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THE PUBLIC POLICY ENIGMA IN INTERNATIONAL COMMERCIAL ARBITRATION

(With Special Reference to Public Policy as a Ground to Refuse Enforcement of Foreign Arbitral Awards in India, and its Comparison with England, Singapore, and the United States)

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ABSTRACT

The notion of public policy owing to its fluid nature coupled with the significance of its application in the realm of cross-border dispute resolution mechanisms has for long been an issue of interest as well as concern. The mysterious nature of the doctrine of public policy and its role in international commercial arbitration itself carves out a case for an in depth examination, contributing to both theory and practice.

The elements of uncertainty, unpredictability and subjectivity attributed to public policy have, at times, significantly impeded the functionality of international commercial arbitration, in general, and undermined the foundations of the New York Convention, in particular. Public policy doctrine can play a noteworthy role throughout the process of arbitration; right from the conclusion of arbitration agreement followed by arbitral proceedings to the setting aside and enforcement stage, it is almost omnipresent. And at every stage it can influence the process in a manner that can have a significant impact on the celebrated features of international commercial arbitration, i.e. party autonomy and finality of arbitral awards.

The thesis provides a comprehensive understanding of the complex role that public policy plays in international commercial arbitration at various stages. For that it begins by delving into the genesis of the concept of public policy and its evolution in the field of private international law. Building on that, the thesis explores the manner in which national courts use public policy as a tool at different stages of arbitration to intervene for various reasons.

The major portion of the thesis examines the role of public policy as an exception to enforcement of foreign arbitral awards. It examines the understanding of

public policy exception as envisaged by the New York Convention, and how national courts from across the jurisdictions have responded to it. The focus remains on the diverging approaches followed by the national courts, where on the one hand pro-enforcement policy has been favored and on the other hand courts have preferred an interventionist approach. For the purpose of comparison, the erratic position of the national courts of India on interpretation and application of public policy exception is probed and compared with the approach adopted by the more arbitration friendly courts of England, Singapore, and the United States.

The thesis aims at contributing to the scholarship by identifying the key issues in concern and suggesting a pragmatic approach to deal with them. Keeping in mind the significance of harmonization, if not uniformity, in context of interpretation and application of public policy exception, it lays a road map for jurisdictions like India that are criticized for being too intrusive, with a hope of guiding them to adopt a more arbitration friendly approach.

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INTRODUCTION

Regular cross-border commercial transactions, involving both public as well as private entities, describe one of the essential characteristics of globalization. Not discounting the significance of such commercial transactions in the overall economic growth across the globe, one cannot avoid thinking about a concomitant concern of the potential ensuing legal disputes. As a matter of fact, in the past few decades, with the increase in international trade and investments there has been a substantial increase in the number of international disputes as well.[1]

International trade by its very nature involves parties belonging to different legal systems, thereby making the dispute resolution a profoundly complex exercise.[2] In such a scenario, international commercial arbitration holds the distinction of having successfully emerged as one of the most popular dispute resolution mechanisms.[3] One of the essential factors making international arbitration a favorite in this field is its distinction of allowing greater party autonomy and participation in dispute settlement process with equally greater degree of flexibility, which is more often than not denied by the traditional litigation.[4]

[1] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fourth edn, Wolters Kluwer 2013) 1.

[2] T Várady and others, *International Commercial Arbitration: A Transnational Perspective* (Sixth edn, Thomson/West 2015) 1.

[3] S Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011) 1. See Philip McConnaughay, 'The Role of Arbitration in Economic Development and the Creation of Transnational Legal Principles' (2013) 1(1) PKU Transnational Law Review.

[4] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 28-30.

Another equally, if not more, important factor is the substantial assurance of getting the resultant arbitral award enforced.[5] Enforcement of a decision in a foreign territory, be it of a court or of an arbitral tribunal, remains an important consideration in the minds of the parties while choosing a dispute resolution mechanism, as it serves the vital interests such as damage control or mitigation.[6]

The Convention on Recognition and Enforcement of Foreign Arbitral Awards[7] (hereinafter New York Convention), which guarantees effective enforceability of foreign arbitral awards, has considerably increased the popularity of international commercial arbitration as a cross-border dispute resolution mechanism.[8] However, it is relevant to point out that this assured enforceability is not absolute in nature as the New York Convention itself provides for an exhaustive list of grounds based on which an enforcing court may refuse to recognize and enforce the arbitral award.[9] Having said that, it is important to appreciate that the underlying aim of the New York Convention remains to encourage upholding of international arbitral awards as a rule, save as in extra-ordinary circumstances.[10]

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[5] Ibid.

[6] A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 1.

[7] Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) This Convention recognized the significance of international commercial arbitration as an effective dispute settlement mechanism. The primary aim of the Convention is to ensure that foreign arbitral awards are recognized and generally enforced by the States party to the Convention.

<http://www.newyorkconvention.org/>

[8] ICCA, *Guide to the Interpretation of the 1958 New York Convention – A Handbook for Judges* (ICCA 2011) 15; S Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011) 411.

[9] New York Convention, Article V. The Article lists down seven different grounds on which the court, where enforcement is sought, may refuse to recognize and enforce a foreign arbitral award.

[10] H Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 365.

One of the grounds provided in the New York Convention, that can be invoked to refuse recognition and enforcement of foreign arbitral awards, is violation of 'public policy'.[11] What makes this particular ground interesting and at the same time complex is the fact that there is no common worldwide definition of public policy or a uniform practice on its interpretation and application.[12] The elements of uncertainty, unpredictability and subjectivity linked to its interpretation have at times significantly undermined the foundations of the New York Convention, and also impaired the functionality of international commercial arbitration.[13]

It would be important to note here that the public policy doctrine does not appear only at the stage of enforcement of arbitral awards, but it plays a significant role throughout the process of arbitration. Right from concluding of an arbitration agreement, followed by procedures involved during the arbitration proceedings, and ultimately leading to the annulment and enforcement stages, public policy is almost omnipresent.[14] And it is this elastic nature of public policy that stretches and appears

[11] The New York Convention, Article V (2) provides:

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) …

b) The recognition and enforcement of the award would be contrary to the public policy of that country.

[12] Rashad Rana and Michelle Sanson, *International Commercial Arbitration* (Thomas Reuters 2011) 310; S Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011) 461.

[13] Jan Paulsson, *The Idea of Arbitration* (OUP, 2013) 132.

[14] Hantaniau and Caprasse, 'Public Policy in International Commercial Arbitration' in E Gaillard and D Pietri (eds), *Enforcement of Arbitral Agreements and International Arbitral Awards: The New York Convention in Practice* (Cameron May 2008) 787.

at almost every stage of international commercial arbitration, further heightens the uncertainty.[15]

Given the idiosyncrasies associated with the inherent nature of the concept of public policy, it is only natural to expect that national courts would understand and approach the doctrine differently. Broadly speaking, national courts have responded to the concept of public policy in international commercial arbitration by interpreting it either restrictively or broadly. [16] Though the general trend favors a restrictive interpretation of public policy in matters of international commercial arbitration, the possibility of jurisdictions holding a completely contrary or relatively contrary position is not unheard of.[17] India happens to be listed in later category.[18]

The inconsistency in the approach of the national courts to interpret and apply public policy in matters of international commercial arbitration, particularly in context of enforcement of foreign arbitral awards, has significantly discredited India's position. On the other hand, jurisdictions like England, Singapore, and the United States have thrived in terms of achieving the status of arbitration friendly destination

[15] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fourth edn, Wolters Kluwer 2013) 157.

[16] A Van den Berg, *The New York Arbitration Convention of 1958 (*Kluwer Law & Taxation Publishers 1981) 360.

[17] ICCA, *Guide to the Interpretation of the 1958 New York Convention – A Handbook for Judges* (ICCA 2011) 15; see also, Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3651; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 222; Wasiq Dar, 'Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South-Asian Perspective' (2015) 2(4) European Journal of Comparative Law and Governance 318.

[18] Vyapak Desai and others, 'Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India' in Nakul Dewan (ed), *Enforcing Arbitral Awards in India* (LexisNexis, 2017) 210; S Greenberg and others, *International Commercial Arbitration: An Asia-Pacific Perspective* (CUP 2011) 462; Amdia Renderio, 'Indian Arbitration and "Public Policy"'(Feb. 2011) 89(3) Texas Law Journal 699.

by resorting to narrow interpretation of public policy and by giving due importance to the underlying aims and objectives of the New York Convention.

This thesis delves into the issues and concerns attributed to the interpretation and application of public policy in context of international commercial arbitration. The role of public policy throughout the different stages of arbitration process, right from conclusion of arbitration agreement up to enforcement proceedings is explored and examined. However, special attention is given to the interpretation and application of public policy exception at enforcement stage.

With India as the jurisdiction of primary concern, its position vis-à-vis interpretation and application of public policy exception in context enforcement of foreign arbitral awards is critically scrutinized. The recent developments on the relevant issues that have emerged in India also stand analyzed. Based on the evaluation of the Indian position, a comparison is drawn with the practice, on the relevant issues of concern, in England, Singapore, and the United States.

Objectives, Scope and Significance

As can be inferred from the earlier discussion, the enigmatic nature of public policy and its role in international commercial arbitration itself carves out a case for an in depth examination. While the significance of issues in concern need not be discounted, it is important to appreciate that in order to arrive at a reasonable and meaningful outcome, it is only logical to channelize the research in a manner that not only the core issues at hand are addressed but also due consideration is given to the possible practical limitations of the researcher.

Although this research aims at providing a comprehensive study on the complex role of public policy at various stages in international commercial arbitration, a major

portion of the thesis delves on the issues connected to the interpretation and application of the public policy exception during the enforcement proceedings. Nevertheless, core issues linked with the application of public policy in the pre-enforcement stages do get sufficiently addressed. The reason behind dedicating a chapter to the role of public policy during the pre-enforcement stages is to analyze the nuances of the doctrine that can come into play and influence the entire process of arbitration. Not to mention, the possible impact its engagement during the pre-enforcement stages can have on the enforcement proceedings.

As far as the pre-enforcement stages are concerned, the thesis essentially probes the role and influence of public policy on matters of arbitrability, application of substantive and procedural laws, and the setting aside proceedings. The idea being to examine, how various relevant public policies interplay in defining the limits of party autonomy and arbitrator's discretion. The analysis is done with an aim to identifying the most pragmatic approach to respond to the possible intricacies that may arise.

While analyzing the role and issues connected with the public policy exception during the annulment proceedings, the understanding is developed based on the relevant mechanism provided in the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration, 1985 (hereinafter Model Law).[19] Given the fact that the national arbitration laws of a significant number of countries are more or less similar to the framework provided in the Model Law, using it as a benchmark serves the purpose of including a large number of jurisdictions within the ambit of this research without actually examining the national arbitration laws separately.

[19] <http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf >

While the thesis does not restrict itself to any specific kind of international commercial arbitration, i.e. institutional arbitration or ad hoc arbitration, the discussions and the findings essentially concern arbitrations that take place under the aegis of the New York Convention. International arbitrations, including investment treaty arbitrations, and ensuing arbitral awards, where New York Convention is not applicable are left outside the scope of this thesis. Therefore, judicial discourse on the public policy exception, emerging out of the arbitral awards that are not New York Convention awards, is not covered in the discussions.

As mentioned earlier, the focus of the thesis largely remains on the interpretation and application of the public policy as an exception to the enforcement of foreign arbitral awards. In that, the objective remains to basically decipher the understanding of the public policy exception as was envisaged under the New York Convention. Based on the analysis of the New York Convention and the Model Law, an understanding is developed with regard to the role and scope of national courts in context of the arbitral awards in context of allegations of public policy violation during the enforcement proceedings. Particular attention is given to the scope of national courts as far as the controversial issue of judicial review of arbitral awards is concerned.

Also, the issue concerning procedural public policy and its possible overlap with the grounds dealing with the procedural issues - essentially the natural justice and due process requirements under the New York Convention is dealt with. The thesis highlights the nuances associated with the interpretation of procedural public policy so as to not confuse it with the other grounds, therefore ensuring that the objecting parties do not take any undue advantages. With the aim of developing a pragmatic and effective approach of interpreting and applying public policy in a restrictive manner,

the contribution of concepts like international public policy and transnational public policy is discussed.

As highlighted earlier, the enforcement of foreign arbitral awards is one of the most important considerations in the minds of the parties from business point of view. The approach that national courts of a jurisdiction follow vis-a-vis enforcement of foreign arbitral awards can have a significant impact on potential traders while they consider to engage into a commercial arrangements with a party belonging to a certain jurisdiction. And the approach with which national courts handle the public policy exception during enforcement proceedings essentially reflects the arbitration friendliness of a jurisdiction.

India, which happens to be one of the most important emerging markets and a significant trading partner of various developed and developing nations, has had the dubious distinction of showing great ambiguity in its understanding and application of public policy.[20] More often than not India is perceived as a jurisdiction where its courts are highly erratic and inconsistent when it comes to interpretation and application of public policy. The thesis probes into the prevalent perceptions about India's position on public policy by examining the national arbitration legislation, the judicial discourse, and the recent steps taken by the legislature and the judiciary in order to create a new narrative.

In order to ascertain the extent to which the Indian approach towards the interpretation and application of public policy exception is distant from the

[20] Vyapak Desai and others, 'Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India' in Nakul Dewan (ed), *Enforcing Arbitral Awards in India* (LexisNexis, 2017) 210; Arthad Kurlekar and Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged Under the Public Policy Exception' (2016) 32 Arbitration International 180; Amdia Renderio, 'Indian Arbitration and "Public Policy"'(Feb. 2011) 89(3) Texas Law Journal 699.

international best practices, a comparative and a thematic analysis on public policy exception with the relevant practices in England, Singapore, and the United States is conducted. The comparative evaluation serves a twofold agenda; one, it provides a clear picture on the deficiencies, if any, in the Indian approach, and two, it offers possible solutions to overcome the identified deficiencies. Also, the study serves as a model for those jurisdictions that share concerns akin to India.

Research Questions

The larger question that the thesis essentially probes concerns with the enigmatic role doctrine of public policy plays in international commercial arbitration. In order to determine that, it is important to begin by addressing the fundamental query of as to how the notion public policy is understood in dispute resolution in an international setting. For that, the thesis looks into how the notion of public policy is perceived in the private international regime. Building upon that, the question on when, why and how does the doctrine of public policy plays a role in international commercial arbitration is addressed.

Given the complexities associated with the interpretation and application of public policy at the enforcement stage, the thesis inquiries as to whether there are any efficient and effective mechanisms to deal with those intricacies. With special focus on the position of India vis-a-vis interpretation and application of public policy exception during the enforcement stage, the thesis examines the prevailing narratives suggesting deficiencies in the Indian practice by probing as why India is not considered as an arbitration friendly jurisdiction and as to what can be the possible way of improving the image of India in that regard.

Research Methodology

The thesis has essentially relied on doctrinal[21] method of research in order to identify and analyze the content and application of the doctrine of public policy in context of international commercial arbitration. Therefore, arguments and opinions presented are basically an outcome of the examination of primary sources like the New York Convention, the Model Law, their *travaux preparatoires,* the relevant national legislative frameworks on arbitration, and last but not the least, the relevant case law.

In addition, the secondary sources like books, commentaries, reports, journal articles, case reviews have also been referred to. It is, however, important to mention here that the case laws, particularly from the chosen jurisdictions, remain the highlight because it is the judicial discourse that majorly reflects the stand of a State on interpretation and application of public policy. The underlying idea has been to identify the best possible interpretation of public policy, taking into consideration both primary interests of a State and also the growing demands of international trade.

Comparative approach[22] has been adopted while performing the analytical and thematic comparisons between the Indian position on the issue and that of the other

[21] "Doctrine research is the research process that identifies, analyses and synthesises the content of the law. In this method the essential features of the legislation and case law are examined critically and then all the relevant elements are combined or synthesised to establish an arguably correct and complete statement of the law on the matter at hand". See T Hutchinson, 'Doctrinal Research: Researching the jury' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge India 2014) 7-8.

[22] "A major motivation for conducting comparative law research is to find good, if not the best possible law. The idea is that information about rules in foreign systems tells us something about the quality of these rules and about the possibility and the desirability of adopting these rules in one's own legal system". See J Hage, 'Comparative Law as a Method and Method of Comparative Law' (2014) Working Paper no.11 Maastricht University.
<http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2441090> accessed 20 November 2015. See also G Samuel, 'Comparative Law and its Methodology' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge India 2014) 108.

chosen jurisdictions. And for that purpose a qualitative analysis of relevant legislations, court decisions, dedicated reports, and scholarly writings has been taken into account. The focus remaining on highlighting the shortcomings prevalent in the Indian approach while comparing it with the globally more acceptable approach followed in the other chosen jurisdictions. The objective being to use the conclusions drawn, with the help of both the methodologies, as the basis to make necessary recommendations.

Jurisdictions

The thesis, in the first three chapters, mainly explores the complexities and controversies associated with the interpretation and application of the concept of public policy vis-a-vis international commercial arbitration. Since these chapters develop the understanding of the relevant issues and focus on investigating as to how stakeholders from across the jurisdictions have responded, the study to that extent is not confined to any specific jurisdictions. The idea has been to incorporate varying shades of opinions on the issues in order to finally narrow down to the international best practices.

