute resolution procedures.

[136] Joseph T. McLaughlin, *Arbitrability: Current Trends in the United States*,59 ALB. L.REV. 905 (1996)
[137] Wilko v. Swan, 346 U.S. 427 (1953).
[138] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).
[139] *Id*., at 506.

The Supreme Court dispelled the narrow view that disputes must be settled exclusively under domestic laws and within U.S. jurisdictions.[140] It underscored that non-enforcement of such arbitration clauses would jeopardize international commerce, hindering the willingness of businessmen to engage in global commercial agreements.[141]This ruling bolstered the U.S. adherence to the New York Convention and underscored the significance of international arbitration.

The Scherk decision defined the line between national interests and international policy considerations, reinforcing the U.S. stance on the significance of arbitration in the realm of global business dealings.

- Waiver of Prospective Statutory Rights

In the case of *Puliyurumpil Mathew Thomas v. Carnival Corporation*[142], a dispute arose between Mathew Thomas, a cruise ship employee, and Carnival Corporation, the cruise ship operator. The issue revolved around injuries Thomas sustained while working on the ship. The employment contract between Thomas and Carnival included an arbitration clause. Despite this clause, Thomas filed a statutory claim for damages from his injuries in the Florida State Court. Carnival argued that the case should be resolved through arbitration, and the District Court for the Southern District of Florida ruled in favor of compelling arbitration.

Thomas contended that enforcing the arbitration clause would violate public policy. Consequently, the case was brought before the United States Court of Appeals for the Eleventh Circuit. The Appeals Court overturned the decision to compel arbitration. The Court found that, although all jurisdictional prerequisites under the New York Convention were met, Article V(2)(b) of the Convention provides an affirmative defense. The Court stated that "the arbitration clause required a prospective waiver of [Thomas's] rights to pursue statutory remedies without the assurance of a subsequent opportunity for review," making the dispute unsuitable for arbitration.

The Court cited the precedent set in the *Mitsubishi* case, noting that if "the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies, we would have little hesitation in condemning the agreement as

[140] *Id*., at 509.
[141] *Id*., at 516.
[142] Puliyurumpil Mathew Thomas v. Carnival Corp., No. 07-21867-CV-JAL (11th Cir. July 1, 2009).

against public policy.[143]" This ruling emphasized that arbitration clauses cannot override the right to statutory remedies, particularly when such waivers lack assurance of subsequent review, thereby protecting employees' rights against unjust contractual provisions.

4.2.3 PROCEDURAL GROUNDS

- Annulment of Arbitral Awards

In the matter involving *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.P.*[144]Due to their power purchase agreement, a conflict arose between TermoRio, an energy producer, and Electranta, a state-owned public utility. The terms of the agreement required TermoRio to generate energy, with Electranta having an obligation to acquire it. Within the agreement was an arbitration provision specifying that any disagreements would be settled through this method. Following the emergence of a dispute, both parties brought it before an arbitral tribunal located in Colombia, which ultimately ruled in favor of TermoRio.

Subsequently, Electranta endeavored to invalidate the ruling through the highest administrative court in Colombia, a move that proved successful. In retaliation, TermoRio aimed to uphold the arbitration decision in the United States, contending that under Article V of the New York Convention, American courts possess the authority to enforce a decision even if it has been declared void in another jurisdiction.[145]

The United States Court of Appeals for the District of Columbia declined the enforcement of the arbitral decision. The court determined that recognition and enforcement should be refused if a competent authority has annulled the award.[146] The court acknowledged a narrow public policy exception to Article V(1)(e) of the Convention, stating that a foreign judgment would be unenforceable if it were "repugnant to fundamental notions of what is decent and just" in the United States.

The court considered the Colombian administrative court a competent authority and established that the arbitration decision was lawfully invalidated. Additionally, it concluded that the

[143] Mitsubushi v. Soler, supra, at 637.
[144] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F. 3d 928 (D.C. Cir. 2007).
[145] Ray Y. Chan, *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy,* 17 B.U. INT'L L.J.141(1999).
[146] Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(1)(e), June 10, 1958, 330 U.N.T.S. 38.

Colombian court did not breach any fundamental notions of morality and justice. Consequently, there were no public policy reasons to reject enforcement under Article V(2)(b) of the New York Convention.

This instance illustrates a situation where the rejection of a foreign arbitral award by U.S. judicial bodies occurred following a scrutiny of public policy in accordance with Article V(1) of the Convention.[147]While the refusal was not based on the stipulations of Article V(2)(b), this particular scenario demonstrates the integration of a public policy caveat into Article V(1) of the Convention by U.S. courts, commonly known as a "public policy gloss." The foundation of this gloss lies in the principles of comity, which entail the acknowledgment and reverence for other nations' legal procedures and decisions.

- Lack of reasoning

A case related to lack of reasoning is *Daniel C. Olson v. Hardland Clarke Corp.*[148]. Olson appealed his arbitration award, arguing that the award must be vacated "on the basis that the arbitrator failed to issue a 'reasoned opinion,' as agreed to by the parties and failed to rule on all of the evidentiary issues and claims submitted." The Appellate court, distinguishing between arbitration awards and judicial opinions, dismissed Olson's claims.

The court noted that a court must review an arbitration award on minimal grounds under the FAA. The court cited from a previous case that "arbitrators have no obligation ... to give their reasons for an award."[149] The court noted that the award itself met the parties' request, which "included two bases for the arbitrator's determination that Harland Clarke was the prevailing party, [and] provides enough of the arbitrator's reasoning to facilitate the limited review available under the FAA[150].

[147] Jared Hanson, *Setting Aside Public Policy: The Pemex Decision and the Case for Enforcing International Arbitral Awards Set Aside as Contrary to Public Policy*, 45 GEO.J.INT'L L.825(2014).
[148] Daniel C. Olson v. Harland Clarke Corp., No 14-35586, 9th Cir. (2017).
[149] Biller v. Toyota Motor Corp., 668 F.3d 655, 666 (9th Cir. 2012).
[150] Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co. Inc., and L&L Marine Service, Inc., 87 Civ. 6339 (S.D.N.Y. 1991).

- Duress

Enforcement would violate the country's "most basic notions of morality and justice" if the defendant's due process rights had been violated, such as if the defendant had been subject to coercion or if any part of the agreement had resulted from duress.[151]

In the case of *Transmarine Seaways Corporation of Monrovia v. Marc Rich & Co. A.G.*[152], a dispute arose concerning a charter party agreement. Due to an arbitration clause, the matter was submitted to arbitration before the Arbitral Tribunal in New York, which rendered an award in favor of Transmarine. Seeking to enforce the award, Transmarine brought the case before the United States District Court for the Southern District of New York.[153].

Rich counterclaimed, seeking to vacate the award on the grounds that the agreement had been procured by duress. However, the District Court confirmed the award and rejected Rich's argument. The court held that there had been no violation of public policy under Article V(2)(b) of the New York Convention. Citing the *Fluor Western* case[154], the court noted that agreements obtained through duress contravene national public policy and that duress, if proven, provides a basis for refusing enforcement of an award under Article V(2)(b) of the Convention.

The court emphasized that the burden of proving duress lies with the party making the claim. It further noted that "the law requires an exacting standard of proof from a party claiming duress because public policy favors the enforceability of agreements ostensibly entered into by parties willing to be bound." In this particular case, Rich failed to meet that burden of proof.

The court's discussion on duress in the context of refusing enforcement under Article V(2)(b) intersects with the validity requirements for arbitration agreements. If an arbitration agreement was made under duress, enforcement could be denied under Article V(1)(a) of the New York Convention. Thus, while Rich's claim of duress was not upheld in this case, the court acknowledged that duress, if adequately proven, could indeed serve as a valid ground for denying enforcement of an arbitration award under the Convention.

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[151] Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. A.G., 480 F. Supp. 352, 358 (S.D.N.Y. 1979).
[152] *Id.*
[153] *Id.*
[154] Fluor Western Inc. v. G. & H. Offshore Towing Co.,447 F.2d 35, 39 (5th Cir. 1971).

- Procedural irregularity

A dispute arose between China National Chartering, Corp and Pactrans Air & Sea, Inc. when the gypsum board was damaged during the transit, leading to litigation between the two companies.[155]The agreement between parties contained an arbitration clause stating that any dispute would be resolved through arbitration in Beijing. The dispute was brought before the China Maritime Arbitration Commission in Beijing by China National. The arbitration commission ruled in favor of China National.

When China National sought to enforce the arbitration award in the United States, the Pactrans objected to the enforcement, challenging the validity of the arbitration agreement. Pactrans contended that enforcing the award would violate public policy, asserting that both the arbitral tribunal and China National were "controlled by the Chinese Government," suggesting a conflict of interest and questioning the fairness of the hearing.[156]

The examination of these claims by the United States court did not persuade the court. The court observed that the methods utilized by the arbitral tribunal did not display any signs of a partial process or a relationship that could disqualify them.[157]The evidence presented by Pactrans was lacking in demonstrating that the arbitration's outcome was affected by the ties between China National and the arbitrators or that any partiality was present. Consequently, the court determined that this did not amount to a claim that would disqualify it on grounds of public policy.

The court stressed that the neutrality of an arbitrator is a crucial element in the entire arbitration process. Nevertheless, merely alleging bias cannot reject enforcing a foreign arbitral award. Any claimed bias must be supported by solid proof to trigger the exception based on public policy. Consequently, the court upheld the arbitration award, as Pactrans presented no valid reasons to refuse its enforcement.[158]

[155] China Nat'l Chartering Corp. v Pactrans Air & Sea Inc., 882 F. Supp. 2d 57 (S.D.N.Y. 2012).
[156] *Id*. at 17.
[157] *Id*. at 18.
[158] Fertilizer Corp. of India v. IDI Management, 517 F. Supp. 948, 955 (S.D. Ohio 1981).

- Inconsistent Testimony

International Navigation, Ltd. (“INL”), in its capacity as the disponent owner, and Waterside Ocean Navigation Co., Inc., in its role as the charterer, executed a charter party agreement.[159]The agreement stipulated that Waterside undertook the lease of a vessel from INL and included a provision for arbitration to resolve any potential disputes arising from the contractual relationship.

Subsequently, a disagreement emerged, leading the arbitrators to issue a decision in favor of Waterside, granting them damages. In order to seek the enforcement of the arbitral ruling, Waterside initiated legal proceedings before the United States District Court for the Southern District of New York. INL countered by asserting that the award ought not to be enforced, contending that it contravened U.S. public policy due to purported inconsistencies in the testimonies put forth before the arbitral tribunal[160].

The District Court and the United States Court of Appeals for the Second Circuit both affirmed the award while dismissing INL's objection. They highlighted that for an award to go against U.S. public policy, its validation must violate "the most fundamental concepts of morality and justice" in the state. The court contended that labeling inconsistent testimonies as a breach of public policy would surpass the core principles of morality and justice in the United States.

