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Public Policy Conundrum in the Enforcement of Arbitral Award

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Abstract

Arbitration is a consensual conflict resolution procedure that allows the parties to settle their differences swiftly and amicably in contrast to the conventional courtroom dispute resolution method. The autonomy given to the parties to adopt the procedure of their choice saves time and money. The decision or award can be challenged on limited grounds. According to Sections 34 and 48 of the Arbitration and Conciliation Act of 1996, an arbitration decision in India may be overturned if it violates public policy. The role of public policy in implementing arbitral verdicts is still a controversial topic in the arbitration world, despite the fact that "the New York Convention and the UNCITRAL" model legislation acknowledge its importance. However, the term 'public policy' isn't clearly defined in this Act; instead, courts have tried to explain it through various legal decisions. Indian courts have used the public policy argument to reject arbitration decisions that clash with public policy of the country. Even though India is part of the New York Convention, it has gained a reputation for making it hard to enforce international arbitration decisions. This is mainly because there's no clear understanding of what the public policy exception means in India. This article investigates the theory of public policy and its use in enforcing Arbitral Awards.

Keywords: Arbitration, Arbitrability, Arbitral Award, Public Policy

Introduction:

The New York Convention's pro-enforcement policy is found in Article III. It stipulates that arbitral verdicts must be recognised as binding by all Contracting States and enforced in accordance with local laws in the jurisdiction in which they are used, observing the guidelines established in the Articles. The Article makes it clear that there shall be no interference with the enforcement of the foreign arbitral ruling. But Article V (2) (b)[1] if the award is against public interests of the state, the courts of the contracting states may refuse to enforce it, according to the convention. If the subject matter cannot be arbitrated and accepting the award would violate the public interest of the state, it may be rejected, as stated in Article 36 of the 1985 "UNCITRAL Model Law on International Commercial Arbitration". India's Arbitration and Conciliation Act, 1996, which is based on UNICITRAL Model Law has similar provisions relating to public policy and the arbitrability of disputes. It would not be out of context to expresss that Section 34[2] of the Arbitration and Conciliation Act is a mirror image of UNCITRAL Model Law of International Commercial Arbitration, namely Article 35. As per Section 48 of the Arbitration and Conciliation Act of 1996, even international arbitral rulings may also be overturned if they conflict with Indian public interests.

An arbitration award may be revoked on basis of that it violates public policy if (i) it is tainted by corruption or fraud; (ii) it violates the fundamental principles of Indian law; or (iii) it goes against fundamental moral and just principles, according to an amendment made in 2015 to the Arbitration and Conciliation Act, 1996. Furthermore, it is made plain that only domestic arbitrations will be able to apply the defence of "patent illegality" in an award; foreign arbitrations would not be able to do so.

The Principle of Public Policy:

In the private international law, the term "*ordre public*" refers to either choice of law or the acceptance and implementation of arbitral awards or judgements rendered in other countries.

The public policy concept is based on the idea that, even if the parties are free to enter into a contract and submit the dispute to arbitration, their freedom and the tribunal's arbitral decision may be overturned if they are not in the public interest.

Public policy is defined as the state's public policy in which the award is intended to be used in "Article 5 of the New York Convention". It is also important to remember that the courts can only decide whether enforcing an arbitral ruling would be against public policy. The notion of public policy has gained significance due to a variety of legal academics' interpretations and other court rulings. It has been seen that by and large challenge to an arbitral award is made on the

[1] "Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York)",

[2] Arbitration & Conciliation Act, 1996

ground that it is against public policy of the country because while other grounds of challenge as mentioned in section 34 of the Act are somewhat precise, but as far as "Public policy" ground is concerned it has a distinct reputation of being called an unruly horse considering wide interpretations given to it by Indian courts. Division Bench of Hon'ble Delhi High Court held that interference with Awards on grounds of public policy is possible only if an Award is not only patently illegal, but said illegality goes to the root of the matter[3].