Building upon the findings in the first three chapters, the fourth and the final chapter gives special attention to the interpretation and application of public policy exception, in context of foreign arbitral awards, in India, England, Singapore, and the United States. The peculiarity of India as a jurisdiction with regard to interpretation and application of public policy exception in context of foreign arbitral awards is well known. The inconsistent and erratic approach followed by the Indian national courts

has often put India on the wrong side of the road. The developments of the past few decades, particularly owing to the radical interpretation of public policy by the Indian courts, have put it in the list of countries that are perceived as not so arbitration friendly.

Given the significance of India in terms of its growing economic prowess and its position in international trade and commerce, it is only a reasonable expectation that India joins the mainstream as far as creating an arbitration friendly environment is concerned. For this reason, it is extremely important for India to make a departure from its existing approach on interpretation of public policy and adopt a more desirable pro-enforcement approach. And for doing that, the first step is to identify the shortcomings that have been keeping it away from being part of the mainstream, which then is to be followed by looking at the international best practices on the issues of concern. And that is where jurisdictions like England, Singapore, and the United States come in.

Choice of these three jurisdictions is not made to give an impression that only they represent international best practices and are home to arbitration friendly courts. The choice has been made meticulously by keeping in mind some significant considerations. First, of course, being the track record of these jurisdictions as far as arbitration friendly interpretation and application of public policy exception is concerned, which is reflected from the rich judicial discourse easily available.

England is known for being a significant contributor as far as evolution and development of the law on international commercial arbitration is concerned.[23] Not to mention, owing to its importance in the global trade and commerce, it also happens to be one of the most popular destination for conducting arbitrations as well as for getting

[23] Julian Lew and Melissa Holm, 'Development of the Arbitration System in England' in, Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International, 2013) 1.

arbitral awards enforced.[24] Similarly, the United States holds the distinction of following a pro-enforcement policy – in line with the aims and objectives of the New York Convention.[25] Singapore, as well, in the recent past has turned out to be one of the most popular arbitration destinations in Asia.[26] And the judiciary of Singapore has played a major role in the success story; especially in terms of making it an arbitration friendly jurisdiction as far as enforcement of international arbitral awards is concerned.[27] It is, and rightly so, seen as an inspiration in the region as far as development of law and practice on international commercial arbitration is concerned.

The other important factor taken into account while deciding the jurisdictions was the commonality of the legal systems of the chosen jurisdictions, as all four jurisdictions belong to the common law family. Commonality of language, i.e. English, was also to a great extent an important consideration for the author. And last but not the least, the strong trade relations of India with the chosen jurisdictions also factored in.

Keeping in mind the aforementioned considerations, the thesis provides a

[24] Craig Tevendale and Andrew Cannon, 'Enforcement of Awards' in Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International, 2013) 563.

[25] Mélida Hodgson and Anna Toubiana, 'IBA Public Policy Project – Country Report, USA; in, *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (31 March 2015) 1.

[26] Mangan, Reed, and Choong, *A Guide to the SIAC Arbitration Rules* (OUP 2014) 1. See Queen Mary University of London and School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) 9.
<http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>

[27] Warren B. Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9 Singapore Year Book of International Law 260; Mangan, Reed, and Choong, *A Guide to the SIAC Arbitration Rules* (OUP 2014) 2; Chan Leng Sun, 'Making Arbitration Work in Singapore' in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing 2018) 147

comprehensive study on the role of public policy in international commercial arbitration; and with special focus on the four jurisdictions in the later part, it critically analysis the Indian position on the issues in concern, followed by comparing it with the international best practices adopted by the England, Singapore, and the U.S. – for the purpose of recommending a way forward.

Thesis Structure

Chapter 1 investigates into the very origin of the concept of public policy, as understood in the greater scheme of private international law and thereby reflected in international commercial arbitration. It begins by outlining the genesis and the evolution of the doctrine of public policy that the major legal systems have witnessed over the years. Its interaction with the other significant principle of private international law, the doctrine of international comity, is probed in order to appreciate how these two principles form the very edifice of private international law.

The reason behind delving into the role and position of the concept of public policy in private international law is that it has a significant influence over the manner in which international commercial arbitration regime responds to the doctrine. The nuances attributed to the concept of public policy that leave their impact on various stages of dispute settlement under the conventional litigation are more or less mirrored in international commercial arbitration as well. This chapter, therefore, creates a background for the ensuing discussions in the thesis.

Chapter 2 begins with focusing on the complex role that the concept of public policy plays in the pre-enforcement stages of international commercial arbitration. Given the fact that public policy can influence every stage of international commercial arbitration; this chapter investigates into the possible scenarios where the

public policy doctrine can affect the essential features of international commercial arbitration, like the party autonomy or the substantial discretion that the arbitral tribunals enjoy in various regards. The possible interventions and sway of the national courts, armored with the doctrine public policy, in the pre-enforcement stages of international commercial arbitration is explored.

Special attention is given to the role public policy gets to play during the annulment proceedings. Relevant illustrations from across the jurisdictions help in understanding the concerns and the manner in which various national courts approach the relevant issues. The overall idea behind the discussions in this chapter being not to just investigate the role of public policy during the pre-enforcement stages in isolation and suggest possible ways to overcome the highlighted challenges, but also to underline the significant impact the engagements can leave on the enforcement stage.

Enforcement of an arbitral award is what takes arbitration proceedings and its outcome to the desired and logical conclusion. Though finality of arbitral awards is what makes international commercial arbitration a favorite dispute resolution mechanism, public policy considerations of the enforcing State can actually nullify the entire exercise that parties and arbitral tribunal may have undergone to arrive at an award. **Chapter 3** provides a detailed analysis on the role of public policy as an exception to the enforcement of foreign arbitral awards. Since the scope of the thesis is limited to New York Convention awards only, the chapter decrypts the understanding of public policy as envisaged under the relevant international instruments like New York Convention, itself, and the Model Law, by analyzing the *travaux preparatoires*.

It delves into the nuances associated with public policy exception by exploring the classifications and the levels of public policy exception in international

commercial arbitration. The chapter also investigates into the popular apprehensions and the controversies attributed the public policy exception in context of enforcement of foreign arbitral awards and finds its way to suggest the pragmatic approach to deal with the issues.

Chapter 4 probes the response of India to the concept of public policy in context of international commercial arbitration, with special attention to the enforcement of foreign arbitral awards. The chapter explores the erratic manner in which the national courts of India, especially the Supreme Court of India, have interpreted and applied the public policy exception. By analyzing the relevant landmark decisions emerging from the national courts of India, the chapter highlights the inconsistency with which the courts have treated various issues attributed the public policy.

The phases of departure from the envisioned understanding of the concept of public policy in context of international commercial arbitration coupled with the tendency of unbridled judicial intervention are discussed in detail. The chapter also features the recent developments, including the amendments in the national arbitration law, which have been projected as a welcome change. The effectiveness of these recent developments *vis a vis* the specific concerns attributed to India as a jurisdiction is evaluated.

Chapter 5 looks into the position and practice, with respect to interpretation and application of public policy exception, in England, Singapore, and the United States. By analyzing the landmark decisions emerging in the given jurisdictions on the issue in concern, the chapter highlights the manner in which the national courts have by and large consistently favored a pro-enforcement interpretation of public policy exception – thereby giving impetus to the arbitration friendly environment in their

respective countries. For the purpose of bringing out clarity on responding to the crucial issues and apprehensions that are attributed to the application of public policy exception, a thematic analysis of interpretation of public policy exception in the given jurisdictions is provided. The underlying idea being to present the diverging approaches, i.e. the international best practices on dealing with the relevant issues as reflected by the judicial discourse in England, Singapore, and the U.S on one side and the erratic and interventionist approach displayed by Indian judicial discourse on the other side. With ultimate motive, of course, being to draw lessons for India, to not only point out its shortcomings but also suggest the way forward

"Instead of sprawling in vaporous fashion across the legal atmosphere like a genie of the Arabian Nights, it is shrinking to certain departments of the law; but no one has yet thought of imprisoning it in the jar, and indeed no one has ever been able to do that."[28]

[28] Percy H. Winfield on the concept of public policy in law. See Percy Winfield, 'Public Policy in the English Common Law' (November 1928) 42(1) Harvard Law Review 84

1. THE CONCEPT OF PUBLIC POLICY: AN OVERVIEW

Introduction

In order to truly appreciate the role and effect of the doctrine of public policy in context of international commercial arbitration, it is essential to begin by tracing the origin of the concept of public policy in law. Outlining the genesis and the evolution of the doctrine of public policy will not only help in understanding the jurisprudential development of the concept over the years - across the major legal systems, it will also help in appreciating the nuances that are attributed to it as of today.

It is no secret that the doctrine of public policy, as we understand it under the realm of cross-border dispute settlement, has its roots in private international law. Along with the doctrine of international comity, it is one the founding pillars of the private international law regime. The doctrine of public policy plays a vital role in 'demarcating the limits of principles of tolerance' that the domestic legal system of the forum State can show towards the foreign legal system, be it in terms of the application of foreign law or enforcement of an agreement or a foreign judgment.[29] National court of a State, at times, can be presented with a situation where it has to take a call on safeguarding its fundamental interests by having to disregard the applicable foreign law or refusing enforcement of a foreign judgment.[30] Loosely put, there can be circumstances where the options left on the table for the national courts

[29] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August 2008) 4(2) Journal of Private International Law 235.

[30] Peter Hay, 'The Development of Public Policy Barrier to Judgments Recognition in European Community' in H. Bonne and M. Khachidze (eds), *Selected Essays on Comparative Law and Conflict of Laws*, (C.H. Beck 2015) 887; Ivana Kundu, *Internationally Mandatory rules of a Third Country in European Contract Conflict of Laws – The Roman Convention and the Proposed Rome I Regulation* (Rijeka 2007) 298.

are to choose between deference towards a foreign law or a foreign judgment on the one hand, and protection of the forum State's fundamental interests on the other hand.

As a matter of practice, courts are under an obligation to ensure that if the application of a choice of law clause or if giving effect to a foreign judgment would produce a result that would go contrary to the fundamental interests of the forum State, in such circumstances deference to such choice of law or judgment should be denied.[31] The tool that the national courts resort to in such testing situations, to keep at bay the foreign law or foreign judgment that could harm the fundamental interests of the forum State, is the provision of public policy exception. However, this exception comes with its own perils, biggest being its vagueness and ambiguous nature. Also, its application largely depends upon the discretion that national courts command in this regard.

Judicial discretion in its interpretation, feeds it with enormous potential, to create situations where this doctrine can embrace such multitude of domestic rules for easy application of the forum law that the entire underlying principle of private international law can be defeated.[32] Therefore, if used disproportionately by national courts, it has the potential of severely deterring cross-border commerce and other related interactions.[33] As Herbert Goodrich puts in his seminal work on public policy, it is 'an elastic kind of a grab bag from which one can take out anything which he chooses to put in'.[34] It is because of this element of conceptual ambiguity and judicial

[31] Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005) 398.

[32] North and Fawcett (eds), *Cheshire and North's Private International Law* (12th edn, Butterworths 1992) 113.

[33] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcements of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 708.

[34] Herbert Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) 36 West Virginia Law Quarterly 170.

unpredictability, tracing the evolution of the concept of public policy becomes more important and relevant to bring clarity from the functional point of view.

With this understanding in the background, this chapter will revisit the concept of public policy in private international law with an aim to trace its origin and subsequent evolution – both under the common law system and the civil law regime. The idea is to delve upon the issues and concerns that have been or are attributed to the doctrine of public policy in the private international law regime, as those have a significant influence on how the concept is placed and used in the world of international commercial arbitration. It does, therefore, become imperative to understand and appreciate the nuances associated with the concept of public policy in terms of its application and effect in case of private international law. The focus will, of course, remain on the two crucial areas; i.e. the choice of law and the enforcement of foreign judgments – as there is a stark similarity with the issues affecting choice of applicable law and enforcement of foreign arbitral awards in international commercial arbitration.

Also, a detailed analysis of the reasons behind application of the concept in private international law, as provided in the chapter, will bring to fore the often-contentious issue of varying standards of public policy resorted to by the national courts. The rationale behind distinguishing '*ordre public interne'* from '*ordre public externe',* as practiced in various jurisdictions, will also be briefly discussed. This will help in further understanding the purpose behind the different yardsticks that the national courts keep in mind while dealing with matters that are purely domestic in nature, in contrast with those that involve international element(s). The questions that are raised and examined in this chapter will lay a foundation for the analysis and

exploration of the relevant queries *vis-a-vis* the concept of public policy in context of international commercial arbitration, as offered in the subsequent chapters.

1.1 Evolution of the Doctrine of Public Policy

As a matter of fact, there is no specific reference that can be pinpointed in order to indicate the origin of the doctrine of public policy. While the use of the concept of public policy in context of contracts can be traced back to the fifteenth century, its application in private international law in common law jurisdictions became ubiquitous in the eighteenth century, and in case of continental jurisdictions it gained prominence in the middle of the nineteenth century.[35] P.H. Winfield argues that in the early stages, the courts might have resorted to 'unconscious' or 'half-conscious' application of public policy to solve legal problems under English common law by applying the principle of equity.[36] But as far as the more 'conscious side' of public policy is concerned, he gives credit to the writings of Henry of Bratton (Bracton)[37] where reference has been made to 'stipulations for impossible things, … or of a thing sacred or public which is not subject to private ownership.[38] Though the writings do not reflect the exact concept of public policy, as it is perceived today, they do however present various shades of it.

[35] Arthur Nussbaum, 'Public Policy and the Political Crisis in the Conflict of Laws' in *Selected Readings on Conflict of Laws – Association of American Law Schools,* (West Publishing Co., 1956) 221; Michael Shatten, 'The Determination of Public Policy' (November, 1965) 51 ABA Journal 1048.

[36] Percy H. Winfield, 'Public Policy in the English Common Law' (November 1928) 42(1) Harvard Law Review 77.

[37] George Woodbine (ed.), *Bracton, De Legibus Et Consuetdinibus Anglaie* (Yale University Press, 1922).

[38] Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard Law Review 80.

On the other hand, W.S.M. Knight while tracing the history of doctrine of public policy in English Law suggests that it appeared in its most general form, somewhere in the fifteenth century, in *Dyer's Case*[39], in the form of a maxim '*encounter common ley*', which meant prejudicial to the community or the commonwealth.[40] The case involved an agreement where John Dyer had promised not to engage in the trade in a specified area for a period of six months - without getting anything in return from the plaintiff, failing which the plaintiff had an option of forfeiting Dyer's deposits. Deciding on the application moved by the plaintiff to enforce the restraint, the court held that the arrangement was void as it was '*encounter common ley'*.

A relatively clearer facet of public policy was later seen in, what Lord Edward Coke noted in his 'Commentary Upon Littleton', as, '*nihil quod inconveniens est lictitum*', i.e. nothing inconvenient is lawful - something that even Winfield refers to in his work.[41] The idea behind this maxim was to send across a message that while deciding over a dispute, the courts should take into account the fact that inconvenience caused to public at large deserves more attention than the harm caused to one. Therefore it was suggested that law would 'prefer public good to private good', and if mischief to one can avoid prejudice to many, so be it.[42] The same maxim

[39] [1414] 2 Yearbook Hen. V, fol. 5, pl.26.

[40] W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 207; Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcements of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 691.

[41] W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 207; Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard law Review 80; Thomas Coventry, *A Readable Edition of Coke upon Littleton* (Littlewood & Co., 1830).

[42] Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard Law Review 82.

later found place into a more concrete form in the landmark *Egerton v. Brownlow*[43] case of mid nineteenth century, where Lord Chief Baron Pollock based his opinion on the principle reflecting doctrine of public policy.

But before the groundbreaking *Egerton* judgment, as mentioned by W.S.M. Knight as well, there were some other significant decisions in the eighteenth and the early nineteenth century, which lay emphasis on the underlying principle of public policy exception and contributed in the development of the concept of public policy in law. One of the initial cases that touched upon the issue of public policy was *Mitchel v. Reynolds.*[44] The defendant had entered into a lease agreement with the plaintiff. It was agreed upon by the parties that the defendant would not engage into the trade of baking for a period of five years within the specified area, for the purpose of avoiding competition. It was also agreed upon that in case of violation of the conditions by the defendant, he would pay a bond of fifty pounds to the plaintiff. Upon violation of the agreement, the plaintiff moved an application before the court for enforcement of the agreement. The defended challenged the claim arguing its unlawfulness as it restrained him from engaging into the trade. Lord Macclesfield held that the restraint of trade was reasonable in this case as it was ancillary to a legal transaction. However, it was also clarified that in absence of a reasonable justification, such a restraint of trade would be bad in law and against the public policy.

Another significant case in this regard is *Holman v. Johnson.*[45] The Plaintiff had sold and delivered goods (in this case tea) to the defendant. The Plaintiff was aware of the fact that the defendant intended to smuggle the goods into England. Upon non-payment of the value of the goods, the plaintiff brought action against the defendant.

[43] *Egerton v Brownlow* [1853] IV H.L. 10 Eng. Rep. 359.

[44] *Mitchel v Reynolds* [1711] QB, 24 ER 347.