Despite the arbitral award being grounded on contradictory testimonies, the court noted that the arbitral tribunal acknowledged these inconsistencies, and there were no accusations of perjury. Hence, the award did not breach public policy, leading the court to uphold its implementation.

- Fraud and Corruption

Examples of fraud in the context of arbitration include fabricated documents, perjury, and deliberate violations of discovery orders. In the public policy context, fraud refers specifically to some irregularity within the arbitration process. If fraud is proven in arbitration proceedings, the enforcement of the arbitral award could be denied for a public policy violation. Three prerequisites must be satisfied to reject the enforcement of a foreign arbitration award: (i)

[159] Waterside Ocean Navigation Co. v Int’l Navigation Ltd., 737 F.2d 150 (2d Cir. 1984).
[160] *Id.*

conclusive proof of the fraud must be presented before the court; (ii) the fraud must not have been detectable through reasonable investigation prior to or during the arbitration proceedings; and (iii) the party contesting the award must demonstrate that the fraudulent conduct significantly influenced a matter in the arbitration process.[161]

In the legal dispute involving Tamimi Global Company Limited and Kellogg Brown & Root, LLC ("KBR"), the court evaluated whether the confirmation of an international arbitration award should be annulled for fraud. The contractual arrangement between the two entities pertained to a primary agreement where KBR supplied catering services to the U.S. military in Iraq and subcontracted with Tamimi.[162]The contract stipulated that any disagreements would be resolved through arbitration under the jurisdiction of the London Court of International Arbitration. A conflict arose when the U.S. government refused payment to KBR, leading KBR to withhold payment from Tamimi. Tamimi initiated arbitration proceedings to settle the dispute, resulting in the tribunal ruling in favor of Tamimi. Upon Tamimi's endeavor to enforce the arbitration award in the U.S., KBR filed a counterclaim contending that the contract had been secured through fraudulent and corrupt means, thus asserting that its enforcement would contravene public policy.

The court, nevertheless, determined that KBR's allegations of fraud did not warrant a rejection of enforcement based on public policy considerations. The court rejected the assertion that the contract was secured through a fraud and corrupt contract. It contended that even if proven, these allegations would not lead to a denial of confirmation on public policy grounds since "if Tamimi was providing kickbacks to secure dining services subcontracts, it was KBR's managerial staff who were accepting said kickbacks."[163] Additionally, the court highlighted that "public policy does not support permitting a party that partook in fraud to conceal it and subsequently, upon its revelation by a third party, seek to utilize it as a defense against a valid arbitration award in favor of its supposed co-conspirator."

Likewise, in the case of *Indocomex Fibres Pte., Ltd. v. Cotton Company International, Inc.*[164], Indocomex Fibres agreed to supply unprocessed cotton to the Cotton Company. Indocomex

[161] Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 306 (5th Cir. 2004).
[162] Tamimi Global Company Limited v. Kellogg Brown & Root, No. 2011 U.S. Dist. 30822 (S.D. Tex. May 12, 2011)
[163] *Id.*
[164] Indocomex Fibres Pte. Ltd. v. Cotton Company Int'l Inc., 916 F. Supp 721 (S.D.N.Y. 1996).

did not deliver the cotton, alleging deficiencies in the Cotton Company's letter of credit. In response, Cotton Company alleged a breach of contract, leading to arbitration where the tribunal ruled in favor of Cotton Company. Seeking enforcement of the award in the U.S., Cotton Company faced a counterclaim from Indocomex, contending that Cotton Company engaged in fraud due to the defective letter of credit.

The court decided not to investigate the specific fraud claims against Cotton Company as they related to the substance of the contractual disagreement. Furthermore, the court emphasized that fraud necessitated "a demonstration of misconduct during the arbitration proceedings, such as bribery, concealed bias of the arbitrator, or intentional destruction of evidence" [165] and that such proof of fraud must have been inaccessible to the arbitrator during the hearings. It needs to be established that certain information was withheld from the arbitrator or that the evidence of fraud was only unearthed post-arbitration. The allegations of fraud must be connected to the arbitration proceedings themselves rather than to the substance of the contested claim.

The experience of judicial proceedings in the United States demonstrates that American courts are generally very open to enforcing international arbitration awards. This trend is consistent with the liberal federal policy that strongly supports the enforcement of foreign arbitral awards. Case law indicates that U.S. courts seldom invoke the public policy defense when it comes to enforcing these awards.

U.S. courts draw a distinction between international public policy and domestic public policy, with international public policy being interpreted more narrowly. This narrower interpretation is often applied to international transactions, which supports the enforcement process and preserves stability in the international commercial system. By endorsing arbitration and enforcing arbitral awards, U.S. courts have made arbitration a more appealing option for international businesses. This approach gives assurance to disputing parties that the outcome of the dispute resolution process will be predictable.

International public policy acts as a balancing test, taking into account the national court’s own public policy, the public policy concepts of other states, and the needs of international commerce. When this test is applied to U.S. case law, it highlights the U.S. courts' threefold approach to public policy: (i) party autonomy, (ii) the principle of comity, and (iii) the requirements of international commerce.

[165] *Id.*

First, parties are free to agree to settle disputes through arbitration, thereby waiving their legal right to judicial remedy in exchange for certain benefits. Consequently, they must accept the inherent risks in arbitration proceedings. Second, courts must uphold the principle of comity by acknowledging the capabilities of foreign and transnational tribunals. Finally, courts must recognize the need for predictability in resolving disputes within the international commercial system. A narrower interpretation of public policy helps establish a consistent standard for the international enforcement of arbitration agreements and arbitral awards.

4.3 PUBLIC POLICY CHALLENGES IN ENGLISH ARBITRATION

England has historically held a prominent position in the arena of international arbitration, boasting a practice that is not only vast but also deeply rooted.[166]. In the past, English courts enjoyed the freedom to intercede at any phase of the arbitration procedure. This proactive stance transitioned following global advancements like the Geneva Protocol of 1923. In reaction, England implemented the Arbitration Clauses Act of 1924. Further harmonization with worldwide standards transpired post the Geneva Convention of 1927, culminating in enacting the Arbitration Act of 1930, which fused both the Geneva Protocol of 1923 and the Geneva Convention of 1927 into English legislation.

1950, England amalgamated its arbitration statutes by consolidating the Arbitration Act of 1924 and the Arbitration Act of 1930 into the comprehensive Arbitration Act of 1950. This legislative measure significantly propelled the enforceability of foreign arbitral awards in England, treating them on par with domestic judgments or orders[167]. Nevertheless, for a foreign arbitral award to be upheld under this Act, the subject matter of the arbitration needed to be one that could be arbitrated under English law.[168]

England further cemented its dedication to international arbitration by endorsing the New York Convention in 1975, following the lead of the United States by five years. Subsequently, the Arbitration Act of 1975 was implemented, integrating clauses from the New York Convention into local legislation. Section 3 of this Act likened arbitral awards under the 1975 Act to those acknowledged under the 1950 Act, deeming them akin to judicial judgments. Furthermore, the 1975 Act delineated the reasons for rejecting the enforcement of arbitral awards, echoing the

[166] Bruce Harris, Rowan Planterose, and Jonathan Tecks, The Arbitration Act of 1996: A Commentary 20 (2d ed 1999).
[167] The Arbitration Act 1950, 14 Geo. 6 c. 27, Sections 26 , 36 (Eng.).
[168] *Id*. at Section 37(1).

stipulations of Article V (1) and (2) of the New York Convention. The Act explicitly pertained to awards issued within the jurisdiction of a state that ratified the New York Convention, thus ensuring broad international relevance.

The development of arbitration law in England progressed through various statutes, notably the Arbitration Act of 1979, which modified the appeal provisions of the 1950 Act. This legal evolution reached its peak with the enactment of the Arbitration Act of 1996, serving as the most contemporary and inclusive framework for arbitration in England. The 1996 Act annulled the 1975 Act, the 1979 Act, and Part 1 of the 1950 Act.

The Arbitration Act of 1996 denoted a notable transition towards augmenting party autonomy within arbitration. It grants parties the liberty to determine the resolution of their disputes, ensuring such agreements align with public policy.[169] The Act accentuates the tribunal's jurisdiction over procedural and evidential aspects unless the parties stipulate otherwise.[170]This contemporary approach highlights the significance of adaptability and party autonomy in arbitration proceedings, embodying a refined and sophisticated arbitration system attuned to the demands of global commerce.

In essence, England's voyage in international arbitration has been defined by a sequence of legislative changes that adhere to international agreements and bolster the enforceability of arbitral decisions. From the proactive stance of English courts to the current stress on party autonomy and procedural adaptability, England has solidified its position as a pivotal jurisdiction for international arbitration, dedicated to upholding fairness, efficiency, and deference to international arbitral decisions.

4.3.1 THE ENGLISH ARBITRATION ACT OF 1996

The UNCITRAL Model Law has substantially impacted the English Arbitration Act of 1996, although the 1996 Act does not precisely replicate its content. In contrast to specific jurisdictions, the 1996 Act does not distinguish between domestic and international arbitration. As per Section 99 of the 1996 Act, the 1950 Act remains relevant to foreign awards (as defined in Part II of the 1950 Act) that are not rendered under the New York Convention. Consequently, the provisions of the 1950 Act do not hold sway over an award made within a state party to the

[169] The Arbitration Act 1996, c. 23, Section 1 (b) (Eng).
[170] *Id.* at Section 34 (1).

New York Convention under the 1996 Act, enabling enforcement of an arbitral award similar to a court judgment.[171]

Parties are privileged to contest an arbitral award if a significant irregularity exists, according to Section 68. A serious irregularity is articulated as causing considerable injustice to the parties concerned.[172] Should the court ascertain the occurrence of a severe irregularity, it holds the authority to annul the award entirely or partially, remit the award to the tribunal for reconsideration, or declare the award ineffectual between the parties.[173] Section 68(2)(g) encompasses public policy grounds as a category of serious irregularity, permitting challenges to awards on such grounds. Additionally, Section 68(2)(g) explicitly highlights "the award being obtained by fraud," eliminating the necessity for the court to ascertain whether the fraud runs contrary to public policy, as fraud is expressly enumerated as a basis for annulling the award.

Moreover, notwithstanding the general enforceability of awards from New York Convention signatory states under the English Arbitration Act 1996, Sections 103(1) and (3) authorize the court to reject the recognition or enforcement of such awards if the subject matter is not arbitrable (arbitrability exception) or if upholding or enforcing the award would violate public policy.