Public policy, as defined by the English House of Lords, is "that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public, or against the public-good."[4] When comparing concept of public policy while comparing international and domestic Law, most legal experts agree that "Article V (2) of the New York Convention' suggests that international public policy" has more limitations than domestic public policy. In local matters, the public policy operates on a different platform than in international context. However, it is still a paradox that what is considered as international public policy, is actually to be determined by a national court. While it is accurate that domestic and international public policy run in different dimensions, this difference exists in order to limit the application of public policy when evaluating and enforcing foreign arbitration decisions. Whether a court is located in a common law or civil law jurisdiction, also become important when deciding how it will interpret public policy. Without specifically defining them, public policy in the civil law jurisdiction refers to the fundamental ideals or concepts that form the cornerstone of society. Public policy under common law jurisdiction is associated with broad ideals like morality, justice, and fairness.[5]

For instance, British courts have compared public policy to a few fundamental values rather than providing a clear definition. Public policy considerations are utmost difficult to be explained, but they should always be treated with the utmost care. To prove that an award is somehow illegal, it must be shown that enforcing it goes against the public's best interests or that it would be completely disrespectful to an average, reasonable person that the state governs. However, in India a foreign arbitration decision can be refused execution based on (i) the core principles of Indian law, (ii) what is best for India, or (iii) issues of justice or morality. So, it would be safe to understand that when it comes to public policy, countries that enforce laws look at things from their own viewpoint. As law is a dynamic concept, so the legal concepts of a country do evolve and hence, can change over a period of time. Common law nations have limited what public policy can cover, as demonstrated in the famous US case of "Parsons & Whittemore Overseas Co Inc vs Societe Generale de lindustrie du paper & Bank of America".[6] Nature of the dispute or difference, according to Halsbury's Laws of England, Fourth Edn. A justiciable issue that may be decided civilly must be the subject of the disagreement or dispute that the parties to an arbitration agreement agree to refer. Whether the difference can be legitimately compromised through agreement and satisfaction is a valid test of this.[7]

In Australia, courts have adopted the narrow meaning of public policy outlined in Section 8(7) of the Arbitration Act, 1974, which restricts its interpretation to cases involving fraud, corruption, or transgressions of natural justice principles.[8] As in case of Arbitration in France[9], an arbitration decision can be enforced if the party using it proves it exists and it doesn't obviously go against international public policy. The case of European Gas Turbines SA v. Westman International Ltd[10] outlined what public policy includes. The Paris Court of Appeals decided that enforcing an arbitration ruling related to a bribery agreement goes against the public interest.

As far as India is concerned, as seen above an arbitral award can be set aside in the manner of scheme provided in section 34 of the Act of 1996. it sould be seen that section 34 of the ACT of 1996 corresponds to section 67 and 68 of the English Arbitration Act, 1996 which is actually based on Article 34 of the UNICITRAL Model Law. A bare reading of Section 34 would show that an award can be set aside only on any of the five grounds, as contained in Section 34(2) (a) of the Act of 1996, or any of the two grounds, as contained in Section 34(2)(b) of the Act. Correspondingly, if petitioner fails to establish his case within the four corners of Section 34, the award cannot be set aside. So, question arises, does "public policy" mean policy of a particular government? Time and again Indian courts have made efforts to define and

[3] Gian Chand Totu v. Subhash Chand Kathuria judgment, FAO(OS) No. 1/2004, DOD 16/02/2004
[4] Egerton v Brownlow 4 HLC 1 (1853).
[5] "IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, October 2015"
[6] Parsons & Whittemore Overseas Co Inc vs Societe Generale de l'industrie du papier & Bank of America (RAKTA), 508 F.2d 969 (1974).
[7] "Halsbury's Laws of England, 4th Edn., (Arbitration, Vol. 2, para 503)".
[8] "Traxys Europes SA vs Balaji Coke Industry Pvt Ltd [2012] FCA 276".
[9] Article 1514 of Book IV
[10] Paris Court of Appeal, 1st Chamber – Section C, date of decision September 30, 1993

describe "public policy" of the country. In M.R. Power rojects v. state of Arunachal Pradesh[11], division bench of Hon'ble Gauhati High Court explained that public policy does not mean policy or decisions of a particular government. Rather the concept actually signify what is in public good and in public interest. However, at the same time it was clarified that notion about what is in public good or in public interest or what can be termed as injurious or harmful to public good would vary from time to time.[12]