[45] *Holman v Johnson* [1775] 98 ER 1120 (1 Cowp. 341).

The defendant argued that since the plaintiff was aware of the illicit intentions of the defendants, the sale was bad in law – therefore law did not support plaintiff's claim. Though Lord Mansfield held in favor of the Plaintiff, he made an observation that, 'the principle of public policy is *ex dolo malo non oritur action.* No court will lend its aid to a man who found his cause upon an immoral or an illegal act'.[46] The impression given was that had the plaintiff been in agreement with the defendant to smuggle the goods, then he could have been held as an offender for engaging in illegal or immoral acts – and in that case law would not have assisted him. It is of interest to note here that it was in this decision that the phrase 'public policy' was used for the first time.[47]

Similarly, in *Fletcher v. Sondes*[48] the court held that 'doctrine cannot be law which injured the rights of individuals, and will be productive of evil to the church and to the community'.[49] In all these decisions, one can observe that the courts have made an implicit reference that morality and larger public interest is accorded precedence over individual rights that are created or vested in contravention to the former. And it is this underlying principle that was slowly and gradually laying the foundations of the concept of public policy.

Over the years, in the seventeenth and the eighteenth century, public policy exception started penetrating in variety of cases, concerning issues like marriage contracts, sale of offices, restraint of trade, succession, wagers, and others.[50] As Winfield aptly puts it, public policy ended up making 'some very incongruous

[46] ibid [343]; W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 209.

[47] Michael Shatten, 'The Determination of Public Policy' (November, 1965) 51 ABA Journal 1049.

[48] *Fletcher v Sondes* (1826) 3 Bing. 590.

[49] W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 209.

[50] Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard Law Review 85.

bedfellows'.[51] As an obvious consequence the opinions on the interpretation of the doctrine by different judges differed. And it was actually during this period of prevailing confusion that Justice Burrough[52] had come up with his famous quip of 'unruly horse' with reference to public policy, observing that 'once you get astride it you never know where it will carry you' - something that reverberates even today when public policy is mentioned.

The ambiguity attributed the concept was one of the major reasons that ignited another debate in the legal fraternity - whether it should be the judges deciding on issues of public policy or the matter should be left to the legislature?[53] The debate on whether judiciary should have the authority to decide on what constitutes public policy under the English law, was more or less settled in *Egerton v. Brownlow*.[54] The issue under consideration was whether the terms of the trust offended public policy. A beneficiary of the will, Lord Alford, got inheritance on the condition that if he died without acquiring the title of Duke or Marquis of Bridgewater, the gift will be void and cease to exist. The condition was held to be against public policy and it was declared that the legal heirs of Lord Alford could inherit the estate.

One of the moot questions that was under consideration and deliberated upon was whether public policy should be restricted to aims and objectives of the statutes in place, or it should go beyond and aim for larger public welfare. Lord Chief Baron Pollok made a strong argument where he defended the authority of a judge to decide

[51] ibid 86.

[52] *Richardson v Mellish* [1824] 2 Bing. 229, 252.

[53] W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 209; Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard law Review 87. See Alex Mills, 'The Dimensions of Public Policy in Private International Law' (2008) 4(2) Journal of Private International Law 206.

[54] [1853] IV H.L. 10 Eng. Rep. 359.

on what should be considered as to be in public interest and for public welfare. In his words, he stated:

> 'My Lords, after all these authorities, am I not justified in saying that, were I to disregard the public welfare from my consideration, I should abdicate the functions of my office – I should shrink from the discharge of my duty? I think I am not permitted merely to follow the particular decisions of those who have had the courage to decide before me, but in a new and unprecedented case to be afraid of imitating their example. I think I am bound to look for the principles of former decisions, and not to shrink from applying them with firmness and caution to any new and extraordinary case that may arise'.[55]

Lord Pollock further went on to make a case in support of judges in context of deciding on the issues of public policy, by observing:

'My Lords, it may be that Judges are no better able to discern what is for the public good than other experienced and enlightened members of the community; but that is no reason for their refusing to entertain the question, and declining to decide upon it. Is it, or is it not, a part of our common law, that in a new and unprecedented case, where the mere caprice of a testator is to be weighed against the public good, the public good should prevail? In my judgment, it is'.[56]

[55] ibid 419.

[56] ibid.

On the concerns raised with regard to the uncertainty and vagueness of the principle of public policy, Lord Truro in his part of the judgment decried the apprehensions by observing:

> 'There is no uncertainty in the rule that the law will not uphold dispositions of property and contracts which have a tendency prejudicial to the public good; there, no doubt, will be occasionally difficulty in deciding whether a particular case is liable to the application of the principle; but there is the same difficulty in regard to the application of many other rules and principles admitted to be established law. The principle itself seems to me to be necessarily incident to every state governed by law'.[57]

Though there was significant number of judges who held a contrary opinion on the issue in the case at hand, it was finally agreed upon that judges should have the liberty to decide upon the question of validity of a contract or otherwise when the issue of public policy is raised. And this continues to be the prevailing opinion on the issue across the jurisdictions.

1.1.1 Further Development of the Concept under the Common Law System

In common law jurisdictions, the doctrine of public policy has come a long way by being a tool of judicial law making. In Anglo-American legal system, for example, the application of doctrine of public policy is mostly restricted to its negative function where it serves as a 'safety valve' to prevent application of foreign law or enforcement of foreign judgment - which otherwise would harm the fundamental

[57] ibid 437.

interests of the forum State, if enforced.[58] Oliver Holmes, a prominent American jurist, in his works advocated that judges should not act as mere mouthpiece of law, instead should be more vocal and take into account what is appropriate for the public at large, while deciding cases.[59] The argument is very much in line with the foundations laid in the *Egerton* decision, which supports active role of judges in deciding matters that concern public policy – by giving them ample space to determine what would constitute public policy under the given circumstances.

Similarly, Joseph Story, another eminent American scholar, also voiced in his writings the significance of the concept of public policy. His arguments, highlighting importance of the public policy exception, emphasized upon the need to maintain a balance between national sovereignty on the one hand and on the other hand the need and significance of the operation of comity.[60] Reiterating the need of public policy exception within the ambit of private international law, he stated that, 'no nation can be justly required to yield up its own fundamental policy and institutions, in favor of those of another nation'.[61] While describing the nature of the doctrine of public policy, he called it a tool of 'self-defense', as it protects the forum State from

[58] Ernest G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1923-1924) 33 Yale Law Journal 747.

[59] Oliver W. Holmes, *The Common Law* (Mark DeWolfe Howe edn. 1963) 32; Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcements of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 685.

[60] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 601; Joseph Story, *Commentaries on Conflict of Laws, Foreign and Domestic – Contracts, Rights and Remedies – Marriages, Divorces, Wills, Succession, and Judgments* (8th edn, 1883); Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 33.

[61] Joseph Story, *Commentaries on Conflict of Laws, Foreign and Domestic – Contracts, Rights and Remedies – Marriages, Divorces, Wills, Succession, and Judgments*, (8th edn, 1883) 25. See Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 33.

recognizing those foreign laws that can prejudice the rights of the State or its subjects, by annihilating the State's sovereignty.[62]

Though approaches have changed to interpret the doctrine of public policy - back and forth, one thing has remained constant, and that is its uncertainty. As Winfield fittingly puts it in his work, that for "some judges it has appeared as a 'tiger', so they have refused to mount it at all; and some have regarded it as a 'Balaam's ass' which takes its rider to nowhere, but no one has looked upon it as a 'Pegasus' that could take measure beyond the momentary needs of community".[63] This is a true reflection of how the doctrine has evolved in the common law jurisdictions, over the years. Notwithstanding the variations in approaches through which it has been handled and interpreted – across time and space, it continues to remain a potent tool in the hands of judges that, more often than not, has been put to use in order to protect the larger public interest.

1.1.2. Development of Public Policy under the Civil Law System

If one looks at the civil law jurisdictions, the concept of public policy popularly exists under a different nomenclature and has its roots in statutes.[64] '*Ordre public*', as it is called in most of the continental jurisdictions, finds a mention in the relevant legislations of civil law countries. One of the earliest and the finest example is the

[62] Joseph Story, *Commentaries on Conflict of Laws, Foreign and Domestic – Contracts, Rights and Remedies – Marriages, Divorces, Wills, Succession, and Judgments*, (8th edn., 1883) 32; see also, Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co., 1981) 34.

[63] Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard law Review 91.

[64] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 591; Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 39.

French Civil Code of 1804. Article 6 of the Code, translated in English, reads; 'Private agreements must not contravene the laws which concern public order and good morals'.[65] Though it is also argued that at the time when it was codified in the French law, private international law was in its infancy, so the concept of *ordre public externe* or *ordre public international* that we come across today is by and large a product of judicial interpretations.[66] In fact, Charles Brocher, a Swiss legal scholar, is credited with introducing the expressions '*ordre public interne*' and '*ordre public international*', where the former was to be applied in purely domestic matters and the latter was applicable in matters dealing with private international law.[67]

If we look at the scholarship, Friedrich Savigny, one of the leading legal philosophers on the continental side argued in his treatise that if a foreign law has the potential of violating the 'basic tendencies of the law' of the forum State, in such a case the recognition can be refused.[68] The rationale and the underpinnings that uphold the existence and significance of the concept of *ordre public* in civil law system are no different from those in the common law regime.

A deeper analysis of the concepts of *ordre public* and public policy might suggest some differences between the two concepts, but as far as actual practice is

[65] Bar of the Inner Temple, *Translation of the Code Napoleon or The French Civil Code, 1804* (William Benning 1827).

[66] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 596; J. Kosters, 'Public Policy in Private International Law' (May, 1920) 29(7), The Yale law Journal 747. See Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 40.

[67] Charles Brocher, *Nouveau Traité de Droit International Privé Au Double Point De Vue De La Theore Et De La Pratique* (E. Thorin, Paris 1876) 367; Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 40. See Gerhart Husserl, 'Public Policy and Ordre Public' (Nov., 1938) 25(1) Virginia Law Review 38.

[68] Arthur K. Kuhn, *Comparative Commentaries on Private International Law or Conflict of Laws* (Fred B. Rothman & Co. 1981) 40; F.C. Von Savigny, *A Treatise on the Conflict of Laws and the Limits of their Operation in respect of Place and Time* (T&T. Clark Law Pub. 1869).

concerned the two serve considerably similar purpose in the civil and common law systems, respectively.[69] It is also argued that in the area of international contracts, the differences in the understanding and application of the concept of public policy between the civil or the common law systems are negligible – hence irrelevant.[70] Also, the driving force behind the evolution and development of '*ordre public'* has been no different from that of 'public policy', as it lies on the idea of safeguarding the forum State from potential harm that may be caused by application of foreign laws or enforcement of foreign judgments - that are against its fundamental values.[71]

1.2 Functions of Public Policy Exception

The core function of public policy exception, be it in common law jurisdictions or under the civil law system, remains to intervene and check whether an applicable rule of law or a right created, if brought into effect, would derogate from the then existing fundamental notions of justice of the forum's legal system. In case such a situation arises, the national courts may apply this doctrine to avoid giving effect to any such rule of law or judgment creating those rights. In other words, a national court invokes public policy doctrine when it concludes that the 'conceptions of justice are

[69] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3); Georgia International & Comparative Law 591; Adeline Chong, 'The Public Policy and Mandatory Rules of Third Contract in International Contracts' (April, 2006) 2(1) Journal of Private International Law 29; Gerhart Husserl, 'Public Policy and Ordre Public' (Nov., 1938) 25(1) Virginia Law Review 40.

[70] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Contract in International Contracts' (April, 2006) 2(1) Journal of Private International Law 29-30.

[71] M. Forde, 'The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions (April, 1980) 29 Int'al & Comp. Law Quart. 259; Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 596.

disregarded', the 'conceptions of morality of the forum are infringed', or the transactions 'prejudice the interest of the forum state'.[72]

The functional importance of the concept of public policy, particularly in context of private international law, was aptly emphasized by Sir Hersch Lauterpacht in *Guardianship case*[73], where he referred to this doctrine as general principle of international law.[74] He opined that in the sphere of private international law, the function of the exception of public policy or *ordre public* to set-aside foreign law or judgment in a given case is universally accepted, therefore making it fit to be recognized as a 'general principle of law in the field of private international law'.[75] The manner, in which the concept of public policy has evolved and shaped itself into an indispensable tool resorted to by courts across the jurisdictions, is enough evidence to support Sir Lauterpacht's proposition.

It needs to be appreciated that the function of public policy exception, as understood by some, is not merely to be a tool for interpretation of statutes, but more

[72] North and Fawcett (eds), *Cheshire and North's Private International Law*, (12thedn, Butterworths 1992) 131.

[73] *Netherland v Sweden* [1902] ICJ Rep. 55, 92

[74] L.R. Kiestra, *The impact of the European Convention of Human Rights on Private International Law* (Springer, 2014) 21.

[75] *Netherland v Sweden* [1902] ICJ Rep. 55, Sir Lauterpacht's separate opinion, at Page 92:

> '…in the sphere of private international law the exception of ordre public, of public policy, as a reason for the exclusion of foreign law in a particular case is generally-or, rather, universally -recognized. It is recognized in various forms, with various degrees of emphasis, and, occasionally, with substantial differences in the manner of its application. Thus, in some matters, such as recognition of title to property acquired abroad, the courts of some countries are more reluctant than others to permit their conception of *ordre public* - their public policy - to interfere with title thus created. However, restraint in some directions is often offset by procedural or substantive rules in other spheres. On the whole, the result is the same in most countries-so much so that the recognition of the part of *ordre public* must be regarded as a general principle of law in the field of private international law. If that is so, then it may not improperly be considered to be a general principle of law in the sense of Article 38 of the Statute of the Court'.

importantly to serve the underlying principle of every State legal system that believes in *salus populi suprema lex*, i.e. the welfare of people should be the supreme law.[76] Application of choice of law rules, or for that matter, giving deference to foreign courts by recognition of foreign judgments also constitutes public policy. So whenever a court gets inclined towards invoking the public policy exception, it must weigh the discretionary exception against the public policy of applying foreign law or recognizing foreign judgment.[77] As a matter of fact, it is this evaluation of the competing public policies, when misjudged, that gives rise to all the apprehensions and concerns attributed to the application of the public policy exception.

1.2.1 Application and Related Concerns

Though the application of doctrine of public policy in relevant matters is fairly well established and not a thing of recent past, even then when it comes to actual practice there can be myriad of complications clouding it that the courts or parties might end up facing. One of the biggest issues concerning the application of the doctrine of public policy by courts is that, by its very nature, interpretation of public policy depends solely on judicial discretion.[78] This is problematic because owing to the judicial discretion, the interpretation of public policy varies not only in different jurisdictions, but at times, also within the same jurisdiction. Therefore, leaving enough space for judicial inconsistency and unpredictability.

Some of the scholarship, while critiquing the doctrine of public policy and its application, has argued that, more often than not, public policy is applied without any

[76] W.S.M. Knight, 'Public Policy in English Law' (April, 1922) 38 The Law Quarterly Review 219.

[77] ibid 206.

[78] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) 4(2) Journal of Private International Law 234.

serious legal thinking or intellectual exertion.[79] It won't be an exaggeration to argue that public policy exception, despite several attempts being made to bring more clarity on the concept, has suffered and continues to suffer from profound vagueness. And one of the prime most reasons for this vagueness has been that the 'courts have failed to distinguish between legislative policies reflected in the enactment of particular statutes and fundamental societal policies'.[80]

Discovering what is public policy at a given point of time has come across as the greatest challenge faced by judges in this context.[81] Enormous discretion that courts enjoy while interpreting public policy is often seen as a matter of concern as it increases the vulnerability and exposes decisions to heightened subjectivity. This heightened discretion is also described as a trump card in the hands of the judges, which has the capability of 'freezing contracts, foreign judgments, or arbitral awards'.[82] From the private international law point of view, the misapplication of the public policy doctrine is also seen as a potential threat to its fundamental concepts like international comity.[83] There has always been this apprehension that if the doctrine is misused or abused, it can result in situations where a legitimate claim of a claimant can be denied even if the forum State has nothing substantial to gain from

[79] Holly Sprague, 'Choice of Law: A Fond Farewell to Comity and Public Policy' (July, 1986) 74(4) California Law Review 1447; Monard Paulsen and Michael Sovern, 'Public Policy in the Conflict of Laws' (1956) 6 Columbia Law Review 1016.

[80] Holly Sprague, 'Choice of Law: A Fond Farewell to Comity and Public Policy' (July, 1986) 74(4) California Law Review 1450.

[81] Percy H. Winfield, 'Public Policy in the English Common Law' (November, 1928) 42(1) Harvard law Review 97.

[82] Farshad Ghodoosi, 'The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcements of Private Legal Arrangements' (2016) 94(3) Nebraska Law Review 700.

[83] Monard G. Paulsen and Michael I. Sovern, 'Public Policy in the Conflict of Laws' (1956) 6 Columbia Law Review 971.

such a denial.[84] Interpretation of the doctrine by national courts, based on parochial interests, has for long worried the relevant stakeholders.

Having said that, it is pertinent to mention here that the concerns raised - though valid - are not essentially a representation of the general trend when it comes to practice. Courts, more often than not, have been wary of these trepidations and have as a general policy endeavored to overcome the concerns.