4.3.2 PUBLIC POLICY CHALLENGES IN ENFORCING ARBITRATION AWARDS IN ENGLAND

The pivotal legal case concerning public policy in England is the *Deutsche Schachtbau-und Tiefbohrgesellschaft MB H (D.S.T.) v. Ras Al Khaimah National Oil Company (Rakoil).* [174] This case revolved around a disagreement regarding an oil exploration contract between D.S.T. and Rakoil. Both parties had agreed to settle any disputes through arbitration by including an arbitration clause from the I.C.C. in their agreement. When a conflict emerged, D.S.T. brought its grievances to the I.C.C. arbitration panel. Nevertheless, Rakoil sought to invalidate the

[171] *Id.* at Section 66 (1).
[172] *Id*. at Section 68 (2).
[173] *Id.* at Section 68 (3).
[174] Deutsche Schachtbau-und Tiefbohrgesellschaft M.B.H v. Ras Al Khaimah Nat 'I Oil Co., (1987) 2 Lloyd's Rep. 246, 254 (K.B.).

contract in the Ras Al Khaimah Court, alleging that D.S.T. had misrepresented itself during the arbitration agreement's inception.

The I.C.C. arbitration panel referred the dispute to arbitrators based in Switzerland, a customary procedure in international arbitrations concerning oil drilling concessions. While the proceedings unfolded in the English court for the acknowledgment and execution of the Swiss arbitral decision, Rakoil contended that the arbitrator had utilized unclear and non-precisely defined international regulations rooted in general practices related to licensing rights instead of applying the specific laws of a particular jurisdiction.[175] They asserted that this approach contravened English public policy.

The court, however, did not align with Rakoil's position. It posited that, for an English court to nullify an award on the grounds of public policy, the party contesting it must prove the existence of "some form of illegality or that enforcing the award would be evidently detrimental to the common good or conceivably repugnant to the ordinary, rational, and well-informed member of the public on behalf of whom the State's authorities operate.[176]" Moreover, it was not against English public policy if the arbitrator applied common principles underpinning the laws of diverse nations to regulate contractual relationships, particularly when the parties had not stipulated the legal system that would govern.[177]

The English court validated that the annulment of an award on grounds of public policy must infringe upon a particular and justified concern of the English populace.[178] The court must ascertain that endorsing and executing the award could jeopardize the welfare of the state's residents through the exercise of its public prerogative. Consequently, any exception based on public policy that fails to elucidate how the acknowledgment and execution might detriment the state's public interest will not suffice as a valid rationale to reject the acknowledgment or enforcement of the award.

Similar to the significant American case of *Parson & Whittemore*, the *D.S.T.* case is a crucial English case concerning public policy in the context of recognizing and enforcing foreign arbitral awards. The D.S.T. case essentially defined the concept of public policy in arbitration

[175] *Id.* at 246
[176] *Id*. at 257.
[177] *Id.* at 252-254.
[178] Alexander J. Belohlavek, Arbitration, Order Public and Criminal Law: Interaction of Private and Public International and Domestic Law, 1347 (2009),

in England. Although this standard is less ambiguous than that in the U.S., it does not specify exactly what situations would be deemed "clearly injurious" or "wholly offensive."

The *D.S.T.* case elucidated that English courts distinguish English international public policy from English domestic public policy.[179] This differentiation carries weight as it showcases the nuanced stance of English courts towards public policy exemptions within the realm of international arbitration.

In the seminal case of *Soleimany v. Soleimany* (C.A.)[180], the English court invalidated an arbitral award for contravening Iranian legislation. The litigation concerned a commercial partnership involving Sion Soleimany, the father, and his son, Aber Soleimany. Their agreement revolved around sharing profits derived from trading valuable Persian and Oriental rugs from Iran to England. Aber, based in Iran, illicitly transported these rugs to his father in England, violating Iranian fiscal and export regulations. Following a payment dispute, Aber opted for arbitration, which took place before the Beth Din, a Jewish tribunal applying Jewish jurisprudence.

The arbitrator determined that despite the unlawful nature of their business dealings, Sion remained obliged to distribute the profits with Aber. According to Jewish legal principles, the legality of the transaction did not impact the adjudication of the parties' entitlements. Seeking to enforce this ruling in England, Aber encountered opposition from Sion, who argued that such enforcement would run counter to English public policy due to the illegitimate nature of the contract. The English Court of Appeal concurred with Sion, asserting that the award could not be upheld since it stemmed from a contract deemed illegal in English law at the time of its formation.[181] Consequently, the court declined to enforce the award on grounds of public policy.

In a notable legal case involving *Westacre Investments, Inc. v. Jugoimport-SPDR Holding Co. Ltd.*,[182] a Yugoslavian state entity engaged the services of Westacre, a Panamanian firm, under the recommendation of a senior Kuwaiti official, to leverage personal connections in securing military equipment sales contracts with the Kuwaiti government. Following the deal's

[179] Omnium de Traitement et de Valorisation SA. v. Hilmarton Ltd., (1999) 2 Lloyd's Rep. 222, 225 (K.B.).
[180] Soleimany v. Soleimany, (1999) Q.B. 785, 804 (K.B.).
[181] *Id*. at 799.
[182] Westacre Invs. Inc. v. Jugoimport-SPDR Holding Co. Ltd., (1999) Q.B. 740,757 (K.B.), aff'd, (2000) 1 Q.B. 288 (K.B.).

progression, the Yugoslavian entity terminated the agreement with Westacre and declined payment. Consequently, Westacre initiated arbitration through the I.C.C. in Paris, where the tribunal applied Swiss legislation and sided with Westacre.

Upon Westacre's endeavor to uphold the decision in England, the Yugoslavian entity contended that enforcement would violate public policy due to the contract's foundation on bribery for securing the sales pact, which was considered unlawful in Kuwait. They argued that upholding the decision would defy the principle of international comity and English public policy.

By weighing the public policy exception against the recognition of foreign arbitral awards principle as per the New York Convention, both the English lower court and the Court of Appeal ruled against the Yugoslavian entity. They maintained that English law allows the enforcement of contracts even if they conflict with the performance location's public policy (Kuwait), as long as it does not contradict the public policy of the governing law (Switzerland) or England.[183] In this instance, utilizing personal influence for contract acquisition was not illegal under Swiss or English regulations. The court also highlighted that solely activities universally condemned, such as terrorism, drug trafficking, prostitution, and pedophilia, alongside blatant corruption and fraud, would violate English public policy.[184] Consequently, the court determined that using personal influence did not fall within these categories and stressed the significance of upholding international arbitration agreements. Therefore, the court enforced the arbitral award.

The case of *Soleimany* can be distinguished from that of *Westacre* because, in *Westacre*, the arbitral tribunal did not identify the underlying contract as illegal. In contrast, the contract in *Soleimany* was explicitly declared illegal. Despite this differentiation, the court's ruling in *Westacre* appears to present specific issues. Using personal influence to secure a contract is commonly perceived as an act of corruption. Such influential power can often be the decisive element in obtaining a contract, thereby inherently tainting the transaction with corruption.

Corruption is a significant global concern capable of distorting public ethics and societal principles. Arbitration processes are generally more adaptable and less transparent than court proceedings, particularly in terms of evidence and fact-finding, so arbitration may not be the

[183] Shai Wade, *Westacre v. Soleimany: What Policy? Which Public?,* 2 Int'l. Arb. .L..Rev., 100 (1999).
[184] D. Rhidian Thomas, *International Commercial Arbitration Agreements and the Enforcement of Foreign Arbitral Awards -A Commentary on the Arbitration Act 1975*, 1 L.M.C.L.Q. 775 (1981).

most suitable avenue for addressing corruption-related disputes. As part of the public domain, court proceedings offer increased transparency and more rigorous examination. The limited interpretation of public policy, as seen in the *Westacre* case, has the potential to erode trust in the legal system and exacerbate issues of corruption on a global scale.

Furthermore, corruption shares similarities with fraud in its repercussions, both of which can have adverse long-term impacts on the worldwide economy. According to Section 68 (2) (g) of the 1996 Arbitration Act, an award obtained through fraud is considered a serious irregularity. Given these factors, the court's ruling in *Westacre* may have been inappropriate. Upholding and enforcing awards that stem from corrupt behaviors could compromise the integrity of the arbitration process and the broader legal system, ultimately to the detriment of the public interest.

In the case of *R v. V,*[185] the dispute revolved around a consultancy contract between two parties: R and V. V had promised to secure approvals from the national oil company of a North African country for R's development plans in exchange for a consultancy fee. Although R had previously made two payments to V, a newly appointed management team at R refused to pay a third due installment. The contract stipulated that any disputes would be resolved through I.C.C. arbitration, with English law as the governing law.

In 2006, V initiated a claim through I.C.C. arbitration in London, seeking the third success fee. The arbitration tribunal ruled in favor of V, ordering R to make the payment. However, R argued that the consultancy contract violated English public policy and the principle of lex loci solutionis (the law of the place where the contract is performed) because, according to R, V's role amounted to mere influence peddling.

Following this, R challenged the arbitral award in court, claiming that it was contrary to English public policy under Section 68 (2) (g) of the English Arbitration Act 1996, which allows for the setting aside of an award on grounds of serious irregularity affecting the tribunal, the proceedings, or the award.

R relied on the precedent set by the *Westacre* case to support its argument. In *Westacre*, the court held that only activities that are universally condemned, such as terrorism, drug

[185] R. v V., (2008) 1 Lloyd's Rep 97, (EWHC 1531 (Comm), 119 Con LR 73 (K.B.).

trafficking, prostitution, and corruption, would be contrary to English public policy and, therefore, unenforceable.

The court, however, dismissed R's challenge. It upheld the tribunal's decision, concluding that "the consultancy contract was not illegal as a matter of the lex loci solutionis"[186] to be sound and unimpeachable. The court ruled that the contract did not violate English public policy.[187] This decision reaffirmed the principle that unless a contract involves serious and universally condemned activities, it would not be considered contrary to English public policy.

In essence, the court's decision in *R v. V* reinforced the importance of respecting the arbitral tribunal's findings and enforcing arbitral awards unless there is clear evidence that the contract violates fundamental principles of public policy. This case highlighted the judiciary's reluctance to interfere with arbitral awards, ensuring the integrity and finality of the arbitration process, provided the agreements and awards do not breach the core principles of public policy.

Like the United States, the English legal system narrowly interprets public policy exceptions, maintaining a solid pro-arbitration stance. While the English courts do recognize the public policy defense, as demonstrated in the *Soleimany* case, subsequent rulings have primarily adhered to the precedent set in *D.S.T. v. Rakoil*. According to this precedent, for a public policy defense to succeed, there must be "some element of illegality which is injurious to the public good or wholly offensive to the ordinary reasonable person."[188]

The case of *Soleimany* demonstrates the continued acceptance of the public policy defense by English courts, albeit subject to stringent criteria. This indicates that parties utilizing this defense encounter significant obstacles. English courts prioritize international comity— the mutual recognition and respect for legal judgments across different jurisdictions— over public policy defense. As a result, the courts confine their assessment to the rationale of the arbitral tribunal rather than delving into the foundational facts of the matter. Unless the arbitral award explicitly demonstrates a violation of public policy, it is improbable for English courts to set it aside on such grounds. This methodology highlights the courts' dedication to maintaining the conclusiveness and enforceability of arbitral awards as long as these awards do not violate essential principles of public policy. In so doing, the English legal framework bolsters the

[186] *Id.* at 43.
[187] *Id*. at 49.
[188] D.S.T., supr*a* note 178, at 254.

reliability and predictability of arbitration as a method for resolving disputes, fostering trust among parties in the arbitration process.