Public Policy & Arbitrability

According to the 1996 Arbitration & Conciliation Act, courts consider public policy when deciding if they should reject an arbitration award. In the case of Renusagar Power Electric Company Vs. General Electric Company[13], Hon'ble Supreme Court clarified that "the expression of public policy in Section 7(1)b(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 must be interpreted in accordance with the doctrine of public policy as applied in the field of private international law in a 1996 A&C Act case involving the enforcement of an ICC award." The court explained that the term 'public policy' is used in a limited way, and that enforcing the award requires more than just breaking Indian law to be considered against public policy. The Supreme Court also declared, using this criterion, that enforcement of foreign awards would be denied for public policy reasons if the award would be in conflict with "(i) The interests of India, (ii) fundamental policy of Indian law, and (iii) justice or morality".

In ONGC vs. SAW Pipes Ltd. [14] it was held that the term "public policy of India," as given under Section 34, needs to be interpreted more broadly than it was in the Renusagar Case. The court also noted that the term "public policy" implies certain issues pertaining to the public interest and public good. On the other hand, an award that clearly violates legislative provisions may be deemed to be against the public interest and, as such, in breach of public policy. In the case of Phulchand Exports Ltd vs Ooo Patriot[15] it was ruled that while interpreting Section 48 of the Arbitration and Conciliation Act, 1996 the test laid down in ONGC Saw Pipes must be applied in cases involving foreign awards. Accordingly, Indian courts have the authority to reject a foreign arbitral judgement on the grounds of "patent illegality".

In case of Shri Lal Mahal Ltd. Vs. Progetto Grano Spa[16] Hon'ble SC overruled the judgment given in the case of Phulchand Exports Ltd[17] and reinstated the position held in the Renusagar Power Electric Company Vs. General Electric Company[18] case concerning the enforcement of the foreign arbitral award and confirmed that the test held in the Renusagar case will be applied henceforth for refusal of the arbitral award on the ground of public policy. Further in the case of ONGC Ltd. Vs. Western Geco International Ltd[19] supreme court came to determine if the award went against Indian public interests. They further clarified the notion of "fundamental policy of Indian law" and concurred with the ratio provided in the Saw Pipes Case. The court concluded that the underlying policy of Indian law is based on "three distinct and fundamental juristic principles". accordingly, an adjudicating body must use a "judicial approach" while assessing a citizen's rights. Which means that the court or adjudicating authority must adhere to the principles of natural justice and cannot act irrationally or capriciously. A ruling that is so illogical or perverse that a reasonable person could not have reached that result cannot be upheld by the court of law. In the case of Penn Racquet Sports Vs. Mayor International Ltd[20] the Hon'ble Delhi High Court held that merely because a foreign award is in violation of an Indian law, it does not mean that same cannot be recognised or enforced. In order for Indian courts to refuse to recognise and enforce foreign award, said award must be against the core tenets of Indian law. A foreign award may also be denied execution on the grounds that it is against Indian interests, justice, or morality.in recent decision of Hon'ble Delhi HIgh hCourt rendered in Union of India v. M/s V.K. Sood Engineer & Contractors, (Delhi)[21] it was held that courts can not review merits of the dispute or re-appriciate evidence. Neither can it examine erronous application of law. Only if an award shocks the conscience of the Court or is fundamentally illegal or is so perverse as to go to the root of the matter than it can be set aside on the ground of patent illigality.

[11] 2008 (48) RCR (Civil) 841
[12] Central Inland Water transport Corporation Ltd. V. Brojo Nath Ganguly, (1986) 3 SCC 156
[13] Renusagar Power Electric Company Vs. General Electric Company MANU/SC/0195/1994.
[14] ONGC vs SAW Pipes Ltd MANU/SC/0314/2003.
[15] Phulchand Exports Ltd vs Ooo Patriot MANU/SC/1217/2011.
[16] 2014 (2) SCC 433
[17] Civil Appeal no. 3343 of 2005, date of decision 12.10.2011
[18] Supra
[19] ONGC Ltd. Vs. Western Geco International Ltd MANU/SC/0772/2014.
[20] Penn Racquet Sports vs Mayor International Ltd MANU/DE/0147/2011.
[21] 2025 NCDHC 3828

The 246th law commission report[22] emphasized that Section 34 outlines a comprehensive list of reasons for contesting an award under the Arbitration & Conciliation Act of 1996; however, without getting into substantive issues, they mostly deal with procedural ones. The Law Commission believes that Section 34 needs to make it clear that an award cannot be revoked just because the court of law disagreed with the facts or because the tribunal made a legal mistake. The Law Commission proposed adding the another clause to section 34 which read as 'For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute.'