1.2.2 Effect of Public Policy Exception

The effect of public policy exception is by and large 'negative' in character, as it works as a 'shield' to avoid undesirable results in the forum State.[85] More often than not, it is invoked only to refuse giving effect to a foreign applicable law or a foreign judgment. However, courts may also resort to public policy in order ensure that the more appropriate and acceptable law in the given circumstances is applied.[86] This is where public policy may appear to have a 'positive' character as well. For example, as mostly observed in civil law jurisdictions, the public policy exception can also play a positive role where courts may implement forum State's own mandatory laws or rules in a case where an objection is made against the otherwise applicable foreign law.[87]

[84] ibid.

[85] Burkhard Hess and Thomas Pfeiffer, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law - Study conducted by Directorate General for Internal Policies* (European Parliament 2011) 28.

[86] Joost Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) Netherlands International Law Review 376.

[87] Burkhard Hess and Thomas Pfeiffer, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law' - Study conducted by Directorate General for Internal Policies* (European Parliament 2011) 28.

Mandatory laws may be applied when there is an exception made to the substantive foreign laws, for example, where the substantive rules like rules on damages are considered to be in contradiction with the fundamental values of the forum State. This analogy, however, may not hold true in case of procedural irregularities, for example, in case of procedures on trial. There is an understanding in private international law that procedural irregularities can be remedied only in the forum of origin.[88] The relationship between the concept of public policy and the application of mandatory rules is discussed in more details in the next chapter – in context of international commercial arbitration.

1.3 Public Policy and Private International Law

With the noticeable increase in the transnational interactions, be it commercial or otherwise, nation-states acknowledged the significance of accommodating foreigners for ensuring more peaceful and just relations.[89] The complexities in settling disputes where interests of more than one State were involved demanded for a new legal regime altogether. With the result, private international law as a branch of law emerged as an answer to the difficulties that the stakeholders of cross-border transactions were confronting with.

Private international law, as a legal regime, helps in finding solutions and dealing with the situations where the facts, events or transactions involved in the case at hand have a foreign element involved, which necessitates recourse to a foreign

[88] ibid 14.

[89] Holly Sprague, 'Choice of Law: A Fond Farewell to Comity and Public Policy' (July, 1986) 74(4) California Law Review 1448.

legal system.[90] Private international law, in such circumstances, assists the national courts to answer the relevant questions and reach just solutions. One of the prime most reasons for States to have rules on private international law is to cater to the legitimate expectations of the parties involved in the dispute.[91] The idea remains to achieve a harmonious and reliable dispute settlement mechanism in matters concerning cross-border transactions.

Conflict of laws or Private International Law as a system infuses in nations, respect and tolerance for the foreign laws and foreign judgments - through the concept of international comity, yet at the same time ensures that sovereignty of the nations does not get compromised in the process - by empowering national courts with the tool of public policy exception. The principle of comity and the doctrine of public policy, though on the face of it serve opposite purposes, they mark the two most significant pillars of the private international law system. The significance of the two doctrines, and the possibilities of both being at logger-heads against each other to serve the larger purpose of private international law have been well discussed and debated in various scholarly writings.[92] And most of the scholarship agrees on the need of adopting and maintaining a balanced approach for the success of private international law regime.

It is not disputed that every Member State of the international community is well within its competence to decide the sphere of private international law for

[90] North and Fawcett (eds), *Cheshire and North's Private International Law* (12th edn, Butterworths 1992) 4.

[91] L.R. Kiestra, *The impact of the European Convention of Human Rights on Private International Law* (Springer 2014) 16.

[92] Herbert Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) 36 West Virginia Law Quarterly 156; J. Story, *Commentaries on Conflict of Laws, Foreign and Domestic* (4th edn, 1852) 33.

itself.[93] And there is no legal obligation upon any State to give precedence to the interests of international community over its own political, social, economic, or any other interests.[94] Public policy exception, which is judicially administered, is basically an exception to the commitments made by a State to give effect to foreign law or judgment in appropriate conditions.[95] And national courts enjoy a significant amount of discretion when it comes to invoking this exception in pursuit of safeguarding the State interests.

It needs to be underlined that every State has its own rules on private international law.[96] However, there can be instances where States are also bound by certain special private international law rules due to the obligations under any multilateral or bilateral treaties concerning private international law.[97] For example, under some European Union legislations, the rules on private international law of Member States are regulated to some extent.[98] But in these legislations public policy exception clauses are also present, which provide the Member States enough space to have a final say in certain aspects concerning private international law.[99]

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[93] J. Kosters, 'Public Policy in Private International Law' (May, 1920) 29(7) The Yale law Journal 745.

[94] Ibid.

[95] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 591.

[96] L.R. Kiestra, *The impact of the European Convention of Human Rights on Private International Law* (Springer 2014) 13.

[97] ibid.

[98] Regulation (EU) No. 1215/2012 of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012); Rome Convention on the Law Applicable to Contractual Obligations (1980).

[99] Art. 45 & 58 of the Regulation (EU) No. 1215/2012 of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012).

'Article 45 (1): 'On the application of any interested party, the recognition of a judgment shall be refused:

It is, however, important to note that the public policy exception is usually invoked by courts of the Member States only in exceptional circumstances where there is a 'manifest' disregard to the fundamental values of the forum State.[100] This exemplifies the importance of maintaining the balance between the doctrines of comity and public policy, as pointed out above.

1.4 Public Policy Exception in Private International Law: In Practice

As discussed earlier, the doctrine of public policy along with the principle of international comity serves as the foundation of private international law regime - having contributed significantly not only in the development but also in sustaining the regime. Though every sovereign State enjoys supremacy within its territory and can choose to refuse application of any foreign law within its jurisdiction, such extreme policy can have serious consequences and can potentially end up isolating the State in the present day structure of modern civilized world.[101]

The public policy exception, no doubt functions as a tool for protecting sovereign interests of the forum State, it nevertheless must not become '*carte blanche*

(a) if such recognition is manifestly contrary to public policy (ordre public) in the Member State addressed…'.

Article 58(1): 'An authentic instrument which is enforceable in the Member State of origin shall be enforceable in the other Member States without any declaration of enforceability being required. Enforcement of the authentic instrument may be refused only if such enforcement is manifestly contrary to public policy (ordre public) in the Member State addressed…'.

[100] Burkhard Hess and Thomas Pfeiffer, *Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law - Study conducted by Directorate General for Internal Policies* (European Parliament 2011) 28.

[101] North and Fawcett (ed), *Cheshire and North's Private International Law*, (12th edn, Butterworths 1992) 4.

for the national courts'.[102] Public policy exception, as reasonably expected, should be invoked within the contours of justified limits; in absence of which its unfettered application can result in unwanted outcomes like cultural imperialism and decline of the mutual respect and tolerance, therefore shaking the very edifice of private international law.[103]

In private international law, the two areas of concern where public policy exception plays a significant role are issues with regard to application of foreign chosen law and the decisions of foreign courts. In case of the former, public policy exception may deny application of a law that otherwise would have applied, and in the later case public policy exception may be invoked to deny the recognition and enforcement of the foreign judgment creating vested rights.[104] In both cases, ordinarily, the litmus test remains whether or not the application of a particular law or enforcement of a foreign judgment would harm the fundamental interests of the forum State.

The choice of law rules, as understood, help in choosing the appropriate governing law in a particular case at hand. If the national court is of the opinion that resorting to a particular foreign law in settling the dispute at hand will harm public welfare of the forum State, it can invoke the public policy exception and refuse application of such foreign law. Similarly, in context of recognition and enforcement

[102] Gralf-Peter Calliess, *Rome Regulations: Commentary on the European Rules of Conflict of Laws*, (Wolters Kluwer 2011) 235; *Netherland v. Sweden* [1902] ICJ Rep. 55, see, Sir Lauterpacht's separate opinion, at Page 90.

'There are, in that wide and highly controversial province of *ordre public*, matters which are the object of uncertainty and occasional exaggerations of national prejudice reluctant to apply foreign law'.

[103] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) 4(2) Journal of Private International Law 236.

[104] Joost Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) Netherlands International Law Review 374.

of foreign judgments, the forum court may look into the fact whether the enforcement of the judgment in the forum State is not in contravention to the public policy of the forum State. If the court comes to a conclusion that the applicable choice of law or the recognition and enforcement of the foreign judgment could be contrary to the public policy of the forum State, it would in all likelihood give priority to its own public policy and refuse to give effect to the foreign law or the foreign judgment.

1.4.1 Public Policy and Choice of Law

When it comes to cross-border commercial transactions, there have been tremendous developments on the legal front to make dispute settlement, in particular, less cumbersome and more harmonious. Greater party autonomy in terms of choice of law or sometimes even the choice of forum has been one of the highlights of the long traversed journey of developments in private international law regime. Though party autonomy in terms of choice of law has been progressively gaining currency, this autonomy, however, does not come without restrictions.[105]

Conflict of laws, at times, inherently gives rise to situations where the forum court prefers the law of the forum to the law that would have otherwise been applicable in the given case. And the principle that the forum courts rely upon, while handling such a situation, is the doctrine of public policy or '*ordre public'*. The idea behind invoking this doctrine is to ensure that the larger public interest of the forum prevails over the so-called 'inconsistent' foreign law.[106] The yardstick used by the

[105] Adeline Chong, 'The Public Policy and Mandatory Riles of Third Contract in International Contracts' (April, 2006) 2(1) Journal of Private International Law 27.

[106] North and Fawcett, *Cheshire and North's Private International Law*, (12th edn, Butterworths 1992) 113.

national courts for the purpose of evaluation in such cases is that of the notion of justice or the fundamental interest of the forum State.

Private international law, by its very nature, is designed to facilitate the harmonious existence of the separate municipal legal systems, which differ in the way they regulate various legal relations.[107] And interactions between subjects of these different municipal systems, more often than not, give rise to occasions where courts under one municipal system have to take into account the laws of the other legal systems. As simple as it may sound in theory, when it comes to practice the mechanism is marred by several complications.

Though there have been continuous efforts to promote more and more harmonization of private international law rules, one of the major complications that parties face is the variation in rules on private international law adopted by various jurisdictions.[108] As a result, national courts on innumerable occasions have been reluctant to replace their rules with the foreign rules that they consider inferior to their own. Sometimes the reluctance is genuine, but at times there is a certain degree of parochialism as well that creeps in and influences national courts to resort to the public policy doctrine in order to restrain the application of a foreign law.[109]

It is argued that a more efficient and desirable outcome can be arrived at if national courts, while determining the appropriate applicable law, resort to 'weighing and evaluating the significance of the public policy considerations'.[110] That would help a great deal in discounting the possibility of arbitrary and parochial approach in

[107] ibid 3.

[108] ibid 9.

[109] Herbert F. Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) Vol. 36 West Virginia Law Quarterly 172.

[110] Holly Sprague, 'Choice of Law: A Fond Farewell to Comity and Public Policy' (July, 1986) 74(4) California Law Review 1464.

context of interpretation and application of the public policy doctrine. As public policy exception is not expected to be invoked just because the applicable foreign law is not similar to the domestic law of the forum, but 'because it is intolerant of the way in which it is different'.[111] There is a need of resorting to a more balanced and nuanced approach that supports more analytical consideration of policy issues by trying to find out the direct relationship between the policy issue and the case at hand, rather than adopting whimsical application of the doctrine.[112]

While deciding on whether a foreign legislation is against the public policy of the forum, courts should rather refrain from jumping the gun, and 'not embark on an independent and unfettered appraisal of what constitutes public policy'.[113] Identifying the specific public policy that would get harmed and drawing a cause and effect relationship between the said public policy and the contested applicable foreign law can be a significant step towards making the application of the doctrine of public policy more transparent and predictable.

1.4.2 Public Policy and Enforcement of Foreign Judgments

One of the most significant objectives that the private international law regime serves is the promotion of international coordination and harmony in context of enforcement of judicial decisions.[114] The soul of private international law in practice rests on the fair idea that once the rights and obligations of the parties involved in a dispute are settled under a particular law, the same should be respected and recognized wherever

[111] ibid 213.

[112] ibid 1476.

[113] Shaheed Fatima, *Using International Law in Domestic Courts* (Hart Publishing 2005) 398.

[114] L.R. Kiestra, *The impact of the European Convention of Human Rights on Private International Law* (Springer, 2014) 16.

an occasion demands, albeit subject to public policy considerations.[115] This, not only, helps in building up the confidence amongst the stakeholders of cross-border commercial transactions, it also ensures that the national court where enforcement is sought can have a say and intervenes as and when it deems fit.

The operation of legal systems is territorially circumscribed; therefore, the driving force behind the recognition of judgments lies in the doctrine of comity.[116] Doctrine of comity is not just based on the idea of courtesy, but also on the element of fear in minds of the judges that if they disregard foreign judgments, then their judgments will also not be recognized or enforced in foreign countries.[117]

Having said that, it is equally important to highlight that the national courts have always retained the authority to function as a 'safety net' while deciding on recognition and enforcement of foreign judgments, which undoubtedly remains an important function in the existing multicultural and globalized world.[118] Whenever national courts have reasons to believe that recognition or enforcement of a foreign judgment would result in a situation that would violate the fundamental notions of morality and justice of the forum, the public policy exception or *ordre public* is invoked to avoid such violations.[119] However, here again, the complications arise when the understanding and approaches of interpretation of the doctrine of public policy by a national court come under clouds.

[115] Herbert F. Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) Vol. 36, West Virginia Law Quarterly 165.

[116] Dicey, Morris, & Collins, *The Conflict of Laws*, (14th edn, Sweet & Maxwell, 2006) 567,568.

[117] ibid 568.

[118] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) 4(2) Journal of Private International Law 202.

[119] L.R. Kiestra, *The impact of the European Convention of Human Rights on Private International Law* (Springer, 2014) 21.

As stated in the foregoing arguments as well, public policy essentially comprises of 'fundamental values' of the forum state – and by this definition itself the doctrine comes across as substantially vague. And this vagueness in its character is something that makes it an issue of concern when it comes to the interpretation and application of the doctrine. In addition to that, one of the major criticisms that the doctrine of public policy has been associated with is the inherent uncertainty that it carries along, both territorially and temporally.[120] Not only does public policy vary from jurisdiction to jurisdiction, it may vary within the same jurisdiction during different time spans.

A balanced and suitable approach for national courts would be to not to perceive recognition of rights created by foreign judgments as an abdication of sovereignty of the forum State, rather as an endorsement of the principle of fairness supported by the State.[121] National courts, in situations that warrant consideration of the public policy exception, should not ignore the public policy of upholding the underlying principles of private international law, which are equally important to the forum State. [122] An equitable and a thoroughly evaluated approach towards interpretation and application of the public policy doctrine, in context of enforcement of foreign judgments, can only be a step towards the pursuit of justice and facilitating the much-needed harmonization in the private international law regime.

[120] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) 4(2) Journal of Private International Law 202.

[121] Herbert F. Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) 36 West Virginia Law Quarterly 172.

[122] Alex Mills, 'The Dimensions of Public Policy in Private International Law' (August, 2008) 4(2) Journal of Private International Law 210.

1.5 The Gordian knot of Varying Standards

There is a well-acknowledged understanding that the doctrine of public policy should be applied, in context of private international law, keeping certain limits in mind. Although, private international law and its application remains a matter of national policy of every sovereign State, the unfettered use of public policy exception can have the potential of swallowing the entire regime of private international law.[123] The doctrine of public policy is inherently and essentially national in character, as its sole purpose is to protect the interests of the forum State.[124] This is the primary reason for the differences that exist in the standards of public policy in terms of what it constitutes and how it is interpreted, across the jurisdictions.

These varying standards, which are to a substantial extent intertwined with the doctrine of public policy, have contributed significantly in retaining, if not further enhancing, the unpredictability and ambiguity attributed to the concept. The apprehensions and practical problems that these varying standards bring along have obviously not gone unnoticed. One of the solutions in context of private international law, that happens to be an outcome of the jurisprudential developments over the years, has been the idea of rendering a different treatment to the matters involving international element(s) - in comparison to the purely domestic matters.

If we look at the actual application of public policy exception, it ordinarily appears in two different facets; one is applicable in the domestic context and the other in international context.[125] Under the civil law system, as mentioned above, the

[123] ibid 205; *Tucker v. R A Hanson Co.* [1992] 956 F 2d, 218.

[124] Tena Hoško, 'Public Policy as an Exception to Free Movement within the Internal Market and the European Judicial Area: A Comparison' (2014) 10 Croatian Yearbook of European Law and Policy 195.

[125] Adeline Chong, 'The Public Policy and Mandatory Riles of Third Contract in International Contracts' (April, 2006) 2(1) Journal of Private International Law 29.

difference is popularly recognized through the phrases '*ordre public interne*' and '*ordre public international*'. In case of the former, the purpose is to restrict freedom of individuals of the forum State, and in case of the later, it is to restrict the extraterritorial force of foreign laws and judgments.[126] The conceptualization now finds place in common law system as well, where it is represented by 'domestic public policy' and 'international public policy', respectively.