4.4 THE CONCEPT OF PUBLIC POLICY IN HONG KONG

Hong Kong has emerged as a prominent global commercial center where many financial and business dealings occur regularly. The vibrant economic landscape of Hong Kong renders it an attractive choice for overseas investors. Numerous elements contribute to Hong Kong's position as Asia's primary financial and commercial hub. These factors encompass its exceptional infrastructure, a highly effective transportation network, top-notch accommodation options, advanced telecommunications, and being one of the most efficient airports worldwide. Moreover, the presence of Chinese (Cantonese) and English as official languages in Hong Kong significantly benefits foreign entities involved in business activities there.

From a juridical standpoint, Hong Kong holds particular appeal for foreign investors owing to its robust common law legal framework, which has been upheld even after the handover from the United Kingdom to China in 1997. This legal continuity guarantees a steady and foreseeable setting for resolving conflicts. Also, Hong Kong's judicial system has a solid history of upholding foreign arbitration awards per the New York Convention, showcasing a supportive stance on enforcement. Hong Kong's courts generally maintain a non-interventionist attitude towards international arbitrations,[189] bolstering Hong Kong's standing as a favorable arbitration destination.

The Hong Kong International Arbitration Centre (HKIAC), established in 1985, serves as the principal arbitration body in Hong Kong. As per the Arbitration Ordinance of Hong Kong, if disputing parties have not chosen arbitrators, the HKIAC will assume the role of the default appointing authority.

4.4.1 EVOLUTION OF ARBITRATION LAW IN HONG KONG

The historical backdrop surrounding the development of arbitration law in Hong Kong has been significantly shaped by English statutory regulations pertaining to commercial arbitration.[190]

[189] Benjamin P. Fishburne and Chuncheng Lian, *Commercial Arbitration in Hong Kong and China: A Comparative Analysis,* 18 U. Pa. J. Int'l Econ. L, 297 (1997).
[190] Kenneth R. Simmonds and Brian H. W. Hill, *Arbitration Law in Hong Kong: Commercial Arbitration Law in Asia and the Pacific*, Int'l Com. Arb. No. 2.3, 1 (1990).

Initially, arbitration procedures in Hong Kong involved a 'special case' or 'case-stated' mechanism, which obligated arbitrators to present legal issues for judicial assessment.[191] Consequently, akin to the practice in England, local courts in Hong Kong assessed arbitral awards based on their legal validity.

A pivotal legal transformation occurred in Hong Kong in 1982 when a new Arbitration Ordinance was introduced.[192] This ordinance incorporated various elements that appealed to the global legal and business sectors. Particularly noteworthy was the differentiation made between domestic and international arbitrations, along with the introduction of conciliation as an alternative method of dispute resolution.[193] Despite these changes, the ordinance preserved the right of parties to appeal arbitration awards for judicial scrutiny and the court's authority to address legal matters arising from arbitration.[194] The framework for domestic arbitration continued to rely on the English Arbitration Acts of 1950, 1975, 1979, and 1996 until the arbitration law reform in 2011.

Another significant alteration to Hong Kong's arbitration legislation transpired with the enactment of the Arbitration Ordinance in 1990, which integrated the UNCITRAL Model Law for international arbitrations while upholding existing regulations for domestic arbitration.

Another evolution in Hong Kong's arbitration framework occurred with implementing the new Arbitration Ordinance (Cap. 609) on June 1, 2011. This ordinance abolished the differentiation between domestic and international arbitrations, establishing a uniform system based on the UNCITRAL Model Law that applies to all arbitration proceedings in Hong Kong.[195] Any ongoing arbitral processes initiated before the enforcement of the new ordinance are governed by the previous Cap. 341.

4.4.2 THE NEW YORK CONVENTION AND HONG KONG

Hong Kong's accession to the New York Convention occurred in 1977 under the administration of the United Kingdom.[196] During this period, Hong Kong was recognized as a reliant territory of the United Kingdom, which formally adopted the New York Convention on September 24,

[191] W. Laurence Craig et al., Hong Kong Law, Int'l Com. Arb. No.5, § 34.01, 595 (1990).
[192] Hong Kong Arbitration Ordinance 1982, Cap. 341 (HK).
[193] *Id*. Section 20.
[194] *Id.* Section 23 A.
[195] See http://www.tannerdewitt.com/media/publications/hong-kong-new-arbitration-ordinance. php.
[196] New York Convention: Contracting States and Reservations, *Int'l Com. Arb*. pt. VI.4, VI.8 (July 1996).

1975. The extension of the convention's applicability to its dependent territories took place on April 21, 1977. Consequently, Hong Kong became subject to the provisions of the New York Convention starting from April 21, 1977, until the transfer of sovereignty to China on June 30, 1997.

The presence of China as a member of the New York Convention ensures the continued relevance of the convention in Hong Kong. Nevertheless, China's reservations concerning reciprocity and commerciality have implications for Hong Kong's adherence to the convention. Given Hong Kong's current status under Chinese jurisdiction, the enforcement of arbitral awards between Hong Kong and China falls outside the scope of the New York Convention. This is due to the reclassification of these awards as non-foreign.[197] As a result, arbitral awards issued in China can be enforced in Hong Kong and vice versa. This arrangement establishes a cohesive enforcement framework between the two regions.

4.4.3 LEGAL FRAMEWORK FOR IMPLEMENTATION OF ARBITRAL AWARDS IN HONG KONG

The notion of 'public policy' within the realm of implementing foreign arbitral awards was initially delineated in Sections 40(E) and 44(3) of the former Arbitration Ordinance Cap. 341. Section 40(E) mainly focused on the rejection of award enforcement in Mainland China,[198] whereas Section 44(3) was concerned with the broader scope of enforcing foreign awards. Section 44(3) states, "the enforcement of foreign award could be refused if it is not capable of settlement by arbitration, or if it would be contrary to public policy."

Upon the introduction of the new Arbitration Ordinance Cap. 609, the clauses about the rejection of award enforcement have been revised and consolidated. Sections 86(2)(b), 89(3)(b), and 95(3)(b) of Cap. 609 now dictates the enforcement of awards that do not fall into the categories of conventional or Mainland awards. These sections stipulate that an award may be rejected if it conflicts with public policy.

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[197] The award application between China and Hong Kong is under *Arrangement Concerning the Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region*, signed on June 21, 1999.

[198] Section 44(3) of the Arbitration Ordinance Cap.341 provides, *"Enforcement of a Mainland award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong, or if it would be contrary to public policy to enforce the award."*

Cap. 609 effectively integrates the regulations for enforcing all arbitral awards, regardless of their origin. This consolidation implies that the same principle binds all awards: enforcement could be declined if it contradicts public policy. This standardized approach under Cap. 609 ensures that all arbitral awards within Hong Kong are regulated by a coherent legal framework, thereby bolstering the foreseeability and dependability of arbitration proceedings in the locality.

4.4.4 LANDMARK RULINGS ON USING PUBLIC POLICY TO ANNUL ARBITRAL AWARDS IN HONG KONG

One of the landmark cases pertaining to the use of public policy as a basis for annulling an arbitral decision under the New York Convention in Hong Kong is the *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*.[199] This particular case emerged from a contractual disagreement where Hebei Import & Export Corporation alleged that the machinery procured from Polytek Engineering was faulty. The machinery was examined at the purchaser's plant, involving a group of technicians alongside the arbitration panel. Nevertheless, Polytek was not notified about this inspection and, consequently, had no representative in attendance.

The arbitral decision was eventually rendered in favor of Hebei, prompting Hebei to pursue enforcement of the decision in Hong Kong. Polytek, feeling aggrieved, petitioned the Beijing court to nullify the decision, contending that it was not afforded a just opportunity to present its position. The Beijing court dismissed Polytek's assertion. Unsatisfied, Polytek escalated the matter to the Hong Kong Court of Appeal, asserting a defense based on public policy. Polytek argued that the presence of the head arbitrator at the inspection, without Polytek's awareness or representation, jeopardized the impartiality of the process.

The Hong Kong Court of Appeal acknowledged the validity of Polytek's arguments, observing that the interactions between Hebei's technicians and the head arbitrator exceeded mere technical support and potentially influenced the tribunal's ruling. This situation contradicted the principle of natural justice, as arbitration must be both conducted impartially and be perceived as such to uphold public trust in the arbitration process.[200] Furthermore, the court noted that the constraints on Polytek's ability to counter the inspection findings violated

[199] Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 H.K.C. 205 (C.F.A).
[200] *Id.* at 36-37.

Chinese regulations, which mandate parties to have an oral hearing unless they waive this right and afford them the opportunity to scrutinize evidence.[201]

Drawing from these considerations, the Court of Appeal declined to enforce the decision, citing a breach of public policy. Nevertheless, the case did not culminate there.

Subsequently, the Hong Kong Court of Final Appeal overturned the decision of the Court of Appeal. It determined that the inspections did not impact the arbitral decision, underscoring that a prior oral hearing had been conducted where Polytek was given a chance to comment on the technician's report but opted not to avail of this opportunity.[202] Additionally, Polytek did not substantiate its claim of not having had a sufficient opportunity to state its case.

The *Hebei* case set a significant precedent in favor of upholding foreign arbitral decisions in Hong Kong. It reinforced the principle that courts should exercise discretion within the confines of the Arbitration Ordinance and the New York Convention. The Court of Final Appeal also elucidated that even if a different court declines to enforce a decision, it does not prevent the losing party from contesting enforcement in the jurisdiction where enforcement is requested. Critically, the Court of Final Appeal stressed that the interpretation of 'public policy' should be narrow, defining it as actions "contrary to the fundamental conceptions of morality and justice of Hong Kong."

This case underscores the pro-enforcement stance of Hong Kong's legal system, aligning with international arbitration standards and reinforcing the city's reputation as a reliable arbitration hub.

In the matter of *Logy Enterprises Ltd v. Haikou City Bonded Area Wansen Products Trading Co.*,[203] the dispute pertained to the sale of steel wire rods. Within the Chinese arbitration regulations governed by the China International Economic and Trade Arbitration Commission (CIETAC), each party has the right to select an arbitrator. Upon the unavailability of Haikou's chosen arbitrator, the CIETAC chair designated Zhai Bao Shan as a substitute. Logy initially selected Zhai but later ascertained that Zhai was not included in the list of approved arbitrators. Moreover, Logy discovered that Zhai was the Director of the Technology Section of the Import

[201] *Id.* at 41-42.
[202] *Id.* at 9.
[203] Logy Enterprises Ltd. v. Haikou City Bonded Area Wansen Products Trading Co., [1997] 2 H.K.C. 481.

and Export Commodity Inspection Bureau (CCIB), a role unrelated to trading operations or steel wire rods.