The 246th law commission report recommended significant revisions to Section 34 of the Act, which were implemented by 2015 Act[23]. The main aim of the change was to restrict courts from getting involved in arbitration decisions based on 'public policy'. They updated Section 34(2) to add Section 2A and Explanation 2. To clarify, Explanation 2 of Section 24(2) made it clear that looking at the details of the case isn't part of figuring out if there's been a breach of the basic principles of Indian law. Since the Arbitration & Conciliation Act, 1996 was amended in 2015, the courts have refrained from interpreting the word "public policy' broadly or becoming involved in the merits of the case.

Taking a cue, in recent decision rendered by Hon'ble Allahabad High Court in Ranbir Singh v. National Highways Authority of India[24], it was held that re-appraisal of evidence by the courts or substituting arbitrators findings is impermissible.

Further, In the case of "Associate Builders vs. Delhi Development",[25] The Hon'ble Supreme court ruled that any arbitral award must be fair, impartial, and reasonable in order for the courts to consider it. It also clarified the parameters of how the most fundamental concepts of justice and morality should be interpreted. As a result, it declared that an award may be overturned on the grounds of "justice" if it shocks the court's conscience. On the other hand, an award that violates morality was deemed to be something that goes against contemporary mores and would shock the court's conscience.

In "Venture Global LLC and Ors. vs. Tech Mahindra Ltd and Ors."[26] According to the Supreme Court's interpretation in the Associate Builders case, it would be against Indian public policy and patent unlawful to violate the restrictions imposed by the FEMA. The Supreme Court stated that "an arbitral tribunal's award may only be overturned on the grounds specified in Section 34 of the AAC Act." Unlike an appellate court, the court is unable to delve into the facts to evaluate the merits of the claim or decide if the award was legal.

In Govt. of India vs Vedanta Limited,[27] The Hon'ble SC noted that public policy included fundamental policy, Indian interests, fairness, and morality on the basis of the criteria provided in the Renusagar case. Thus, as the ONGC v. Western Geco case would show that while limiting the reach of public policy, an arbitral tribunal's incorrect interpretation of the contract's terms would not be used as a basis for contesting the award on its merits.

Hon'ble Supreme Court in the matter of Vijay Karia. Vs. Prysiman Cavi E Sistemi SRL,[28] The Indian public policy issue with the Foreign Arbitral Award was examined and clarified by the Supreme Court. In this case, the award debtor argued that the foreign awards rendered in a London-based arbitration proceeding by the London Court of Arbitration violated Indian public policy by breaking the Foreign Exchange Management Act, 1999 (FEMA), and thus should not be enforced in India. As it considered this topic, the court clarified the differences between the legal framework established by FEMA and its predecessor, the Foreign Exchange Regulation Act of 1973 (FERA). In contrast to FERA, which was primarily concerned with regulating foreign exchange, the court explained that FEMA is centred on managing it. It also noted that FEMA does not have any provisions that would cancel any transactions, but FERA did. The court decided that if there was a FEMA infringement, the Reserve Bank of India might later provide permission to overlook the infraction. A breach of this kind is thus the one that can be fixed. According to the court, this means that neither the arbitral ruling nor the agreement it enforces may be considered legally ineffective. The court further emphasised that a violation of the fundamental policy of Indian law must be equivalent to a break of some statute or legal concept that is important to Indian law and should not be vulnerable to compromise. The public policy regarding an award that was allegedly in violation of FERA was that the FERA's provisions were enacted to protect India's national economic interest, and as such, their violations were against Indian public policy, according to the SC ruling in the Renusagar case. That decision