In purely domestic cases, courts are not concerned with conflict of laws issues, instead they just take into account and decide on the discrepancy between the existing municipal law and the parties' stipulations.[127] Disputes before the national courts with international elements require different policy considerations as compared to purely domestic cases.[128]

In matters that involve foreign elements, national courts essentially take into account the larger picture of international trade and other standards of international practice, as those might also constitute the general State policy.[129] Every jurisdiction that believes in upholding rule of law looks forward to ensure adequate administration of justice, be it in purely domestic cases or cases with an international element. It goes without saying that the national courts, which are part of the State structure are expected to give due consideration to the image of the State in larger international context. Given the importance of harmonious coexistence in the prevailing

[126] J. Kosters, 'Public Policy in Private International Law' (May, 1920) Vol. 29, No. 7, The Yale law Journal 753; M. Forde, 'The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions (April, 1980) Vol. 29 Int'al & Comp. Law Quart. 260.

[127] Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 593.

[128] Gralf-Peter Calliess, *Rome Regulations: Commentary on the European Rules of Conflict of Laws*, (Wolters Kluwer, 2011) 322; Kent Murphy, 'The Traditional View of Public Policy and Ordre Public in Private International Law' (1981) 11(3) Georgia International & Comparative Law 593.

[129] Ernest G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1923-1924) Vol. 33, Yale Law Journal 748.

environment of global interdependence, respecting rules and judgments of foreign States is the least that national courts across the jurisdictions must take into account.

As Goodrich puts it, '[P]art of our difficulty about public policy would disappear if we sharpened our thinking in the use of the term…It is desirable to distinguish between public policy when used in the internal sense and when used in conflict of laws'. [130] Not only legal scholars, but courts as well, across the jurisdictions, on several occasions have acknowledged the need of such a restrained and restrictive interpretation of public policy when matters involving international elements are at hand. [131] The practice of narrow interpretation of public policy exception is also encouraged under the various European Union arrangements.[132] The landmark *Krombach*[133] judgment provided adequate guidance to the member states of European Union, when it highlighted what the national courts should take into account while deciding on invoking of the exception of *ordre public.* The court observed that there should be notable discrepancy between the foreign rule applicable

[130] Herbert Goodrich, 'Foreign facts and Local Fancies' in Maurice Culp (eds), *Selected Readings on Conflict of Laws – Association of American Law Schools* (West Publishing Co. 1956) 217.

[131] See *Loucks v Standarard Oil Co of New York* [1918] 224 NY 99, 111. Justice Cardozo of the U.S. Supreme Court, in his ruling observed that:

> 'We are not so provincial as to say that every solution of a problem is wrong because we deal it otherwise at home. The courts are not free to refuse a foreign right at the pleasure of judges, to suit individual notion of expediency or fairness… They do not close their doors unless help would violate some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal'.

See *Vervaeke v Smith* [1983] 1 AC 145, 164; *Kuwait Airway Corporation v Iraqi Airways Co. & Anr* [2002] UKHL 19,140.

[132] Tena Hoško, 'Public Policy as an Exception to Free Movement within the Internal Market and the European Judicial Area: A Comparison' (2014) 10 Croatian Yearbook of European Law and Policy 198; Regulation (EU) No. 1215/2012 of the European Parliament and the Council on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast) (2012); Rome Convention on the Law Applicable to Contractual Obligations (1980).

[133] *Dieter Krombach v. Andre Bramerski* [2000] Case C-7/98 ECR I-1935

and the rules of the forum State, such discrepancy should have the potential of violating the fundamental principles of the forum State, and that violation of fundamental principles should constitute a manifest breach of a rule of law of the forum State.[134]

Having identified the need of observing restrained standards while applying the doctrine of public policy in context of private international law, one must not, however, confuse the inference drawn from the strong voices supporting the narrow interpretation as a suggestion to give up court's right to intervene when 'foreign law or judgment' is involved.[135] It is a well-settled principle of law that a national court will refuse to apply a foreign law or enforce a foreign judgment, when it is considered by the court as contrary to the public policy of the forum.[136] Whenever the court in its wisdom concludes that application of a foreign law or enforcement of a foreign judgment has the potential of disregarding local law or policy to the extent that it would shock the conscience of the forum court, the public policy exception may be invoked.

The concern before the courts in such situations remains to evaluate as to what exactly would lead to 'shocking the conscience'? Perhaps, a more considerate analysis of the public policy exception and the State policy of international relations is something that must be taken into account by the courts. As ultimately, national courts are expected to come up with a conclusion that serves the interest of public at large, rather than any parochial interests of the forum. It might also be of help to take into account that some sacrifices at the local level can result in greater benefits of

[134] ibid [21] [31] [34] [37].

[135] Ernest G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1923-1924) 33 Yale Law Journal 748.

[136] Herbert F. Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) 36 West Virginia Law Quarterly 170.

international harmonization of law, catering the larger public interest in the long run. Efforts by member states, of international community, to show 'mutual tolerance for each other's little idiosyncrasies does not seem a great deal to ask for'.[137] The greater the tolerance national courts show towards the foreign law or the foreign judgments, lesser would be the possibilities of abuse of public policy exception.

As rightly put by Joost Blom, "The more the courts become 'international minded', in the sense that they respond more readily to the perceived needs of the international system, the more they can be expected to judge that sharp anomalies within the legal system are tolerable in order to accommodate rights stemming from foreign law". [138] The courts must take into account and keep a check on the possibilities of the application of public policy exception itself resulting in injustice.

Summary

The doctrine of public policy has, for long, established itself as a significant, yet controversial, legal concept – particularly in the context of private international law. There is no denying in the fact that it is impossible to compartmentalize or make predictable the doctrine of public policy, as far as its interpretation and application is concerned. However, considerate efforts of the national courts, in terms of giving due consideration to the importance of principle of comity and greater good of the private international law regime, can definitely make its application less controversial and more acceptable.

[137] Herbert Goodrich, 'Foreign facts and Local Fancies' in Maurice Culp (Eds.), *Selected Readings on Conflict of Laws – Association of American Law Schools* (West Publishing Co.1956) 219.

[138] Joost Blom, 'Public Policy in Private International Law and its Evolution in Time' (2003) Netherlands International Law Review 395.

It needs to be appreciated that there are always certain borderline areas, where nations have and will continue to have strong differences in the foreseeable future, for which public policy exception will continue to be valuable.[139] Also, from the practical point of view, it will be almost impossible to bring on board nation-states on a proposal of doing away with the public policy exception – as that would adversely affect the greater goal of achieving harmony in cross-border dispute settlement regime. However, that does not discount the reality that the apprehensions associated with the interpretation and application of the public policy exception are frivolous or unsubstantiated.

Public policy exception, owing to its inherent characteristics, more often than not, has continued to concern the relevant stakeholders, particularly because of the unfettered and excessive discretion enjoyed by judges with regard to interpretation of the doctrine of public policy, and the inability of national courts to determine with certainty as to what exactly constitutes public policy.[140] In fact, given the unpredictable and subjective nature attributed with the concept of public policy, there have been voices that have even advocated doing away with the doctrine itself.

For example, Ernest Lorenzen in his seminal work questioned the very purpose of public policy and went on to explain the dispensability of the doctrine of public policy.[141] He argued that, 'if a State A under its conflict of law rules is bound to recognize power of another State B to attach legal consequences to certain operative facts…how can the courts of the former State nullify the effect given to such

[139] Peter Hay, 'The Development of Public Policy Barrier to Judgments Recognition in European Community' in H. Bonne and M. Khachidze (eds), *Selected Essays on Comparative Law and Conflict of Laws*, (C.H. Beck 2015) 891.

[140] ibid.

[141] Ernest G. Lorenzen, 'Territoriality, Public Policy and the Conflict of Laws' (1923-1924) 33 Yale Law Journal.

operative facts? ... Is it not strange to argue in the first place that State A has no choice in accepting the original rule and then to admit that it has power to set aside the effect of that rule whenever it pleases on the plea that such recognition or enforcement would violate its public policy?'[142] In theory the argument might hold some water, but the reality remains that under the prevailing mechanisms recognized under international practice, public policy is indispensable to make private international law more meaningful and practical. Sir Lauterpacht's observation is, perhaps, an apt response to the above raised concerns. In the famous *Guardianship case*[143], he noted:

> 'Admittedly, the notion of ordre public - like that of public policy – is variable, indefinite and occasionally productive of arbitrariness and abuse. It has been compared in this respect, not without some justification, with the vagueness of the law of nature. Admittedly also, it has often been the instrument or the expression of national exclusiveness and prejudice impatient of the application of foreign law. Yet these objections, justified as they are, do not alter the fact that the principle permitting reliance on ordre public in the sphere of private international law has become - and that it is - a general principle of law of most, if not all, civilized States. More than that: It is, on its own merits, part and parcel of the entire doctrine and practice of private international law almost from its very inception; the two are inseparable, not only as a matter of history but also of necessity; they have grown together in a mutual interaction and compromise'.[144]

[142] ibid 747.

[143] *Netherland v Sweden* [1902] ICJ Rep. 55 (Sir Lauterpacht's separate opinion).

[144] ibid 94.

The expectation from national courts is that while considering invoking of the public policy exception, it ought to be kept in mind that the 'application' of the foreign law in a particular case, and not the foreign law itself, should be incompatible with the public policy of the forum.[145] Also, public policy should not be used as a tool by the courts to criticize the decision of a foreign court, therefore, must not be allowed to be used as a backdoor channel to review the merits of the judgment rendered by a foreign court.[146] Instead of evaluating the judgment itself, it is the consequences of enforcement of the judgment that should be weighed against the public policy of the forum State. The courts must also take into account the fact that it is not necessary that rules of internal public policy have to, by default, be part of the external or international public policy as well.[147] An appropriate approach worth considering is to have a higher threshold with regard to violation of public policy, in matters involving foreign element(s).

The modern understanding of private international law lays greater emphasis on differentiating between '*ordre public interne'* and the '*ordre public international'.*[148] While the former, which happens to be more expansive in scope, should be restricted to domestic matters only, the later that is narrower in scope, should be applicable in cases involving international elements.

Over the years, a strong sentiment has been developed that voices in favor of applying standards of international public policy, when it comes to matters involving

[145] Dicey, Morris, & Collins, *The Conflict of Laws* (14th edn, Sweet & Maxwell 2006) 1127.

[146] North and Fawcett (eds), Cheshire and North's Private International Law (12th edn, Butterworths 1992) 426; *Etablissements Rohr SA v Dina Ossberger Trading AS Firma* Ossberger Turbinenfabrik [1982] 3 C.M.L.R 35.

[147] Dicey, Morris, & Collins, *The Conflict of Laws,* (14th edn, Sweet & Maxwell 2006) 1127; *Regazzoni v K C Sethia Ltd.* [1956] 2 QB 490, 514.

[148] Ivana Kundu, *Internationally Mandatory rules of a Third Country in European Contract Conflict of Laws – The Roman Convention and the Proposed Rome I Regulation*, (Rijeka 2007) 298.

foreign elements. International public policy includes those norms of public policy which are of such significant importance that when applied in international cases, can override the applicable conflict of law rules.[149] Which basically suggests that not every rule of domestic public policy necessarily applies in cases that involve international elements. At this juncture, it is important to clarify that international public policy also is essentially a part of the national public policy of the forum State. It only differs from domestic public policy because of its restrictive scope of interpretation, helping in containing the unfettered application of public policy exception by national courts.

The idea is that the public policy exception, in case of private international law, should only be perceived as a safeguard mechanism and not as weapon to launch an attack against everything that looks alien. National courts must be cautious enough and ensure that the application of the doctrine of public policy does not turn into becoming nemesis to the underlying objectives of private international law. Respecting and recognizing foreign law and foreign judgments would not only help in bringing commercial stability, it would also promote the forum State as a jurisdiction that does not provide shelter to defaulters of legal obligations.[150] A clear policy and reasonable approach towards interpretation and application of the public policy doctrine cannot be overemphasized, as it can go a long way in building confidence amongst the stakeholders of cross-border commercial transactions.

[149] Gralf-Peter Calliess, *Rome Regulations: Commentary on the European Rules of Conflict of Laws*, (Wolters Kluwer 2011) 322.

[150] Herbert Goodrich, 'Public Policy in the Law of Conflicts' (1929-1930) 36 West Virginia Law Quarterly 171.

2. PUBLIC POLICY IN INTERNATIONAL COMMERCIAL ARBITRATION: PRE-ENFORCEMENT STAGES

Introduction

Over the years, International Commercial Arbitration has proved its mettle as one of the preferred cross border dispute resolution mechanisms. The considerable autonomy that the parties enjoy with regard to the choice of law, procedures, place of arbitration, and appointment of arbitrators, has been its principal attractive feature.[151] Arbitration, being a product of contract, by and large flows in the direction that its creators, i.e. the parties to the dispute, want it to follow.[152] However, the idiosyncrasy of international commercial arbitration as a dispute resolution mechanism does not come without limitations or restrictions. States, through their national courts, do retain sufficient powers to intervene in the process, wherever they feel that the said autonomy needs to be curtailed to certain levels in the larger public interest of that State.[153]

The doctrine of public policy serves as a significant tool in the hands of national courts; justifying striking down of an agreement completely or partially, influence application of laws, and leave considerable impact on the fate of arbitral award – be it at the annulment or the enforcement stage.[154] As a matter of fact, in international commercial arbitration, right from conclusion of the arbitration agreement up until the

[151] Barraclough and Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6(2) Melbourne Journal of International Law 1; Francisco Blavi, 'The Role of Public Policy in International Commercial arbitration' (2016) 82(1) Arbitration (London) 1.

[152] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) 2(4) Arbitration International 512; Francisco Blavi, 'The Role of Public Policy in International Commercial arbitration' (2016) 82(1) Arbitration (London) 1.

[153] Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) American Business Law Journal 512.

[154] ibid 513.

enforcement of arbitral awards, public policy doctrine can emerge at any stage and play a noteworthy role.[155] It may be raised by a party to challenge the validity or enforceability of the agreement in its entirety or of the arbitration clause; it may be raised before the arbitral tribunal during the proceedings - in context of application of laws; at the time of setting-aside of the arbitral award before the relevant national court, or for that matter, during the enforcement proceedings to challenge the recognition and enforcement of the arbitral award.[156]

Much of the scholarship on international commercial arbitration focuses on the enforcement stage, and rightly so, when it comes to examining the role of public policy. Given the, almost, omnipresence of public policy throughout the arbitration process, it would be unfair not to investigate into to the significant role of public policy during the pre-enforcement stages. This chapter essentially examines the role that public policy plays at various stages of international commercial arbitration, before the enforcement proceedings are initiated.

The very first stage in arbitration proceedings where the arbitral tribunal gets to decide on whether or not the subject matter under the arbitration agreement could be arbitrated upon, may call for taking into account certain public policy considerations. Though the issue mostly concerns with the principle of arbitrability, public policy considerations do crop up because of the intertwined relationship between arbitrability and public policy. An analysis of the relationship between these two principles, which are distinct yet similar, is provided in order to bring out the role that public policy may play in context of arbitral tribunal's decision over the fate of an arbitration agreement.

[155] Gary Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing* (Fourth edn, Wolters Kluwer 2013) 157.

[156] Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) s26 American Business Law Journal 515.

Party autonomy, as far as choice of laws and procedures are concerned, is considered to be the hallmark of international commercial arbitration. Nevertheless, this freedom to cherry-pick applicable laws must not be mistaken as something absolute in nature. Non-derogation from certain mandatory rules of relevant legal systems, by parties or the arbitral tribunals, remains unavoidable. Here again the public policy considerations play a significant role in deciding the scope of mandatory rules of the relevant legal system in context of influencing the party autonomy or decisions of the arbitral tribunals.

The chapter examines the concerns attributed to the effect of mandatory rules over applicable laws in great detail, and highlights the relationship between mandatory rules and public policy under a legal system. The analysis helps in pointing out the differences between the two concepts and suggests a road map as to how arbitral tribunals ought to react in situations where parties' choice of laws is at loggerheads with certain mandatory rules.

Last but not least, the chapter delves into the role and scope of public policy as a ground to set aside an arbitral award before the relevant national court(s). Taking the Model Law as an authority on the mechanism to challenge the validity of an arbitral award before the seat courts, this chapter briefly examines the significance of annulment proceedings – focusing on the ground of public policy exception listed in the Model law. Though most of the discussion on interpretation and application of public policy exception is provided in the next chapter - in context of the New York Convention, this chapter primarily investigates into the concerns attributed to public policy exception at the annulment stage. Concluding with the possible way out to overcome or at least mitigate the challenges.

2.1 Arbitration Agreements and Public Policy

Arbitration agreement or the agreement to arbitrate is the 'corner stone' of the entire arbitration process.[157] It is this agreement between the parties that allows them to resolve their disputes outside the conventional court system, through the process of arbitration – giving the parties substantial flexibility and autonomy. Therefore, it won't be incorrect to state that parties' agreement on settling the dispute through arbitration, in itself, is the first step in the grand scheme of arbitration. The arbitration agreement generally exists in any of the two forms; an arbitration clause within a principle agreement - where the parties agree to submit future disputes to arbitration, or a submission agreement where the parties agree to submit existing disputes to arbitration.[158]

As mentioned earlier, the role of public policy in international commercial arbitration is not confined to the enforcement stage only - it comes into picture at various stages of the arbitration process. Public policy becomes relevant at the very initial stage of arbitration process where the issue of arbitrability crops up.[159] As the very competence of the arbitrators to settle a dispute through arbitration depends upon the fact that whether the subject matter of the dispute under the agreement could be arbitrated upon or not, the question of arbitrability of the dispute plays an important role.