Asserting that this raised legitimate concerns, Logy contended before the Hong Kong court that the arbitral award should not be enforced. They maintained that the composition of the arbitral tribunal did not adhere to the law of the jurisdiction where the arbitration transpired (China). Arguing that the award was rendered in contravention of CIETAC's arbitration regulations,[204] Logy posited that it contravened public policy.

Nevertheless, both the Court of First Instance and the Hong Kong Court of Appeal upheld the award. Their rationale was grounded in the absence of evidence supporting a violation of public policy due to Logy's failure to substantiate that Zhai exhibited bias.[205] The courts underscored that assertions based on public policy necessitate concrete proof of partiality or malpractice rather than mere procedural irregularities.[206] This case emphasized the imperative for public policy objections to evince a discernible and substantial impact on the equity of the arbitration proceedings.

This verdict reinforces the tenet that challenges based on public policy in arbitration should be narrowly interpreted and necessitate tangible proof of an infringement. In this instance, the Hong Kong courts' adjudications are consistent with their stance favoring enforcement, underscoring that the burden of proof rests with the party contesting enforcement on public policy grounds. Absent clear indications of bias or a significant breach of procedural fairness, the courts are inclined to uphold arbitral awards to buttress the conclusiveness and effectiveness of the arbitration process.

While Hong Kong generally maintains a positive stance towards enforcing foreign arbitral awards, there are instances where the courts have refused enforcement due to procedural defects. A notable example is *Pakilto Investment Ltd. v. Klockner East Asia Ltd.*[207]

In this case, the parties entered into a sale and purchase contract, selecting CIETAC arbitration to resolve disputes. When issues arose regarding the quality and quantity of the goods, the arbitral tribunal appointed an expert to provide an opinion. The defendant objected to the

[204] Article 2 of the CIETAC arbitration rules requires CIETAC to *"independently and impartially resolve"* disputes.
[205] Logy, *supra* note 208, at 17-18.
[206] *Id.* at 15.
[207] Pakilto Investment Ltd. v. Klockner East Asia Ltd., [1993] 2 H.K.L.R. 39.

expert's opinion and informed CIETAC of its intention to make submissions on the report. However, the award was rendered in favor of the plaintiff before the defendant had the opportunity to comment.

When the plaintiff sought to enforce the award in court, the defendant opposed the application, arguing that it had been prevented from presenting its case to the tribunal. The defendant contended this was inconsistent with Section 44(2)(c) of the Arbitration Ordinance, which addresses procedural irregularities.[208] The defendant claimed that the procedural irregularity constituted a violation of public policy. The court rejected the public policy defense, emphasizing that public policy should be construed narrowly and that enforcement may only be denied if it violates the forum state's "most basic notions of morality and justice."

Nevertheless, the court ultimately refused to enforce the award due to the serious procedural irregularity that had occurred during the arbitral proceedings. The defendant had been denied a fair and equal opportunity to present its case, which satisfied the grounds outlined in Section 44(2)(c). Consequently, the court exercised its discretion to refuse enforcement of the award.

Although the public policy was cited as a ground for refusal in the *Pakilto* case, the court's decision was primarily based on serious procedural irregularity rather than the public policy itself. This approach underscores Hong Kong's strong pro-enforcement bias while ensuring fairness in judicial proceedings. The court in *Pakilto* refrained from making a broad 'public policy' exception to refuse the award. Instead, it focused on procedural irregularity, which is not typically considered under public policy in Hong Kong.

Hong Kong courts are prepared to exercise their discretion to refuse enforcement, but only when procedural defects are sufficiently severe to affect the fairness of the arbitral process or the outcome. The *Pakilto* decision contrasts with the *Hebei* case, where the Court of Final Appeal ultimately enforced the award despite allegations of procedural irregularity.

In *Hebei*, Polytek claimed it was denied the opportunity to present its case because the chief arbitrator participated in an inspection without Polytek's presence. However, the court found that Polytek had an earlier opportunity to comment on the technician's report but declined to

[208] Section 44(2)(C) of the Arbitration Ordinance provides "Enforcement of a Convention award may be refused if the person against whom it is invoked proves; (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

do so. The court concluded that the inspection did not affect the award's fairness, and Polytek failed to prove its claim of lack of opportunity.

The differing outcomes in *Pakilto* and *Hebei* highlight the courts' approach to procedural irregularities. In *Pakilto*, the court refused enforcement due to the defendant's lack of opportunity to be heard, while in *Hebei*, the court enforced the award because Polytek did not promptly raise its objection during the arbitration proceedings. Both cases affirm that actual bias must be proven if public policy is raised as grounds for refusal, and objections must be made promptly during arbitration proceedings.

Hong Kong ardently advocates for the pro-enforcement doctrine about arbitral awards, focusing on a narrow construal of the concept of 'public policy.' The *Gao Haiyan v. Keeneye Holdings Ltd.* case is an illustrative instance endorsing this stance.[209] In this particular case, the Court of First Instance in Hong Kong initially declined to uphold an arbitration award rendered by the Xi'an Arbitration Commission on the grounds of public policy. This decision was prompted by the revelation that one of the arbitrators had dual roles as both arbitrator and mediator, thereby eliciting apprehensions regarding partiality.

Gao Haiyan (Gao) engaged in a share transfer agreement with Keeneye Holdings Ltd. (Keeneye), wherein Gao consented to transfer shares to Keeneye. Subsequently, Gao contended that the agreement was null and void due to duress and misrepresentation, prompting Keeneye to initiate arbitration proceedings. Throughout the arbitration process at the Xi'an Arbitration Commission, the Commission proposed a transition from arbitration to mediation. Ultimately, the arbitral tribunal decided to favor Gao, annulling the agreement.

Following this, Gao endeavored to enforce the arbitral award in Hong Kong. Keeneye, however, moved to annul the enforcement order, citing bias on the part of the tribunal. The allegation of bias stemmed from an incident wherein the Secretary General of the Arbitration Commission and an arbitrator dined with a representative from Keeneye three months before the issuance of the award. During this undisclosed meeting, Keeneye's representative was informed that the tribunal intended to rule in their favor, contingent upon Keeneye paying RMB 250 million as compensation. Keeneye declined this proposition, leading to the subsequent issuance of the award favoring Gao.

[209] Gao Haiyan v. Keeneye Holdings Ltd., CACV No.79 of 2011 (C.A. Dec. 2, 2011).

The refusal to enforce the award by the Hong Kong Court of First Instance was based on the arbitrators' apparent bias and Keeneye's failure to waive its objection right. Gao's appeal to the Court of Appeal was successful, leading to the approval of award enforcement. The Court of Appeal's decision highlighted the absence of bias and concluded that the matter in question did not violate the “fundamental conceptions of morality and justice” in Hong Kong.

The Court of Appeal stressed that the potential bias arising from a particular procedure in Hong Kong does not automatically equate to a breach of public policy. As long as the procedure is deemed acceptable in its originating jurisdiction, it must be exceptionally egregious to contravene moral and justice principles in Hong Kong for it to breach public policy.

The ruling in *Gao v. Keeneye* showcases Hong Kong's stringent stance on the public policy exception. By scrutinizing the case's details, the Court of Appeal acknowledged that a mediation conducted over dinner in a hotel, while uncommon in Hong Kong, is a customary practice in mainland China. With no evident bias and considering the circumstances, the Court of Appeal proceeded with award enforcement.

This case illustrates the narrow interpretation of public policy within Hong Kong's legal framework. Only when an award fundamentally contradicts morality and justice principles in Hong Kong will it be declined on public policy grounds. The *Gao v. Keeneye* verdict underscores the Hong Kong courts' dedication to upholding foreign arbitral award enforcement, bolstering the region's reputation as a pro-enforcement jurisdiction.

Hong Kong courts approach the notion of 'public policy' with a meticulous and thorough examination to guarantee its restricted utilization. The divergent outcomes observed in the *Hebei* and *Pakilto* cases may potentially bewilder involved parties, given that both instances entail procedural irregularities but culminate in disparate verdicts. In the *Hebei* case, the court underscored the importance of parties promptly raising any procedural issues during arbitration to afford the arbitrator the opportunity to rectify them. Conversely, in *Pakilto*, the court exercised its authority to reject the award, aligning with the party that neglected to raise the matter promptly, thereby demonstrating faith in the party's integrity and ensuring an impartial hearing.

The commitment of Hong Kong courts lies in ensuring a just hearing, wherein even if a lower court enforces an award, a superior court could decline enforcement to preserve integrity in the

judicial process. This cautious implementation of 'public policy' aims to safeguard state sovereignty without exceeding limits, refraining from utilizing public policy grounds to reject award enforcement unless absolutely indispensable.

The *Logy* case further reinforces this stance, where the court was disinclined to label an arbitral mistake as falling within the realm of 'public policy.' This consistent approach, evident across cases, illustrates that Hong Kong courts prioritize rational and good-faith conduct when seeking redress. The *Gao v. Keeneye* case cements the pro-enforcement position, demonstrating that Hong Kong courts interpret 'public policy' in a highly restrictive manner, assuring parties that their contractual arrangements will be honored.

Hong Kong has established itself as a dependable jurisdiction for enforcing arbitral awards. The courts' restricted interpretation of 'public policy' guarantees the upholding of awards unless procedural deficiencies are grave enough to jeopardize the fairness of the proceedings. This legal framework instills confidence in parties that Hong Kong's judicial entities will honor and execute their contractual commitments.

4.5 PUBLIC POLICY CONSIDERATIONS IN SINGAPORE ARBITRATION

4.5.1 LEGAL FRAMEWORK FOR ARBITRATION IN SINGAPORE

There exist three primary statutes:

- The International Arbitration Act (IAA),
- The Arbitration Act (AA), and
- The Arbitration (International Investment Disputes) Act.

The IAA adopts and enforces the Model Law on International Commercial Arbitration, established by the United Nations Commission on International Trade Law, to standardize arbitration regulations across various jurisdictions. Additionally, the IAA ratifies the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It applies to arbitration cases from an international perspective, which includes any proceeding with a transnational element. However, parties can mutually decide to use the IAA for non-international arbitration by explicitly stating so in the arbitration agreement.

On the other hand, the AA pertains to domestic arbitrations and typically entails more oversight by Singapore's courts than the IAA. Notably, the Singaporean courts have the authority to determine whether to grant a stay in support of arbitration, a discretion absent under the IAA.

Lastly, The Arbitration (International Investment Disputes) Act implements the United Nations Convention on the Settlement of Disputes Between States and Nationals of Other States.