[22] 246th Law Commission of India Report, Amendment to the Arbitration and Conciliation Act 1996
[23] the Arbitration & Conciliation (Amendment) Act, 2015
[24] 2025 NCAHC 76657
[25] Associate Builders vs. Delhi Development MANU/SC/1076/2014.
[26] Venture Global LLC and Ors. vs Tech Mahindra Ltd and Ors MANU/SC/1373/2017.
[27] Government of India vs Vedanta Limited MANU/SC/0689/2020
[28] Vijay Karia. Vs. Prysiman Cavi E Sistemi SRL, MANU/SC/0171/2020.

is not the same as this one. The SC ruled in the Vijay Karia Case that the same grounds that might be used to challenge a foreign arbitral decision in an international commercial arbitration held in India would also be used to challenge a decision pertaining to "public policy of India." Accordingly, the terms "public policy of India" as they appear in Sections 48 and 34 of the 1996 Arbitration and Conciliation Act are interchangeable. It is therefore doubtful that Indian courts will consider a challenge to an award rendered in an international commercial arbitration with an Indian seat on the grounds that the ruling contradicts the "Public Policy of India" by breaking the FEMA norm.

India will thus become a center for arbitration thanks in large part to the Supreme Court's pro-arbitration position in this case.

Conclusion:

Public policy and domestic mandatory law cannot be separated, according to courts in many jurisdictions. If the arbitral award conflicts with the domestic mandatory law of the nation where it is intended to be enforced, the domestic court of that nation may deny enforcement of the award. Many nations, however, have begun to distinguish between domestic required legislation and public policy, allowing agreements between parties that contravene the mandatory rules and deeming them legitimate for the implementation of the arbitral ruling. Therefore, the domestic and international public policy difference is drawn when discussing international public policy in regard to international arbitration.

However, the state's rules and procedures for handling the foreign arbitral award are the prism through which international public policy is perceived. Consequently. Even if a foreign arbitration decision is considered part of international public policy, it is still interpreted based on the laws and rules of the state. Therefore, it is labeled as international public policy and defined according to state laws. Rather than just focusing on international public policy, the court should aim to adopt a transnational view of public policy. Transnational public policy is built on international agreements regarding universal standards of behavior that are widely accepted and seen as unacceptable in most civilized countries, such as bribery, murder, slavery, piracy, corruption and terrorism. It encompasses public policies that are not state-specific but rather cross state boundaries. Therefore, by embracing the transnational public policy, which has clearly defined terms of moral principles or legal fundamental recognised in all civilised nations, the court's approach to its State worldwide public policy can be substantially broadened. Additionally, it can help to standardise the international framework for determining whether to enforce the foreign arbitral ruling.

REFERENCES

1. Arbitration & Conciliation Act, 1996
2. The Arbitration & Conciliation (Amendment) Act, 2015
3. Renusagar Power Electric Company Vs. General Electric Company MANU/SC/0195/1994.
4. ONGC vs SAW Pipes Ltd MANU/SC/0314/2003.
5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York,
6. Egerton v Brownlow 4 HLC 1 (1853).
7. IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, October 2015
8. Parsons & Whittemore Overseas Co Inc vs Societe Generale de l'industrie du papier & Bank of America (RAKTA), 508 F.2d 969 (1974).
9. Halsbury's Laws of England, 4th Edn., (Arbitration, Vol. 2, para 503).
10. Traxys Europes SA vs Balaji Coke Industry Pvt Ltd [2012] FCA 276.
11. European Gas Turbines SA v Westman International Ltd Paris CA, 1er Ch., 30 September 1993.
12. Phulchand Exports Ltd vs Ooo Patriot MANU/SC/1217/2011.
13. Penn Racquet Sports vs Mayor International Ltd MANU/DE/0147/2011.
14. 246th Law Commission of India Report, Amendment to the Arbitration and Conciliation Act 1996
15. Associate Builders vs. Delhi Development MANU/SC/1076/2014.
16. Venture Global LLC and Ors. vs Tech Mahindra Ltd and Ors MANU/SC/1373/2017.
17. Government of India vs Vedanta Limited MANU/SC/0689/2020.
18. Vijay Karia. Vs. Prysiman Cavi E Sistemi SRL, MANU/SC/0171/2020.