[157] T Várady and others, *International Commercial Arbitration: A Transnational Perspective* (Sixth edn, Thomson/West 2015) 121; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 71.

[158] T Várady and others, *International Commercial Arbitration: A Transnational Perspective* (Sixth edn, Thomson/West 2015) 121; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 72.

[159] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 124.

Though there is no denying that there is a separate ground of arbitrability that can be invoked to set aside an arbitral award or to refuse enforcement of an arbitral award in case the award is issued on a non-arbitrable subject matter, the close relationship between the concept of arbitrability and public policy, nevertheless, deserves some exploration. Arbitrability of a subject matter is perceived as an issue of public policy, though, not directly.[160] As Redfern and Hunter argue, "whether or not a particular type of dispute is 'arbitrable' under a given law, is, in essence, a matter of public policy for that law to determine".[161] Examination of this relationship and the influence of the concept of public policy over the issues of arbitrability, particularly, in context of the initial stages of arbitration would highlight the veiled effect of public policy considerations on arbitrator's decision to proceed with arbitration.

Not mistaking the concept of arbitrability as synonymous to the doctrine of public policy, it cannot be discounted that the two concepts do seem to have an overlapping purpose and effect. Perhaps, that is the reason why some scholarship has even gone to the extent of calling arbitrability a superfluous concept for it being rooted in public policy.[162] With this background, analyzing the concept of arbitrability and its relationship with the broad understanding of the doctrine of public policy will help in identifying the not so direct role that public policy gets to play *vis a vis* deciding whether or not the tribunal would proceed with arbitration.

[160] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 77; Sai Anukaran, Scope of Arbitrability of Disputes from the Indian Perspective (2018) 14(1) Asian International Arbitration Journal 74.

[161] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 112.

[162] Vasselina Shaleva, The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia (2003) 19 (1) Arbitration International 77; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 112.

2.1.1 Arbitrability

One of the basic issues that the arbitrators face at the very beginning of arbitration proceedings is the determination of arbitrability of the dispute that is referred to in the arbitration agreement, i.e. whether the dispute at hand can be resolved through arbitration. Although party autonomy under the international commercial arbitration regime facilitates significant freedom to parties to settle commercial disputes through arbitration, national laws that are closely connected to the dispute may inflict restrictions.[163]

The principle of party autonomy, therefore, cannot prevail over the position on arbitrability held by the State where arbitration is seated, or for that matter where the award's enforcement would be sought. Arbitrability is one of those areas where there can be a collision between 'the contractual and jurisdictional natures of international commercial arbitration'.[164] The freedom to agree upon to submit any kind of dispute to arbitration is not absolute.[165] There are certain sensitive issues even in commercial transactions that some States believe should be dealt with by the national courts. Essentially because, allowing private arbitrators to decide upon issues might adversely affect the larger public interests.[166]

[163] Loukas Mistelis and Stauros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009) 4.

[164]ibid 4; Sai Anukaran, 'Scope of Arbitrability of Disputes from the Indian Perspective' (2018) 14(1) Asian International Arbitration Journal 73.

[165] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 306.

[166] ibid; Loukas Mistelis and Stauros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009) 4.

In addition, it is also argued that arbitration as a process may not be as adequately equipped as judicial courts to decide on matters which require intensive and rigorous fact-finding.[167] The other argument supporting non-arbitrability of certain issues, though not based on any credible evidence, has been that arbitrators lack the ability to apply the law and public policy principles correctly, and that there is also a likelihood of pro-business bias on part of arbitrators.[168]

Be that as it may, the fact remains that certain type of issues, even if closely connected with commercial transactions, are generally reserved by legal systems for the national courts - hence non-arbitrable due to the encompassing public interest.[169] For example, disputes arising between a foreign corporation and its local agent in some Arab countries are resolved only by national courts, and in Mexico the disputes that concern with the administrative recession of contracts where a State entity is a party are dealt exclusively by the administrative courts.[170] Similarly, in India, like in many other jurisdictions, matters related to consumer disputes, insolvency disputes, debt recovery related disputes are some examples of the kind of disputes that are considered to be non-arbitrable.[171]

It is argued that the arbitrability of issues in a jurisdiction depends upon the relevant domestic laws or policy – which the State decides consciously based on its

[167] Loukas Mistelis and Stauros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009) 23; *Alexander v. Gardner-Denver* [1974] 415 U.S. SC 36, at 58.

[168]ibid 26; *American Safety Equipment Corp. v J.P. Maguire & Co* [1968] 391 F.2d 821; *University Life Insurance Co. v. Unimarc Ltd*. [1983] 699 F.2d 846.

[169] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 110.

[170] ibid 111.

[171] *Booze Allen and Hamilton Inc. v SBI Home Finance Ltd.* [2011] 5 SCC 532; *Aftab Singh v. Emaar MGF Land Limited & Anr.*, [2017] Consumer Case No. 701 of 2015, 13 July 2017.

public policy.[172] Therefore, public policy considerations of a legal order play a major role in determining the arbitrability of disputes.

Arbitrators generally decide on the issue of arbitrability keeping in consideration the mandatory rules under the applicable law and those of the seat of arbitration.[173] Arbitrability is generally classified into 'subjective arbitrability' and 'objective arbitrability'. In case of former, there is a restriction on specific parties with regard to entering into arbitration agreements, where as in case of the later, the restriction is based on the subject matter of the dispute.[174] And it is this subjective and objective arbitrability restriction that may be of such fundamental significance to a legal system that it is considered as part of the public policy.[175]

2.1.2. Arbitrability and Public Policy – A Nuanced Relationship

It would be important to begin this section with the premise that the principle of arbitrability is distinguishable from the doctrine of public policy, however the two are relatable.[176] As pointed out earlier, determining arbitrability of a dispute under a given

[172] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 6; Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 77.

[173] Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 321.

[174] Sai Anukaran, 'Scope of Arbitrability of Disputes from the Indian Perspective' (2018) 14(1) Asian International Arbitration Journal 74; Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 77.

[175] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 128.

[176] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3695.

law, particularly with respect to objective arbitrability, in quintessence is a matter of public policy under the relevant law.

When an arbitrator decides that the subject matter of an agreement is not arbitrable, he basically reaffirms the State law on the issue - which is nothing but a reflection of the public policy directing certain class of matters to be left out exclusively for national courts to adjudicate upon.[177] Therefore, some areas that the States believe to be of larger public importance, in accordance to the public policy of the State, are reserved for settlement through conventional court system. For example, matters related to competition law, punitive damages, security regulations, fraud, bribery etc. are by and large considered as non-arbitrable in some jurisdictions.[178]

The obvious challenge before an arbitral tribunal while deciding on the issue of arbitrability is which public policy considerations should the tribunal take into account. Also, the lack of precise definition coupled with the absence of uniformity with regard to interpretation of public policy across the jurisdiction only adds to the dilemma of the arbitral tribunal.

The options before the arbitral tribunal may be to consider the law governing the contract, law of the seat of arbitration, national laws of the parties involved, law of the country where the enforcement of the award will most likely be sought, or combination of all of these.[179] Though, in principle, the tribunal is not under any legal obligation to necessarily consider all these options, nevertheless, the most important consideration for

[177] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) Vol.2 No. 4 Arbitration International 278

[178] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 04.

[179] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 196.

the tribunal while deciding on arbitrability remains to ensure that the award rendered serves its logical conclusion, i.e. it is enforceable.

As a matter of practice, arbitral tribunals are usually inclined to rely on the public policy considerations of the legal order of the seat of arbitration for determining arbitrability.[180] However, this approach may at times run the risk of enforcement of ensuing arbitral award being refused if the public policy considerations with regard to arbitrability of a dispute in enforcing State differs from that of the State where award was issued. For example, issues relating to intellectual property rights may be arbitrable at the seat of arbitration but public policy considerations at the enforcing State might hold a contrary view on the issue.[181]

It might be relevant to point out here that opinions on arbitrability of issues are not drastically varying across the jurisdictions.[182] Therefore, giving primacy to the public policy considerations of the seat of arbitration while deciding on arbitrability seems a reasonable solution, as it avoids the risk of annulment of the award, automatically increasing the possibility of its enforcement in another country.[183] As once the award is passed, the issue of arbitrability can be raised by the award debtor during the annulment proceedings, and successful annulment of the award can later be used to impede the enforcement proceedings.[184]

[180] ibid 197.

[181] See *Shrek Enterprises AG v. Societe des Grandes Marques* [1979] IV YBCA 286. Italian Corte di Cassazione refused to enforce an arbitral award that decided on a trademark dispute.

[182] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 721.

[183] ibid 13; *Société Fosmax LNG v. Groupement d'enterprises STS* [2016] Case no. 388806, 09 November 2016. The Counseil d'Etat annulled an international arbitral award on the ground of public policy for not taking into account the relevant mandatory rules governing arbitrability in France.

[184] Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 24(4) Journal of International Arbitration 27.

Having said that, it needs to be appreciated that arbitrability of subject matter, under a legal system, is arguably more closely related to the concept of mandatory rules, and need not always rise to the level of public policy.[185] It is also relevant to make a mention that the rules that restrict arbitrability may not in all cases be a reflection of or part of public policy, as the said restrictions could very well be just part of the applicable mandatory rules.[186]

Therefore, should an arbitrator always denounce arbitrability when some relevant mandatory rule of law suggests so? It is an issue that has no definite answer and is left best to the wisdom of the tribunal in a given situation.[187] In Switzerland, for example, the view is that least restrictive opinion of the arbitrator in this matter should be encouraged.[188]

In *Fincantieri-Cantieri et Oto Melara SpA v. M*[189] the Swiss Federal Court while deciding upon the arbitrability reaffirmed this opinion. In the case at hand, the Italian companies had entered into an agency agreement with M, where the later was to act as an intermediary to conclude a contract with the Republic of Iraq. Dispute arose in the year 1989 and Iraq seized the payments for the equipment purchased. M commenced arbitral proceedings against the Italian companies and the arbitral tribunal issued an interim award. Italian companies challenged the arbitrability, given the embargo

[185] Karl Heinz Böckstiegel, 'Public Policy and Arbitrability' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law Taxation 1986) 183.

[186] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 126.

[187] Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 24(4) Journal of International Arbitration 33.

[188] ibid 27; Robert Briner, 'The Arbitrability of Intellectual Property Disputes with Particular Emphasis on the Situation in Switzerland' (1994) 728 WIPO Publication 66.

[189] *Fincantieri-Cantieri et Oto Melara SpA v. M* , 23 June 1993, 353

imposed by United Nations on having commercial ties with Iraq. The Swiss Federal Court declined to uphold arguments of non-arbitrability.

Similar approach was suggested by the U.S. Supreme Court in landmark *Scherk v Alberto-Culver Co.*[190], where it observed:

> 'The invalidation of such an agreement in the case before us would not only allow the respondent [Alberto-Culver] to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws in our courts…We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts'.

However this may not hold true in all situations. Matters where the relevant mandatory rules reflect international public policy, arbitrability may be denied.[191] For example, in an ICC award between a Korean and an Italian party, it was held that despite the contract being governed by the Korean law, the European competition law by reason of Italy's public policy would be taken into consideration, to determine whether the contract in question violated the competition policy within the common market.[192]

Whether or not the arbitral tribunal is bound by the public policy considerations of any specific State law while deciding upon the arbitrability - has varying theoretical and practical answers. Arbitrators, not being guardians of any State's public policy are under no obligation to take into account public policy considerations of any State, however,

[190] [1974] 417 U.S. SC 519. See *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* [1985] 473 U.S. SC 614.

[191] Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 24(4) Journal of International Arbitration 27.

[192] ICC Award No. 4132, [1985] YBCA, 49.

giving due consideration to it serves as an incentive to assure enforceability of the awards rendered and effectiveness of the institution of international arbitration.[193] The largely maintained opinion is that the tribunals, although not being part of any State, must take into consideration the international public policy while deciding on matters of arbitrability.[194]

2.2 Application of Substantive & Procedural Law and Public Policy

In International Commercial Arbitration, owing to the principle of autonomy, it is an established practice that the parties are free to choose substantive law and procedural law that regulates their contractual relationship as far as dispute settlement is concerned.[195] The parties may even opt for a law that has no direct connection, whatsoever, with the dispute involved – therefore separating the dispute from the law forming closest connection with it.[196]

The applicable law or the substantive law, or as known in some jurisdictions as the governing law of the contract, basically assists in interpretation of 'the validity of the contract, the rights and obligations of the parties, the mode of performance, and the

[193] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) 2(4) Arbitration International 286; Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 322.

[194] Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 324; Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 24(4) Journal of International Arbitration 28; Loukas Mistelis and Stauros Brekoulakis, *Arbitrability: International and Comparative Perspectives* (Wolters Kluwer 2009) 13.

[195] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 158.

[196] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 607.

consequences of breaches of the contract'.[197] And on the other hand the procedural law, which more often than not is the arbitration law of the seat of arbitration, governs the manner in which arbitration proceedings are to be conducted.[198]

An additional idiosyncratic feature of international commercial arbitration is that this freedom to choose law is not limited only to national laws, but extends to other non-codified bodies of law like general principles of law, *lex mercatoria*, rules of arbitration institution etc. as well.[199] Arbitrators may also be authorized by the parties to act as amiable compositors.[200] Basically, parties can choose any national law, or rules independent of any legal system, rules of any arbitral institution, or device their own rules for settlement of disputes through arbitration.

Interestingly, arbitrators, owing to their inherent a-national character, are also not constrained by any national 'conflict of law' rules, when it comes to application of law in arbitration proceedings. This position was clarified by the U.S. Supreme Court in the *Mitsubishi case* where it held that the 'International Arbitral Tribunal owes no prior allegiance to the legal norms of particular states'.[201]

Though there is tremendous amount of flexibility that the parties and the arbitral tribunals may enjoy, particularly in comparison to the conventional litigation, it does not mean that arbitrators can always freely apply the law chosen by the parties without any

[197] ibid 185.

[198] ibid 166.

[199] H Kronk and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 283; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 417; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 190.

[200] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 417.

[201] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* [1985] 473 U.S. SC 614.

restrictions.[202] It also needs to be taken into account that the parties might take advantage of this liberty to escape application of certain mandatory rules – hence some restrictions.[203]

Arbitrators have to be wary of the reality that by ignoring certain relevant mandatory rules, the award might run the risk of being annulled and later refused enforcement.[204] More so, to completely ignore mandatory rules might result in a situation where States would begin denouncing arbitration as an acceptable dispute resolution mechanism as they would perceive it as an instrument facilitating encroachment upon their sovereignty.

Having said that, it is also important to point out that not all mandatory rules can be allowed to prevail over the choice of law made by parties as that would also seriously hinder the purpose of international commercial arbitration as a dispute settlement mechanism. Therefore, it is advisable that only those mandatory rules that, if breached, would violate the public policy, should be given preference over the parties' freedom of choice of law.[205]

[202] H Kronke and others, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 284; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 418.

[203] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 607.

[204] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 728; Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) 2(4) Arbitration International 276.

[205] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwel 2007) 608.

2.2.1 Mandatory Rules and International Commercial Arbitration

Mandatory rules are part of the national laws of a jurisdiction that apply irrespective of the agreement between the parties on contract's proper law or procedural law. [206] In other words, they are the 'imperative provisions of law' that are essentially to be applied in all circumstances.[207] Mandatory rules usually exist in a statutory form, and are regulatory in nature; for example, rules governing certain aspects related to anti-trust, consumer protection, currency control etc.[208] The legislative intent behind developing mandatory rules is to ensure protection of the economic, social, or political interests of the people of the State.[209] However, mandatory rules need not be confused with public policy, as is explained in the later sections of this chapter.[210]

Arbitration, as pointed out earlier, is widely acknowledged as a creation of an agreement between the disputing parties. And one of the essential characteristics of arbitration is party autonomy. Owing to the party autonomy, parties are free to choose any law to govern the settlement of dispute, or they can authorize the arbitrators to choose the appropriate law(s).[211] The functional aspect of such party autonomy is to narrow down the choice of applicable law on the subject matter; in

[206] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 206.

[207] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) Journal of Private International Law 31; Luke Villiers, Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards (2011) 18 Australian International Law Journal 158.

[208] Luke Villiers, 'Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) 18 Australian International Law Journal 158.

[209] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 361.

[210] See discussion at Section 2.2.2, Chapter 2.

[211] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 206.

other words excluding the application of all other potential laws that could have been applicable.[212]

Whether such party autonomy should be absolute, and if not, to what extent should it be restricted, has for long remained a moot question with no precise answers. Be that as it may, the fact remains that in practice it is an accepted principle that party autonomy is subject to certain minimum standards shaped in the form of mandatory rules.[213] National courts cannot turn a blind eye to tribunal's non-application or inaccurate application of such mandatory rules, as that might leave an adverse impact on the larger public interest.[214] As a result, mandatory rules, inherently, impose certain restrictions on the otherwise prevalent 'party autonomy' and the 'arbitral discretion'.[215] It is also argued that party autonomy cannot sustain on its own 'independent from any national legal system'.[216] Nevertheless, the tussle between honoring the original intentions of the parties and restrictions imposed by mandatory rules to protect the public interests of the forum continues to remain.[217]

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[212] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 53.