In short, Singapore has a dual-track arbitration framework, both domestic and international. IAA governs arbitrations arising from international arbitration agreements,[210] while the AA 2002 establishes the framework for domestic arbitrations. The IAA incorporates the UNCITRAL Model Law on International Commercial Arbitration, embracing the worldwide consensus on critical aspects of international arbitration.[211]

Under the guiding principle of 'law follows business,' the Singapore government has recently taken proactive measures to amend and enhance its arbitration laws. These efforts aim to create a favorable environment for arbitration and various ADR methods, including mediation. Recent examples are the 2017, 2021, and 2022 amendments to the third-party funding framework and the enactment of a framework for conditional fee arrangements allowing these types of arrangements in international arbitration proceedings and related court and mediation proceedings.[212] This new statute presents supplementary financial and risk-mitigation instruments for businesses, enabling entities facing financial limitations to pursue their claims. Other recent amendments of the IAA include establishing a default mechanism for appointing arbitrators in multi-party cases where there is no specific agreement in that regard and recognizing the powers of the arbitral tribunal and the Singapore High Court to enforce confidentiality obligations in arbitrations.[213]

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[210] Section 5(2) IAA defines an arbitration as international if: (i) at least one of the parties to the arbitration agreement has its place of business outside of Singapore; (ii) the place of arbitration is outside of the state in which the parties have their place of business; (iii) any place where a substantial part of the obligation of the commercial relationship is to be performed, or the place to which the subject matter of the dispute is most closely connected, is situated outside of the state in which the parties have their place of business; or (iv) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

[211] The IAA rules apply in the absence of other rules agreed between the parties to the extent that they are not inconsistent with the non-derogable provisions of the Model Law or the IAA (see IAA, Sections 15 and 15(A)).

[212] In 2017 Singapore introduced third-party funding in international arbitration proceedings and related court and mediation proceedings. Then in 2021 and 2022 it extended the third-party funding framework to cover Singapore International Commercial Court proceedings, domestic arbitration proceedings and related mediation proceedings. However, damages-based agreements are not permitted. In Singapore, only entities that meet the criteria set out in the Civil Law (Third-Party Funding) Regulations 2017 may provide third-party funding (e.g. they must be professional funders whose principal business is funding the costs of dispute resolution proceedings and they must have a minimum paid-up share capital).

[213] IAA, Sections 9(B); 12(1)(j); 12A(2). These amendments came into force in December 2020.

The courts of Singapore are renowned for their unwavering support of international arbitration proceedings and their inclination to uphold the integrity of arbitration agreements entered into by involved parties. During the SIAC Symposium 2023, Justice Prakash recently emphasized the crucial role that domestic courts play in safeguarding the credibility of arbitration. This is achieved firstly by delineating the parameters of arbitration, secondly by offering assistance to arbitration through interim measures ordered by the court, and thirdly by enforcing arbitral decisions based on a principle of 'minimal curial intervention' and deliberate avoidance of an excessively broad interpretation of natural justice.[214]

The IAA acknowledges the principle of *kompetenz-kompetenz*, wherein the arbitral tribunal is vested with the authority to make decisions regarding its own jurisdiction. According to Section 10 of the IAA, parties retain the option to seek judicial intervention to scrutinize a tribunal's determination on jurisdiction. Similarly, Section 6 of the IAA empowers a party involved in an arbitration agreement to request a court overseeing a dispute governed by the said agreement to stay the proceedings in favor of arbitration.

In Singapore, no specific subjects have been identified by statute as non-arbitrable,[215] so it is for the court to delimit what is and is not arbitrable based on various factors, including the scope of the arbitration agreement and public policy considerations.[216]

Section 11(1) of the IAA stipulates that any dispute may be determined by arbitration unless it is contrary to public policy to do so. The pivotal ruling by the Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd*.[217] , stands as the leading precedent addressing the categorization of non-arbitrable matters. The pronouncement in *Larsen Oil* by the Court of Appeal upheld the pro-arbitration position of the Singapore judiciary, interpreting arbitration

[214] SG Courts, 'Justice Judith Prakash: Speech delivered at Singapore International Arbitration Centre Symposium 2023' (29 August 2023) https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-judith-prakash-speech-delivered-at-singapore-international-arbitration-centre-symposium-2023 (accessed 30 November 2023). See also, S. Moody, 'Justice Prakash reflects on arbitrability at GAR Live Singapore' in Global Arbitration Review (4 September 2023) https://globalarbitrationreview.com/article/justice-prakash-reflects-arbitrability-gar-live-singapore (accessed 30 November 2023).
[215] *Aloe Vera of America, Inc v Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174, para. 72.
[216] *Tomolugen Holdings Ltd. and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373, para. 75., Section 11(1) IAA reads as follows: 'Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so'. As Justice Judith Prakash put it (Ibid): '[t]he question of arbitrability requires careful consideration of whether the dispute raises public policy concerns, and whether these concerns are of such a nature that they should be determined by the court instead of by privately appointed adjudicators. Therefore, while it is not incorrect to refer to certain types of disputes as being arbitrable, it should be borne in mind that this is analytical shorthand that should not eclipse the actual enquiry that underlies the determination of the arbitrability of a dispute.'
[217] [2011] 3 SLR 414.

clauses expansively to encompass a wide array of disputes. Nevertheless, it underscored that issues exclusively linked to a statutory insolvency framework fall outside the scope of arbitrability. The Court of Appeal refrained from issuing overarching policy declarations on the classification of other types of matters as non-arbitrable. Despite the absence of comprehensive guidance, the prevalent perspective, aligned with numerous common law jurisdictions, is that subjects such as those entailing matrimonial and criminal issues are deemed non-arbitrable.

In the case of *Anupam Mittal v Westbridge Ventures II Investment Holdings*,[218] the Court of Appeal in Singapore has recently introduced a comprehensive approach in which the arbitrability of the subject matter is to be initially assessed based on the governing law of the arbitration agreement. If the said law considers the subject matter to be arbitrable, the next step involves an evaluation under the law of the arbitration's seat, irrespective of the law governing the merits of the case.[219]

4.5.2 ENFORCEMENT AND RECOGNITION OF ARBITRAL AWARDS: LANDMARK DECISIONS AND TRENDS

Arbitral awards are final, and grounds for setting them aside or resisting their enforcement are limited and in line with those established in the New York Convention, which is directly applicable to the recognition and enforcement of foreign awards.[220] Foreign awards are enforced in the same manner as domestic awards, with court intervention being limited to situations explicitly provided for by legislation. Judicial review of an arbitral tribunal's factual determinations[221] is only permissible if there is a breach of 'the most basic notions of morality'[222], such as fraud or the breach of natural justice.

One of the primary reasons for challenging an award's validity based on Singaporean public policy is the infringement of natural justice. The criteria for establishing this are stringent and

[218] [2023] SGCA 1.
[219] The Court of Appeal held that the dispute in *Anupam Mittal* was arbitrable as, although the main contract was governed by Indian law (which considered the subject matter of the dispute non-arbitrable), Singapore law was both the law of the arbitration agreement and the law of the seat, and under Singapore law claims of corporate mismanagement and oppression are arbitrable. What the decision in *Anupam* illustrates is the court's role in providing clarity on how arbitrability is determined.
[220] Section 31 IAA, lists the grounds on which a Singapore court can refuse to recognise and enforce an award, replicating those in the New York Convention.
[221] Arbitral tribunals' findings on foreign law are treated as findings of fact; hence they cannot be reviewed by the domestic court.
[222] PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA, [2007] 1 SLR(R) 597, para. 59.

arduous to satisfy.[223] Nevertheless, despite its rarity, the Singaporean judiciary is unafraid to interfere and set aside an award when there are valid grounds to do so.[224]

The Singapore courts may refuse enforcement of foreign arbitral awards under Section 31 of the IAA. The grounds for refusal set out in that section are exhaustive:

- A party could not validly enter into the arbitration agreement at the time the agreement was made.
- The arbitration agreement is invalid under its chosen law or the law of the country where the award was made.
- A party was not given sufficient notice of the arbitrator's appointment, of the arbitration proceedings, or was unable to present its case at those proceedings (generally known as a “breach of natural justice”).
- Generally, where the award dealt with matters that parties did not intend to submit to arbitration.
- The tribunal or the arbitral procedure was not in accordance with the agreement of the parties or in accordance with the law of the country where the arbitration took place.
- The award has not yet become binding on parties or has been set aside or suspended by a competent authority of the country in which, or under the laws of which, the award was made.
- The subject matter is non-arbitrable under the laws of Singapore (*Larsen Oil*).
- The enforcement of the award would be contrary to Singapore's public policy.

Similar to the courts in Hong Kong, the courts in Singapore have consistently maintained that public policy is a narrowly defined ground for intervention. The Singapore judiciary has remained firm in its commitment to a "less-interventionist" approach rather than shifting towards a "more-interventionist" stance. This principle has been strongly supported by Justice Judith Prakash in cases such as *Aloe Vera of America v. Asianic Food,*[225] *VV v. W,*[226] *and Sui Southern Gas Co. v. Habibulah Coastal Power Co.*[227]

[223] China Machine New Energy Corp v Jaguar Energy Guatemala LLC, [2020] 1 SLR 695, para. 87).
[224] CAJ v CAI, [2021] SGCA 102.
[225] [2006] 3 SLR 174.
[226] [2008] 2 SLR(R) 929.
[227] [2010] 3 SLR 1.

In the *VV v. W* case, the High Court provided specific guidelines for what could be considered under public policy. Referring to English case law, the court held that public policy should only invalidate an arbitral award if it (i) shocks the conscience, (ii) is clearly injurious to the public good, (iii) is wholly offensive to an ordinary, reasonable, and fully informed member of the public; or (iv) violates the most basic notions of morality and justice.

Furthermore, the apex court in Singapore underscored this approach in the 2007 case *PT Asuransi Jaya Indonesia (Persero) v. Dexia Bank SA.*[228] In 2011, the Singapore Court of Appeal reinforced its stance on minimal intervention in the *AJU v. AJT* [229]case, overturning the High Court's decision and reaffirming its commitment to non-interference with arbitral awards, even in cases involving allegations of illegality and public policy breaches.

AJU v. AJT dealt with serious allegations, including fraud, forgery, duress, undue influence, illegality, and bribery. The High Court had annulled an international arbitral award by ruling that the underlying contract was illegal. However, the Court of Appeal recognized the need to balance upholding the finality of arbitral awards with ensuring the integrity of the judicial process. It concluded that the threshold for setting aside an international arbitral award on public policy grounds is equivalent to that for resisting the enforcement of a foreign arbitral award.

The Court of Appeal contrasted two approaches from English case law. The "less interventionist" approach, as seen in the majority decision in the *Westacre Investments* case, grants significant deference to a tribunal's findings, provided that the illegality issue was considered and ruled upon. Conversely, the "more interventionist" approach from the *Soleimany* case allows the court to engage in a deeper inquiry if prima facie evidence of illegality is found.

Ultimately, the Singapore Court of Appeal favored the "less interventionist" approach, emphasizing the legislative policy of Singapore's IAA, which prioritizes the autonomy of arbitral proceedings and the finality of arbitral awards. Section 19B(1) of the IAA specifically mandates deference to the factual findings of arbitral tribunals.

[228] [2007] 1 SLR 597.
[229] [2011] SGCA 41.

As noted by commentators, by adopting a standard of "minimal review," the Court of Appeal's decision underscores its ongoing commitment to the autonomy of the arbitral process and the importance of maintaining the finality of arbitral awards. This approach ensures that the judiciary respects the decisions made by arbitral tribunals, reinforcing the reliability and stability of arbitration as a mechanism for resolving disputes.

4.5 CONCLUSION

In conclusion, examining legislative and judicial approaches toward public policy in the United States, England, Hong Kong, and Singapore reveals a common thread of judicial restraint and a pro-enforcement stance. The landmark judgments analyzed in this chapter demonstrate a consistent trend toward narrowly interpreting public policy exceptions, thereby minimizing judicial interference in arbitral awards. This narrow interpretation is crucial in upholding the sanctity of arbitration agreements and ensuring the finality of arbitral awards.

The judicial approaches in these jurisdictions underscore the importance of respecting party autonomy and the arbitral process, which are cornerstones of international arbitration. By limiting the scope of public policy defenses, courts in the U.S., England, Hong Kong, and Singapore have contributed to a stable and predictable arbitration environment, which is essential for fostering international trade and investment.

CHAPTER 5

SUGGESTIONS AND CONCLUSIONS

5.1 INTRODUCTION

The final chapter of this dissertation, titled "Suggestions and Conclusions," serves as the culmination of an extensive examination of how public policy is interpreted in arbitration by both foreign and Indian courts. Throughout the preceding chapters, we have explored the varying judicial approaches to public policy across different jurisdictions, highlighting the nuances and implications of these interpretations on the enforcement of arbitral awards. This chapter synthesizes these findings to provide a comprehensive understanding of the current state of public policy in arbitration, with a particular focus on its application in India.

Courts have consistently adopted a narrow interpretation of public policy in foreign jurisdictions such as the United States, England, Hong Kong, and Singapore. This approach has minimized judicial interference, thereby upholding the finality and efficacy of arbitral awards. Conversely, Indian courts have exhibited a broader interpretation, leading to greater judicial intervention and potential challenges in the enforcement of awards. This disparity underscores the need to reassess India's arbitration framework critically.

The chapter begins by summarizing the key findings regarding foreign courts' interpretation of public policy, emphasizing the benefits of a narrow and consistent application. It then contrasts these findings with the Indian context, identifying the areas where Indian arbitration legislation and judicial practices diverge from international norms. Based on this analysis, the chapter proposes several targeted suggestions to align India's arbitration regime with global standards.

By reducing judicial intervention and refining the scope of public policy in arbitration, India can enhance the predictability and reliability of its arbitration system. These changes are crucial for positioning India as a favorable destination for international arbitration and fostering greater confidence among global investors and businesses.

5.2 IMPLICATIONS FROM FOREIGN JUDICIAL PRONOUNCEMENTS

As arbitration becomes an increasingly favored method for resolving legal disputes, several factors that might impact the complete application of the party autonomy doctrine must be considered, with judicial intervention being significant. A key area of ongoing debate is the proper role and scope of 'public policy.' The existing tension between the need for influential arbitral awards and concerns arising from sovereign immunity creates a scenario where awards might conflict with fundamental laws or principles of a foreign state.

Courts should consider various factors before using 'public policy' as a basis to refuse or annul an arbitration award. These include the pro-enforcement spirit of the New York Convention, respect for party autonomy, sensitivity to the needs of the international system, and the desire for finality.[230] This approach ensures that the 'public policy' exception is not applied excessively.

The New York Convention allows signatories to refuse the enforcement of arbitral awards on matters that are non-arbitrable or contrary to public policy. 'Public policy' and 'arbitrability' often overlap and are sometimes inseparable; thus, some jurisdictions may refer to both terms as barriers to recognizing and enforcing arbitration awards. Therefore, it is fair to say that there is a special bond between 'public policy' and 'arbitrability.'

One of the main weaknesses of the New York Convention is that it does not provide an explicit definition of 'public policy.' This makes determining the scope of this exception challenging, as each country has its own mechanism for addressing this issue. Despite the frequent litigation over the 'public policy' defense, successful outcomes are rare in foreign countries. This is likely due to the court's narrow interpretation of public policy and a tendency to favor international public policy over domestic concerns. Using public policy as a basis to refuse to recognize and enforce a foreign award is thus one of the most challenging defenses to establish under Article V of the New York Convention and may not be a helpful approach. Courts generally reject this defense by applying a narrow interpretation.[231]

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[230] Susan Choi, *Judicial Enforcement of Arbitration Awards Under The ICSID and New York Conventions*, New York University Journal of International Law and Politics, 125 (1995-1996).
[231] Ramona Martinez, *Recognition and Enforcement of International Arbitral Awards under the United Nations Convention of 1958: The "Refusal" Provisions*, 24 Int'l Law , 507 (1990).

A clear example of this outcome is found in Western countries. For instance, U.S. courts have shown a tendency to favor arbitration, as seen in the decisions in *Scherk* and *Mitsubishi*, which were upheld even when in conflict with Federal securities and antitrust laws. A similar line of reasoning is evident in *Parson v. Whittemore*, where the court also referred to the general pro-enforcement bias of the New York Convention. Emphasizing the need to uphold public policy in the enforcement of foreign awards suggests that awards should only be denied on this basis where enforcement would violate the forum state's most basic notions of morality and justice.

In England, national courts are reluctant to refuse enforcement of awards on public policy grounds. It has been said that "there is no case in which this exception has been applied by an English court."[232] Even though the 'public policy' exception was applied in the *Soleimany* case, English courts are likely to strongly support the pro-enforcement doctrine, holding that public policy is affected only if an award is "clearly injurious to the public good or wholly offensive to ordinary reasonable."

Singapore's and Hong Kong's public policy approach aligns with Western applications. Still, it has not yet reached the level adopted in the U.S. This may be because Asian culture is more conservative than that of Western societies. As public policy typically evolves to reflect societal needs, arbitration in Asia may gradually align more closely with modern international arbitration practices as cultural changes become evident.

5.3 NAVIGATING PUBLIC POLICY IN INDIAN ARBITRATION: FINDINGS AND FUTURE DIRECTIONS

Public policy is a legal concept deeply rooted in the common law tradition. Throughout history, courts have scrutinized underlying policy principles to determine whether to uphold a transaction or contract benefiting private entities at the expense of the public. This principle has also been extended to arbitration awards enforcement, with courts declining to enforce or set aside awards conflicting with public policy.

At its essence, public policy serves as the mechanism through which the government upholds public order, aligning with the perceived common good. It encompasses the societal, ethical, and economic principles that unite a community and serve as the foundation of its legal system.

[232] Kerr, *Concord and Conflict in International Arbitration*, 13 Arbitration International, 140 (1997).

The concept of public policy has been criticized for its inherent flaws, primarily due to its adaptability. The interpretation of 'public policy' evolves with changing times and shifting ideas of morality and justice. For instance, the decriminalization of homosexuality in India demonstrates this dynamic quality. In the significant 2018 ruling of *Navtej Singh Johar & Ors v. Union of India*,[233] the Supreme Court of India declared unconstitutional Section 377 of the Indian Penal Code, which criminalized consensual same-sex relations among adults. This marked a notable departure from the 2013 decision in *Suresh Kumar Koushal v. Naz Foundation*,[234] where the Supreme Court upheld the criminalization.

Public policy is not only influenced by temporal changes but also varies across individuals and jurisdictions. Individuals, including judges, hold diverse views on what constitutes the public good, shaped by personal backgrounds and viewpoints. Additionally, the perception of the public interest can significantly differ among states, regions, and communities. For instance, while the Indian Supreme Court decriminalized homosexuality in *Navtej*, the High Court of Singapore, in *Ong Ming Johnson v. Attorney-General*,[235] upheld a law criminalizing male homosexual acts, highlighting its role in preserving public morality.[236]

Scholars have differing opinions regarding the application of the public policy criterion. Some argue for its moderate use, while others, such as Lord Denning in *Enderby Town Football Club Ltd v. Football Association Ltd*,[237] suggest adapting it to contemporary needs, proposing that 'with a good man in the saddle, the unruly horse can be kept in control.'

The interpretation of public policy within arbitration law has undergone significant evolution. Indian courts have frequently invoked the public policy doctrine to reject the enforcement of both domestic and foreign arbitral awards.[238]

This dissertation argues for a more restrained application of the public policy exception in India, especially concerning the enforcement of foreign awards and international commercial arbitration awards. This restraint is crucial in light of the Indian government's objective of

[233] (2018) 10 SCC 1.
[234] (2014) 1 SCC 1.
[235] [2020] SGHC 63.
[236] Section 377A of the Penal Code (Singapore) provides: Outrages on decency – 377A. Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to two years.
[237] (1971) Ch. 591, 606.
[238] Centrotrade Minerals & Metals Inc v. Hindustan Copper Ltd, (2017) 2 SCC 228

positioning India as a hub of arbitration and attracting foreign investment. Reducing judicial interference on public policy grounds will enhance the credibility of India's arbitration framework and support its economic aspirations.

In the domain of arbitration, the Arbitration and Conciliation Act of 1996 includes provisions for the annulment of domestic awards under Section 34 and the rejection of foreign awards under Section 48 on grounds related to public policy. This dissertation explores the necessity of further restricting the public policy doctrine, particularly in its application to foreign awards and awards arising from Indian-seated international commercial arbitration, to align Indian law with international standards.

5.3.1 THE NEED FOR RESTRICTING THE PUBLIC POLICY DOCTRINE

India seeks to position itself as a critical center for international commercial arbitration. This goal has been accentuated through endeavors like establishing the New Delhi International Arbitration Centre (NDIAC) as per the New Delhi International Arbitration Centre Act, 2019. The governmental vision, as articulated by Prime Minister Narendra Modi, aims to foster a favorable milieu for arbitration that entices foreign investments.[239] This is prompted by the preference of international commercial entities for arbitration over litigation due to its efficiency and predictability.[240]

Two pivotal elements that can bolster India's status as a favored venue for international arbitration comprise:[241]

- A Supportive Framework for Arbitration: A legal structure facilitating seamless arbitration proceedings.

[239] *The Quest for Making India as the Hub of International Arbitration*, PMIndia.gov.in website (12 June 2019), https://www.pmindia.gov.in/en/news_updates/the-quest-for-making-india-as-the-hub-of-international-arbitration/ (accessed 13 May. 2024).
[240] Chartered Institute of Arbitrators, *Changing Trends of International Commercial Arbitration in India*, (20 May 2019), https://www.ciarb.org/resources/features/changing-trends-of-international-commercial-arbitration-in-india/ (accessed 12 May. 2024).
[241] Badrinath Srinivasan, *Developing India as a Hub of International Arbitration: A Misplaced Dream?*, 15 July 2016, presented at the International Conference on Challenges in Domestic and International Arbitration (Chennai, 23–24 Sept. 2016), https://ssrn.com/abstract=2849269 (accessed 12 Apr. 2024).