[213] Ines Medic, 'Significance of Mandatory Rules in International Commercial Arbitration' (Feb. 2017) Paper presented at the 19th International Scientific Conference on Economic and Social Development Melbourne, Australia 41; Gary Born, *International Commercial Arbitration in the U.S.: Commentary and Materials* (Wolters Kluwer 2001) 436.

[214] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 61.

[215] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 3.

[216] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) 2(4) Arbitration International 286.

[217] Ines Medic, 'Significance of Mandatory Rules in International Commercial Arbitration' (Feb. 2017) Paper presented at the 19th International Scientific Conference on Economic and Social Development Melbourne, Australia 42; Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 206.

International treaties or national laws on international arbitration do not as such mention or provide any explanation on the role of mandatory rules in international arbitration. Most of the analysis available is a product of judicial evaluation or scholarly works.[218] There is, however, a general understanding that certain aspects of mandatory rules in a jurisdiction find their roots in public policy of the State.[219]

Public policy considerations in the form of mandatory rules of the seat of arbitration or any other connecting legal system can significantly limit the freedom of arbitrators.[220] There are certain unassailable moral and ethical standards in every legal system that the arbitrators cannot afford to ignore while applying laws chosen by the parties. In addition to the laws chosen by the parties, there can be other laws that have material relationship with the dispute before the tribunal.

Mandatory rules, in some cases being matter of public policy, ought to be applied even in instances where the general body of law to which such mandatory rules belong is itself not competent to be applicable as per the relevant conflict of law rules.[221] Public policy, traditionally considered as negative in character, acts as a restraining factor to the application of a foreign law. Principles of public policy, as normally perceived, function as an invisible barrier that protects a legal system from

[218] Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (October 1986) 2(4) Arbitration International 275.

[219] ibid.

[220] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 420; Nathalie Voser, Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration (1996) 7 The American Review of International Arbitration 321.

[221] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 726

the potential risk of access to incongruous foreign rules into it.[222] However, in the form of mandatory rules, it imposes a positive obligation upon the arbitrators to apply such rules that the parties otherwise would not have chosen.[223]

The different categories of mandatory rules that might be applicable can originate from the proper law of the contract, the national law of the place of arbitration, legal order of any third country having close connection with the case at hand, or even the legal order of the State where the enforcement of the award would most likely be sought.[224] No national arbitration law provides any help in identifying with certainty as to which particular mandatory rules should the arbitrators apply. Arbitrators may even opt for considering mandatory rules of more than one legal order.

Cumulative application of mandatory rules of different States, wherever possible, having close connection with the case at hand may theoretically look as an appropriate solution, however, practically it might not be so.[225] The possibility of having distinct considerations within States, uncertainty with regard to place of enforcement of the award, or for that matter mandatory rules reflecting parochial interests of a State, may be some reasons that can justify the decision of arbitrators of not considering the

[222] Mauro Rubino, *International Arbitration: Law and Practice* (Second edn, Kluwer Law International 2001) 504.

[223] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 129; Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 725.

[224] Marc Blessing, 'Mandatory Rules of Law versus Party Autonomy in International Arbitration' (1997) 24(4) Journal of International Arbitration 27; Audley Sheppard, **'**Mandatory Rules in International Commercial Arbitration - An English Law Perspective' (2007) 18 American Review of International Arbitration 1; Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) Journal of Private International Law 27.

[225] Mauro Rubino, *International Arbitration: Law and Practice* (Second edn, Kluwer Law International 2001) 533.

constellation of public policies.[226] However, if a choice is to be made between the public policy of the seat of arbitration and that of the State where the enforcement of the award will most likely be sought or that of the law governing the contract, it is the first one that should take priority - as seat is certain and has immediate connection with arbitration proceedings.[227]

Even though an arbitral tribunal is under no legal obligation to take into account the mandatory rules of the seat of arbitration, the tribunal nevertheless has a duty towards the parties to issue an enforceable award.[228] Therefore, arbitrators generally keep in mind their principle mandate, i.e. to issue an enforceable award, and decide on the application of mandatory rules accordingly.

Normally, it is expected from an arbitral tribunal that it would settle the dispute in accordance with the laws, substantive and procedural, chosen by the parties.[229] However, at the same time, one cannot afford to ignore the fact that the law of the seat of arbitration exercises a supervisory role over the arbitral proceedings, therefore ignoring the mandatory rules of the seat law can run the risk of award being set aside

[226] Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 324. See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 315.

[227] Mauro Rubino, *International Arbitration: Law and Practice* (Second edn, Kluwer Law International 2001) 531; Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 325.

[228] Laurence Shore, 'Applying Mandatory Rules of Law in International Commercial Arbitration' (2007) 18 American Review of International Arbitration 1; Andrew Barraclough and Jeff Waincymer, Mandatory Rules of Law in International Commercial Arbitration (2005) 6 Melbourne Journal of International Law 215; Article 32.2 LCIA Arbitration Rules.

[229] Audley Sheppard, **'**Mandatory Rules in International Commercial Arbitration - An English Law Perspective' (2007) 18 American Review of International Arbitration 2.

by the seat court, and possibly being refused enforcement during the enforcement proceedings.[230]

2.2.1.1 Mandatory Rules of Lex Fori

As mentioned earlier, seat of arbitration holds a significant position in the scheme of international commercial arbitration. Given the supervisory role of the seat courts over the arbitral proceedings, restrictions imposed by the mandatory rules of the legal system of the seat of arbitration can significantly influence the application of law by the arbitral tribunal.

Deviation from the mandatory rules under the *lex fori* can cost success of the arbitral award, as the award would be running the risk of being set aside on the ground of violation of public policy. And an annulled arbitral award would further run the risk of being refused enforcement under Article V (1)(e) of the New York

[230] Ines Medic, 'Significance of Mandatory Rules in International Commercial Arbitration' (Feb. 2017) Paper presented at the 19th International Scientific Conference on Economic and Social Development Melbourne, Australia 42; Audley Sheppard, **'**Mandatory Rules in International Commercial Arbitration - An English Law Perspective' (2007) 18 American Review of International Arbitration 2; Carolina Cunha, 'Arbitrators and Courts Compared: The Long Path towards an Arbitrator's Duty to Apply International Mandatory Law' (2016) 21 Young Arbitration Review 31.

Convention.[231] Therefore, it is safe to assume that when it comes to procedural rules, party autonomy is not limitless.[232]

As far as restrictions over party autonomy are concerned, there is no uniform scheme in practice – though a lenient approach is expected.[233] There is a general understanding that mere contradiction with a procedural rule under the legal system of the seat of arbitration would not necessarily result in violation of the public policy. Contradiction should be fundamental and go against the mandatory requirements of a fair procedure, in order to invite violation of public policy. Therefore, disregard of the relevant mandatory rules may not always result in violation of public policy of the forum.

In a recent decision, Santiago Court of Appeals (Chile) decided on whether rejecting the possibility to summon the respondent's legal representative for cross-examination, whose testimony the arbitrator admitted, would be contrary to public policy because there was violation of the Chilean Civil Procedure Code.[234] The Court held that mere violation of the internal procedural regulations of Chilean law did not constitute public policy violation, unless basic rules of justice and morality get

[231] Article V (1) (e) of the New York Convention NYC reads:

> 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:
>
> …
>
> (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.

[232] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 232.

[233] ibid 245.

[234] *Ingeniería Proyersa Limitada v Steag GMBH* [2016] Santiago Court of Appeal 2685-2016 (September 2016).

affected. Stressing that taking the two at par would prejudice the party autonomy principle and go against the minimum court intervention approach.[235]

2.2.1.2 Mandatory Rules of *Lex Causae*

It is quite natural to assume that if parties choose a governing law, in the course of application of that governing law – its mandatory rules are expected be taken into account. Does it imply that non-application of such mandatory rules of *lex causae* will result in violation of public policy? The answer to this question depends upon how the national court seized of the matter will interpret the issue.

It cannot be ruled out that the national court, be it at the seat of arbitration or where enforcement of the arbitral award is sought, will consider disregard of mandatory rules of *lex causae* as the basis to set aside the arbitral award or refuse enforcement of the arbitral award for violating the public policy.[236] However, as a matter of practice, national courts in most of the jurisdictions hold a higher threshold and consider disregard of mandatory rules of *lex casuae* as violation of public policy only if such disregard violates the most fundamental notions of morality and justice of the forum.

For example, in *Tamil Nadu Electricity case*[237], the issue before the court was whether an amendment in Indian Law, which was the governing law, making the subject matter non-arbitrable would amount to violation of public policy of the forum, i.e. England. The court held that to attract public policy of England, mere

[235] ibid. See *D.T.F v I.T. of P & Anr*. [2016] Supreme Court (Greece) Judgment 366/2016 (Civil Division A1), where the court held that the violation of Civil Code's procedural rule dealing with burden of proof rules, would not constitute violation of public policy.

[236] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 395.

[237] *Tamil Nadu Electricity Board v ST – CMS Electric Co Private Ltd*. [2007] EWHC 1713.

violation of Indian mandatory law would not suffice. The court further held that, the applicant should have invoked something more than mere disregard of Indian law.

In *Société MK Group v. S.A.R.L Onix abs Société Financial Initiative*[238], the Court of Appeal of Paris had to decide if the breach of the mandatory rules of Republic of Lao, which in the case at hand was the governing law, would amount to violation of public policy in France. The court opined that breach of foreign mandatory rules could be considered as contrary to public policy in France only if the relevant values of French law are violated. Since in the case at hand the mandatory rules under consideration were emanating from a UN resolution, over which there was an international consensus, the court held that breach of the mandatory rules amounted to violation of international public policy.

2.2.1.3 Mandatory Rules of Third Law

Violation of mandatory rules of a third law, i.e. a law that is neither *lex fori* nor *lex causae*, may not as such make the award vulnerable to annulment. However, concerned about the obligation to issue an enforceable award, arbitral tribunal might also take into account mandatory rules of the place where enforcement of the award would most likely be sought. Unlike application of mandatory rules of *lex fori* and *lex causa*, application of mandatory rules of 'third law', in order to restrict party autonomy, has mostly been a controversial issue.[239]

[238] 15/21703, Court of Appeal of Paris, 16 January 2018; Nataliya Barysheva and Valentine Chessa, 'Société MK Group v. S.A.R.L Onix abs Société Financial Initiative, Court of Appeal of Paris, 16 January 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

[239] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) Journal of Private International Law 27.

Disregarding mandatory rules of the country where enforcement is sought, can at times invite refusal of enforcement of the award for violation of public policy. Some national courts have on several occasions been criticized for interpreting contradiction with their mandatory rules, at the enforcement stage, as violation of public policy.[240] It is, therefore, advocated that a restrictive interpretation should be followed by the enforcing courts when evaluating violation of their mandatory rules on the yardstick of violation of public policy.[241]

For example, the German Court of Appeal of Celle was seized of a matter where the Buyer argued that allowing enforcement would violate public policy of Germany as arbitral proceedings where shrouded under procedural irregularities. Also, the award allowed disproportionately high contractual penalty which was against the relevant mandatory rules of Germany. The court while holding against the arguments of the Buyer, held:

> 'In the specific case of foreign arbitral awards, the departure in the foreign arbitration from mandatory rules of domestic procedure is not [automatically] a violation of public policy. Rather, there must be a violation of international public policy. Hence, the recognition of foreign arbitral awards is as a rule subject to a less strict regime than [the recognition of] domestic arbitral decisions. The issue is not whether a German judge would have reached a different result based on mandatory German law. Rather, there is a violation of international public policy only when the consequences of the application of foreign law in a concrete case is

[240] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 381.

[241] *National Oil Corporation (Libya) v. Libyan Sun Oil Company* [1990] 733 F. Supp 800, U.S. District Court of Delaware; *Belship Navigation Inc v Sealift Inc* [1996] XXI YBCA, 799-807; *Inter Maritime Management SA v Russin & Vecchi* [1997] XXII YBCA, 789-799.

so at odds with German provisions as to be unacceptable according to German principles. This is not the case here'.[242]

In order to keep the possible controversies at bay, arbitral tribunals might take into account only certain fundamental principles that have a universal validity and are commonly accepted by large number of legal systems – more like 'international mandatory rules'.[243] For example, laws on anti-trust, corruption, smuggling etc.[244]

2.2.2 Mandatory Rules and Public Policy: Demarcating the Boundaries

The relationship between mandatory rules and public policy is very subtle to define and demarcate. The amount of overlap one witnesses while addressing these two concepts, easily seduces one to conclude that they can be treated as synonyms and can be used interchangeably.[245] However, it is important note that though their characteristics to a great extent may be similar, the essential structure and more notably the operation varies.

Cheshire and North note that mandatory rules command a positive application of a domestic law, where absence of application of such law may result into adverse effects on the larger public interest.[246] On the other hand, public policy as a concept

[242] *Seller v Buyer*, Oberlandesgericht [2007] XXXII YBCA, 322-327.

[243] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 305.

[244] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) Journal of Private International Law 31.

[245] ibid 32.

[246] North & Fawcett (eds), *Cheshire & North's Private International Law* (Thirteenth edn, OUP 1999). 132.Audley Sheppard, **'**Mandatory Rules in International Commercial Arbitration - An English Law Perspective' (2007) 18 American Review of International Arbitration 3-4.

has negative connotations, whereby it is the presence of a particular foreign law whose application may adversely affect the public interest of the forum state.[247]

The relevant question that needs to be asked is whether failure on part of an arbitrator to apply the mandatory law can always constitute violation of public policy? There is no certain answer to this question. For those who argue that mandatory rules are an expression of public policy, non-application of mandatory rules will necessarily result in violation of public policy.[248]

For example, in *Eco Swiss v. Benetton*[249] the Court ruled that, where a party has applied before a court of a Member State for setting aside of an arbitral award, that court must grant such an application if the award is contrary to Article 81 of the EC Treaty (now Article 101 of the Treaty on the Functioning of the EU) as it happens to be a mandatory rule and its disregard would violate the public policy.

On the other hand, the counter argument made is that for non-application of mandatory rules to constitute violation of public policy, there has to be some connection between the two.[250] It is not necessary that all mandatory rules reflect the fundamental character of a national public policy.[251]

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[247] Adeline Chong, 'The Public Policy and Mandatory Rules of Third Countries in International Contracts' (2006) 2(1) Journal of Private International Law 31.

[248] ibid; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 420; Nathalie Voser, 'Current Developments: Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration' (1996) 7 The American Review of International Arbitration 321.

[249] *Eco Swiss China Time Ltd and Benetton International NV*, Case C-126/97, EU: C:1999:269, para 37.

[250] Luke Villiers, 'Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) 18 Australian International Law Journal 164.

[251] Giuditta C. Moss, *International Commercial Contracts: Applicable Sources of Enforceability* (May 2014 CUP) 256; Luke Villiers, 'Breaking in the 'Unruly Horse': The Status of Mandatory Rules of Law as a Public Policy Basis for the Non-Enforcement of Arbitral Awards' (2011) 18

For example, in *Versatile Technology INC*[252] the parties entered into a joint venture agreement that provided for arbitration as the dispute settlement mechanism, with Costa Rican Law as the governing law. The arbitration was conducted in accordance with the Conciliation and Arbitration Rules of the Costa Rican Chamber of Commerce. The tribunal issued an award in favor of the claimant, Versatec. Dissatisfied with the claim awarded, Versatec challenged the arbitral award before the Supreme Court of Justice of Costa Rica. Among other grounds, the applicant argued that the tribunal had breached the relevant mandatory provisions of the Costa Rican Code of Commerce, therefore violated the public policy. The court rejected the argument and held that the contravention of the said provisions of the Code of Commerce did not automatically amount to violation of public policy.

Similarly, in Germany, breach of mandatory rule would amount to violation of public policy only if it amounts to violation of fundamental principles of German law.[253] In a recent decision the Federal Court of Justice of Germany reiterated its position that not every violation of mandatory law of Germany would amount to violation of the German public policy.[254] In the instant case the arbitral tribunal had disregarded the doctrine of *res judicata*, which the court believed to a fundamental principle under the

Australian International Law Journal 163.

[252] *Versatile Technology INC (Versatec) v Cooperative Nacional de Educadores R.L. (COOPENAE)* [2017] Case No. 16-000212-0004-AR, Judgment No. 01288-2017, Supreme Court of Costa Rica, 26 October 2017; Ryan Mellske, 'Versatile Technology INC (Versatec) v. Cooperative Nacional de Educadores R.L. (COOPENAE), Supreme Court of Costa Rica, Case No. 16-000212-0004-AR, Judgment No. 01288-2017, 26 October 2017', A Contribution by the ITA Board of Reporters, Kluwer Law International.

[253] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 161; I ZB 109/14, Federal Court of Justice, Judgment of 16 December 2015.