- Limited Interference by the Judiciary: Minimal involvement of courts in executing arbitral decisions.

5.3.2 PRO-ENFORCEMENT STRATEGY AND THE 2015 AMENDMENT

The amendments made to the Arbitration and Conciliation Act in 2015 marked significant strides towards adopting a pro-enforcement stance. These alterations aimed at curbing judicial intrusion by narrowing the scope of the public policy exception under Sections 34 and 48. Nevertheless, the existing version of the public policy assessment still allows for subjective construal and excessive judicial scrutiny. The subsequent points elucidate the hurdles:

- Subjectivity of the 'Fundamental Policy of Indian Law': Even after the 2015 amendments, the term 'fundamental policy of Indian law' remains vague and subjective. This lack of clarity empowers courts to invalidate or decline enforcement of awards based on broad interpretations of statutes perceived to be in the national or public interest.[242]

- Relevance to International Awards: The unrestrained applicability of the 'fundamental policy of Indian law' to foreign-seated arbitrations and Indian-seated international commercial arbitrations poses challenges. It compels international entities to adhere to Indian law even if their agreement dictates otherwise.

- Patent Illegality and *Ssangyong*: The ruling by the Supreme Court in the *Ssangyong* case assimilated the Wednesbury unreasonableness test into the 'patent illegality' criterion of Section 34(2A). This empowers courts to conduct preliminary investigations into the evidence supporting an award, potentially resulting in interference with the merits of domestic awards.

[242] Paragraphs 18 and 27 of *Associate Builders*; read with para. 37 of *Ssangyong.*

5.3.3 INCONSISTENCIES IN JUDICIAL INTERPRETATION

Two 2020 rulings from the Supreme Court highlight the discrepancies in the application of the 'fundamental policy of Indian law' examination, indicating a necessity for a more uniform and narrow application of this principle.

In the case of *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors,*[243] the Supreme Court upheld the enforcement of a foreign arbitration award, even though the award potentially violated the Foreign Exchange Management Act, 1999 (FEMA).[244] The Court emphasized the pro-enforcement bias inherent in the New York Convention,[245] which seeks to minimize judicial intervention in enforcing foreign awards. The Court concluded that the violation of FEMA did not amount to a breach of the fundamental policy of Indian law. This decision highlights a lenient and pro-enforcement stance, reflecting a commitment to uphold international arbitration awards unless there is an apparent and significant contravention of public policy.

Later, in the case of *National Agricultural Co-operative Marketing Federation of India v. Alimenta SA,*[246] in stark contrast, the Supreme Court, in this case, refused to enforce a foreign arbitration award, citing that it violated India's export control policy. The Court deemed this policy a fundamental aspect of Indian law, integral to the country's regulatory framework. By holding that the breach of the export control policy constituted a violation of the fundamental policy of Indian law, the Court adopted a more restrictive approach, emphasizing the

[243] 2020 SCC Online SC 177.
[244] The court, inter alia, observed that the Foreign Exchange Management Act, 1999, unlike the Foreign Exchange Regulation Act, 1973, refers to the national policy of 'managing' instead of 'policing' foreign exchange. Further, the court observed that a section similar to s. 47 of the Foreign Exchange Regulation Act, 1973 ('Contracts in evasion of the Act') no longer exists in the Foreign Exchange Management Act, 1999 – therefore, transactions that violate the Foreign Exchange Management Act, 1999, cannot be held to be void. Moreover, such transactions could be condoned by the Reserve Bank of India. The court noted that a rectifiable breach could never be in violation of the fundamental policy of Indian law; and that '"fundamental policy" refers to the core values of India's public policy as a nation which may find expression not only in statutes but in time-honoured, hallowed principles which are followed by Courts.'
[245] The court also interpreted the meaning of the sentence 'enforcement of a foreign award *may* be refused' (emphasis added) in sub-s. (1) of s. 48 of the 1996 Act; holding that grounds for resisting enforcement foreign awards can be classed into three groups: (1) grounds which affect jurisdiction of the arbitration proceedings – in which the court has no discretion and is bound to refuse enforcement; (2) grounds which affect party interest alone – in which the court has discretion to refuse the enforcement but is not bound to do so; and (3) grounds which go to the public policy of India – in which the court has no discretion and is bound to refuse enforcement.
[246] 2020 SCC OnLine SC 381.

importance of adhering to domestic regulatory statutes when considering the enforcement of foreign awards.

These conflicting assessments underscore the subjective nature of examining the 'fundamental policy of Indian law.' The Court's analysis in the *Vijay Karia* case exhibited adaptability, leaning towards a global pro-enforcement trend. In contrast, in the *Alimenta* case, the analysis displayed inflexibility, giving precedence to local regulatory adherence over international arbitration standards. The divergences in judicial analysis introduce ambiguity and unpredictability in the enforcement of foreign awards, potentially dissuading overseas investors and impacting India's aspiration to emerge as a center for global arbitration.

5.3.4 RECOMMENDATIONS FOR FOCUSING THE PUBLIC POLICY DOCTRINE

To align Indian arbitration legislation with global norms and reduce judicial intervention, the following suggestions are proposed:

- **Clear Legislative Definition**

Amendments to the Arbitration and Conciliation Act are recommended as follows:

Goal: The fundamental objective is to present a specific and restricted interpretation of 'public policy.' This adjustment is essential to prevent potential misuse or overly broad interpretations, which could result in excessive judicial intrusion in arbitration rulings.

Emphasis: The definition should specifically address the most severe violations of fundamental principles of justice and morality. Therefore, the invocation of public policy should be limited to scenarios where the violation:

- Threatens the integrity of the judicial system: Instances where enforcing an arbitral award would undermine the foundational principles of the legal framework.

- Contravenes basic notions of morality and justice: Cases where an award is so inherently unjust or immoral that its enforcement would be deemed unacceptable.

- Compromises the rule of law or fundamental procedural fairness: Instances where the arbitration process itself was significantly flawed, making the enforcement of the ruling contrary to principles of fair process and equity.

Execution:

- Drafting: Collaboration among legal scholars is urged to formulate amendments to the Arbitration and Conciliation Act that reflect this narrow interpretation.

- Legislative Procedure: Interaction with legislators is crucial to pass these amendments, emphasizing the importance of confining the scope of 'public policy' to establish a more foreseeable and secure arbitration atmosphere.

- **Objective Standards for Public Policy**

Substitute Subjective Conditions with Objective Standards:

Goal: The objective is to ensure that objections based on public policy adhere to clear, objective criteria rather than subjective judgments that may vary among different judges.

Standards:

- Manifest Violation: Refusal of enforcement should only occur if the breach of public policy is apparent and explicit, requiring no extensive interpretation or debate.

- Fundamental Breach: The violation should represent a fundamental breach of an indispensable rule. This guarantees that only the most severe infractions justify denial of enforcement. For example, a ruling mandating an act that is illegal under Indian law, such as engaging in corrupt practices, would unequivocally contradict public policy.

Execution:

- Guidelines: Formulate comprehensive guidelines detailing these objective standards. Disseminate these guidelines among judges and legal professionals.

- Training: Conduct training sessions for judges and arbitrators to acquaint them with the new standards and ensure consistent application across cases.

- **Rejection of the Perversity Test**

  Explicitly Reject the Perversity Test under the 'Patent Illegality' Standard in Section 34(2A):

Objective: The main aim is to limit the extent to which domestic awards can be scrutinized through judicial review. Proposed changes to Section 34(2A) seek to clarify that patent illegality does not encompass a re-evaluation of the factual determinations or the case's merits. It is emphasized that judicial interference should only occur in cases where a glaring error is present, impacting the core fairness of the proceedings. The advantages of this approach include enhancing the efficiency of the arbitration process, promoting a higher level of finality in arbitration decisions, and instilling trust among global entities in the Indian arbitration landscape.

5.4 CONCLUSION

The extent of claims eligible for submission to arbitration is shaped by the strength of each jurisdiction's sovereign immunity policy. While most jurisdictions tend to construe the public policy exception, thereby favoring enforcement narrowly, some jurisdictions may opt for a broader interpretation. Despite the existence of discrepancies in how the public policy exception is applied judicially, as seen in select cases, these disparities are not significant enough to outweigh the prevailing pro-enforcement inclination. Various organizations have endeavored to propose restrictions on the application of 'public policy' to specific scenarios.

The drafting committee of the United Nations for the New York Convention sought to confine the use of 'public policy' to situations where "the recognition or enforcement of a foreign

arbitral award would be clearly conflicting with the fundamental principles of the legal system of the country where the award was invoked."[247]

Moreover, the International Law Association (ILA) furnishes valuable recommendations for states concerning 'public policy' in its Final Report 2002.[248] This document recommends that courts responsible for enforcement should use discretion and decline to uphold an award only in "exceptional circumstances."[249] Such circumstances could encompass cases where the recognition or enforcement of an international arbitral award would breach international public policy.[250] The international public policy of any state encompasses (i)Fundamental principles related to justice or morality that the state aims to protect, even if it is not directly concerned, (ii) Rules designed to serve the essential political, social, or economic interests of the state and (iii) The state's duty to respect its obligations towards other states or international organizations.[251] The Final Report exemplifies how the arbitration system can internalize its regulatory function, marking a significant contribution to the advancement of arbitration.

In my opinion, a reformed concept of public policy is essential in India, where an inconsistent public policy is applied, as at present. The New York Convention provides excessive discretion to states when using the 'public policy' exception, potentially compromising the conclusiveness of arbitral decisions. Utilizing this broad discretion, national courts may impede the enforcement of awards, hindering arbitration's role in delivering a decisive resolution. Despite the international focus of the 'public policy' exception, local courts retain the authority to choose between applying domestic or international norms. This discretionary power creates a loophole that enables dishonest parties to exploit 'public policy' to evade compliance with binding awards. The uncertainty surrounding the definition of 'public policy' across various jurisdictions exacerbates this challenge. Each country has embraced a distinct approach to arbitration. In an increasingly interconnected global economy, it is crucial for states to collaboratively establish and implement a narrowly defined international public policy standard. This strategy should receive endorsement from the supervisory courts of relevant states to promote more excellent uniformity in international arbitration. Through the adoption

[247] Report of the Committee on the Enforcement of International Arbitral Awards, 28th March 1955, UN Doc. E/2704 and EI AC.42/4/Rev.1.
[248] International Law Association (lLA) on International Commercial Arbitration, *Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, New Delhi Conference, 2002.
[249] *Id*. at Recommendation 1(a).
[250] *Id.* at Recommendation 1(b).
[251] *Id.* at Recommendation 1(d).

of a unified and stringent interpretation of public policy, the effectiveness of international arbitration will be enhanced. The enforcement of foreign arbitral awards will be smoother, aligning with global legal and commercial frameworks. Ultimately, the 'public policy' defense will fulfill its intended objective of safeguarding fundamental principles of justice and morality rather than serving as a manipulable mechanism.

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