[254] BGH – I ZB 9/18, Federal Court of Justice of Germany, 11 October 2018; Richard Kriender, 'BGH – I ZB 9/18, Federal Court of Justice of Germany, I ZB 9/18, 11 October 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

German legal system. The court observed that not only does the violation of *res judicata* amount to violation of public policy, but incorrect application of *res judicata* also violates German procedural public policy.

One thing remains clear, that it is not possible to completely rule out that some mandatory rules can be an expression of the fundamental notions of morality and justice of a legal system; therefore forming the public policy of the State.[255] If the underlying policy behind a particular mandatory rule is to achieve certain fundamental notions of morality and justice, non-application of such mandatory rule is to be considered as violation of the public policy. But then at the same time, it does not imply that a foreign applicable law responding to the same underlying policy, if implemented in a dissimilar method, would call for necessary application of the mandatory law.[256] It is, therefore safe to argue that all rules reflecting public policy of a legal system are mandatory in nature as well, however, nor at all mandatory rules can necessarily form the public policy.[257]

It is not extraordinary to expect that State courts can show more inclination towards a more protective approach, when it comes to application of mandatory rules, to ensure protection of State's public interest. However, it is also expected

[255] G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (eds), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017) 60; Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 144; Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 608.

[256] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 144.

[257] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 72.

from the national courts that they contribute in facilitating and maintaining conducive environment for international commerce by not causing roadblocks in proceedings conducted under international commercial arbitration.[258]

Therefore, it is expected from the national court to evaluate and determine whether non-application of a mandatory rule is actually defeating the underlying fundamental policy, which such mandatory rule would otherwise facilitate, before the non-application of it is considered to be violation of public policy. Testing the relevant mandatory rule(s) on a touchstone of international public policy can be the most appropriate alternative to find a balance between the principle of party autonomy and State's public interest.[259]

2.3 Annulment Proceedings and Public Policy

It is a well-known fact that most of the arbitration laws, across the jurisdictions, do not provide for an appeal mechanism against an arbitral award. In fact, finality of arbitral awards is one of the essential features of international commercial arbitration that makes it an appealing dispute settlement mechanism. As soon as the arbitral tribunal renders an arbitral award, the award-creditor can seek its enforcement in an appropriate jurisdiction.

However, after the award is rendered and before it is actually enforced, the aggrieved party, which usually happens to be the award-debtor, may challenge the award on basis of the relevant statutory ground(s) provided under the law of the country

[258] Andrew Barraclough and Jeff Waincymer, 'Mandatory Rules of Law in International Commercial Arbitration' (2005) 6 Melbourne Journal of International Law 212.

[259] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 610.

where it was made or the law under which it was made.[260] More often than not international arbitral awards are made under the law of the country where it was made, i.e. law of the seat of arbitration.

The proceedings to challenge the arbitral award before the seat court are generally referred to as setting aside proceedings or the annulment proceedings. Therefore, in international commercial arbitration, the award-debtor can generally have the option to challenge the award at two different stages; one during the annulment proceedings, and second during the enforcement proceedings.[261]

Owing to the significance of the New York Convention in the grand scheme of international commercial arbitration, discussions on public policy *vis a vis* annulment proceedings usually gets over-shadowed by the role and scope of public policy exception in the enforcement proceedings. However, it does not discount the fact the annulment proceedings play a vital role in the overall process of international arbitration.

Annulment proceedings essentially serve as a mechanism to ensure that arbitral proceedings and the ensuing arbitral award are not tainted with any irregularity that violates the arbitration agreement, principles of due process, or the public policy considerations of the seat of arbitration.[262] In case the seat court takes a decision to set-aside an international arbitral award, the award not only becomes null and void in the

[260] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3164; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 570; Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, 2008) 194.

[261] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, 2008) 194.

[262] ibid; *Gary Born, International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3164.

seat of arbitration, it also runs the risk of being refused enforcement in other jurisdictions.[263]

2.3.1. Public Policy as a Ground to Set Aside International Arbitral Awards

Generally, arbitral awards are challenged during the annulment proceedings under three categories: jurisdictional grounds, procedural grounds, and the most rare - substantive grounds.[264] The United Nations Model Law on International Commercial Arbitration (hereinafter Model Law), which happens to be the foundation of a substantial number of national laws on arbitration, provides an exhaustive list of the grounds for setting aside arbitral awards, akin to the grounds provided in the New York Convention.[265]

Article 34 of the Model Law lists down the grounds based on which a party may approach the seat court to get an arbitral award annulled. One of the popular grounds based on which the arbitral awards can be set aside by the seat court is the ground of violation of public policy.[266] Not only can the aggrieved party allege violation of public

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[263] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 570; S Greenberg and others, *International Commercial Arbitration, An Asia-Pacific Perspective* (CUP, Cambridge 2011) 426; see, Gary Born, International Commercial Arbitration (Kluwer Law International, Second Edn. 2014) 3165

[264] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth Edition, OUP 2015) 581; Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, 2008) 195-97.

[265] UNCITRAL Status of countries that adopted Model Law. As on 15th of February 2019, the number of States is 80.
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[266] Article 34 (2)(b)(ii) of the Model Law. It reads:

> '(2) An arbitral award may be set aside by the court specified in article 6 only if:
>
> …
>
> (b) the court finds that:
>
> …
>
> (ii) the award is in conflict with the public policy of this State.'

policy, the ground of public policy to annul arbitral award can also be raised, *ex officio,* by the forum in charge of annulment proceedings.[267]

However, the Model law does not, at any place, define 'public policy'. Lack of precise definition or a consensus on interpretation of the public policy exception, like in other cases where the application of public policy is warranted, makes it an open-ended ground to set aside arbitral awards. Needless to mention that the fluidity of the concept of public policy and its potential abuse or misuse by parties or national courts makes it a thorn in the eye – as far as finality of arbitral awards is concerned.[268]

The understanding of the concept of public policy as referred to in the Model Law, be it under Article 34(2)(b)(ii) or under Article 36 (1)(b)(ii), is broadly similar to as it is perceived under the New York Convention.[269] The understanding of the concept of public policy, owing to its varying nature – both temporally and spatially, largely depends upon the interpretation of the doctrine provided by the court before which the award is being challenged. However, national courts, by and large, in most of the

[267] Amokura Kawharu, 'The Public Policy Ground for Setting Aside and Refusing Enforcement of Foreign Arbitral Awards '(2007) 24(5) Journal of International Arbitration 491; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 673.

[268] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International, 2003) 673; Amokura Kawharu, 'The Public Policy Ground for Setting Aside and Refusing Enforcement of Foreign Arbitral Awards' (2007) 24 (5) Journal of International Arbitration 491.

[269] A detailed discussion on the interpretation and application of public policy exception, both under the New York Convention and the Model Law, is provided in the following chapter. See Sections 3.1.2 and 3.1.3, Chapter 3. For the purposes of brevity and to avoid repetition, it would be sufficient to mention here that both, the New York Convention and the Model Law, understood public policy to be fundamental principles of law and justice. See A/40/17, *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session, Supplement No. 17* (3-21 June 1985), at 297.

jurisdictions have conceptualized the public policy exception in context of annulment arbitral awards on similar lines to a greater extent.[270]

Like in case of the New York Convention, grounds to annul an arbitral award, as listed in the Model law, are considered to be discretionary as there is no obligation upon the national courts to necessarily set aside an award even if the requirements under the ground(s) are met.[271] Generally, it is expected from national courts to resort to narrow interpretation of public policy exception for the purpose of annulment proceedings.[272] However, it needs to be pointed out that there are no written rules as such that would restrict the national courts to limit the scope of application public policy exception in context of annulment proceedings.

2.3.2 Interpretation of Public Policy Exception in Annulment Proceedings

National courts have taken varying approaches when it comes to interpreting public policy exception in case of annulment of international arbitral awards. When evaluating an application to annul an arbitral award on the yardstick of public policy, national courts may take into account the relevant fundamental, substantive or procedural, mandatory rules of the jurisdiction.[273] Gary Born argues that public policy in context of setting aside of international arbitral awards refers to 'a relatively narrow category of

[270] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 598.

[271] Gary Born, International Commercial Arbitration (Second edn, Kluwer Law International 2014) 3177.

[272] ibid 3178.

[273] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 158; Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers 1989) 914.

non-waivable rules of mandatory law that are fundamental to the legal or social order of a jurisdiction, often involving criminal prohibitions or comparable mandatory rules'.[274]

Given the expansive and unpredictable nature of public policy, it is generally expected from the national courts to adopt a restrictive approach as far as interpretation and application of public policy exception is concerned.[275] Several national courts have reflected similar understanding with regard to interpretation of public policy exception in context of annulment proceedings. For example, in *Corporacion Transnacional de Inveversiones*[276] a Canadian court while highlighting the similarity in approach of interpreting the public policy exception under the New York Convention and the Model Law, held:

> 'The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention… Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Article 34 and 36 of the Model Law. These authorities accept that the general rule of interpretation of Article V is that the grounds for refusal of enforcement are to be construed narrowly…'.

Similarly, in *Fisher, Stephen J*[277], the Singapore High Court observed:

[274] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3313.

[275] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers 1989) 930.

[276] *Corporacion Transnacional de Inveversiones SA de CV v STET Int'l SpA* [1999] 45 O.R. (3d) 183, Ontario Superior Court of Justice.

[277] *Fisher, Stephen J v Sunho Construction Pte Ltd* [2018] SGHC 76, at para 22.

> 'More generally, it is trite that the threshold for setting aside an arbitral award for breach of public policy was very high. As the Court of Appeal put it in *PT Asuransi*, it encompasses a narrow scope and should only operate in situations where the upholding of an award would, for example, "shock the conscience" or is "clearly injurious to the public good"'.[278]

A Malaysian High Court, highlighting the trend of interpreting the public policy exception restrictively, in a recent decision held:

> 'Threshold required, before a Court will exercise its discretion to set aside an arbitral award for being in conflict with public policy is a high one i.e. it is widely accepted that the definition of public policy ought to be a restrictive one.'[279]

In order to promote and develop a consensus on restrictive interpretation of the public policy exception, there has been a strong opinion advocating application of standards of 'international public policy' for the purpose of annulment proceedings.[280] As a matter of fact, even some of the national arbitration laws mandate the courts to

[278] ibid 60.

[279] *Tanjung Langsat Port Sdn Bhd v Trafigura Pte Ltd* [2016] AMEJ 0770. The opinion on interpretation of public policy exception in annulment proceedings was reiterated by the Federal Court of Malaysia a recent decision. See *Jan De Nul (Malaysia) Sdn Bhd v. Vincent Tan Chee Yioun*, [2018] Civil Appeal 02(f) -7-02/2018(W).

[280] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 251; Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3316; Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 676. See explanation and discussion on the concept of 'international public policy' at Section 3.4.2, Chapter 3.

apply international public policy while dealing with applications on annulment of international arbitral awards.[281]

It would be relevant to mention here that narrow interpretation is not the only approach that courts have resorted to while applying the public policy exception in annulment proceedings. National courts, at times, have favored an expansive interpretation of public policy to annul arbitral awards. For example, the Indian Supreme Court in *Saw Pipes*[282] decided to set aside an arbitral award by expanding the scope of public policy, and held that 'patent illegality' in award would amount to violation of public policy of India.

Similarly, the Supreme Court of Austria, in a decision, held that in certain circumstances defective reasoning in the award might result in annulment of the arbitral award on the ground of violation of Austrian public policy.[283] The court was of the opinion that failure to provide a 'sound' reasoning in the award would make the award liable to annulment. While absence of reasons in an arbitral award is considered as contrary to public policy in many jurisdictions, lowering the threshold by including absence of 'sound' reasoning reflects expansive interpretation of public policy.

Likewise, in *Medical Center of Health Siglo*[284], the question before the Superior Court of Justice of Madrid was whether an error on part of the 'arbitral institution' would amount to violation of public policy. In the case at hand the arbitral institution had provided the claimant with a wrong template form to pursue the claim. The court

[281] French New Code of Civil Procedure of 1981, Article 1505(5); Portugal Arbitration Law of 2011, Article 46 (3)(b)(ii).

[282] *Oil and Natural Gas v. Saw Pipes* [2003] AIR SC 2629.

[283] Docket 18 OCg 3/16i, Supreme Court of Austria, 08 September 2016.

[284] *Medical Center of Health Siglo XXI, SL v Inmuebles Danibes, SL* 64/2017, Superior Court of Justice of Madrid, 12 July 2017; Esperanza Baratech and Fernando Mantilla-Serrano, 'Medical Center of Health Siglo XXI, SL v Inmuebles Danibes, SL, Superior Court of Justice of Madrid, 64/2017, 12 July 2017', A Contribution by the ITA Board of Reporters, Kluwer Law International.

was of the opinion that in the given circumstances the arbitral institution had acted impartially giving rise to the annulment of the arbitral award on the ground of violation of the public policy.

The Supreme Court of Hungary in a decision set aside an arbitral award partially, on the ground of public policy, as it held that the disproportionately high legal costs awarded in the case at hand were against the Hungarian public policy.[285] Interestingly, the court did not hold awarding of such high costs in violation of any law, yet concluded that it was contrary to public policy as it 'contradicted social value judgments'.[286]

Even though the instances of national courts resorting to broad or expansive interpretation of public policy are significant enough in numbers to get noticed, the scholarship and judicial discourse from most of the jurisdictions suggests that restrictive interpretation of public policy during the annulment proceedings, in case of international arbitration, is the more favored position.[287] Narrow interpretation is

[285] Decision No. GFV VI. 30/450/2002/6, Supreme Court of Hungary; T Várady and others, *International Commercial Arbitration: A Transnational Perspective* (Seventh edn, Thomson/West 2019) 504.

[286] T Várady and others, *International Commercial Arbitration: A Transnational Perspective* (Seventh edn, Thomson/West 2019) 504; A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 122. On the contrary the Singapore High Court in *VV and anr. v WW* [2008] SGHC 11, dealing with the similar issue where 'disproportionate costs' awarded were challenged on the ground of public policy, held that:

> 'The concern that has been expressed by the judges and others as to keeping the costs of litigation in proportion to the circumstances of the case has been a concern that related to court litigation and the general rubric of 'access to justice'. From a policy perspective, this concern does not extend to private arbitrations despite personal misgivings at the quantum of any costs award in such litigation. I do not think that the amount of costs awarded by an arbitrator to a successful party in an arbitration proceeding could ever be considered to be injurious to the public good or shocking to the conscience no matter how unreasonable such an award may prove to be upon examination'.

[287] Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 172; Mayer and Sheppard, 'Final

essentially favored for it reflects an arbitration-friendly position and helps in augmenting certainty *vis-à-vis* the fate of international arbitral awards.[288]

2.3.3 Scope of Judicial Review under the Ground of Public Policy Exception

As stated earlier, there are no national laws or international instruments that point out as to what should be the scope of judicial review when a national court is evaluating an application to annul an international arbitral award on the ground of public policy exception. Generally speaking, the scope and operation of the public policy exception in annulment proceedings, as in case of enforcement proceedings, is expected to remain restricted. However, in practice, there is no consensus on as to what should be the scope of judicial review of arbitral awards under the ground of public policy exception.

There is a general understanding that the courts in charge of the annulment proceedings should not indulge in reviewing the merits of the award.[289] National courts on several occasions have declined from considering an allegation of mistake in application of law or facts, on part of the arbitral tribunal, as a violation of public policy.[290] The rationale being that allowing national courts to re-appreciate evidence and

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ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 251.

[288] Michael Hwang and Andrew Chan, 'Enforcing and Setting Aside of International Arbitral Awards: The Perspective of Common Law Countries' in Albert Jan Van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (2001) Vol. 10 ICCA Congress Series 157.

[289] Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 175.

[290] See, for example, *United Arab Emirates v Westland Helicopters* [1994] Swiss Federal Tribunal; *Transport de Cargaison v International Bulk Carriers* [1990] Court of Appeal of Quebec; *Government of New Zealand v Mobil* [1988] YBCA, at 638; *Republic of Latvia v JSC Latvijas Gaze* [2005] Sevea Court of Appeal of Valencia; *X v Y*, Case No. 2018 (Ra) 817, High Court of Tokyo, 01 August 2018; Takiko Kadono et al, 'X v. Y, high Court of Tokyo, Case No. 2018 (Ra) 817, 01 August 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

evaluate arbitral tribunal's wisdom to apply relevant laws could be used as a tool to serve the parochial interests of the forum.[291]

Another essential reason behind limiting the scope of review under the public policy exception is to 'preserve the autonomy of the arbitral process'.[292] Moreover, it is argued that the very logic behind considering arbitral awards as final and binding would fail if national courts are allowed to revisit the merits of the award at will.[293] It is also argued that allowing review of merits can pave the way for unabated judicial intervention, discrediting the arbitral process.[294]

However, this opinion is countered by arguing that the finality of arbitral awards should not be seen as absolute, as upholding objectionable awards may not only violate the forum's most fundamental notions of morality and justice but also bring disrepute to the international commercial arbitration regime.[295] There are scholars who argue that "some room should be left to allow for the setting aside and refusal of enforcement of an arbitral award tainted by egregious and shocking error".[296] The argument is based on the premise that non-intervention by courts in all kinds of cases of error of law or error of facts would be akin to handing over a blank cheque in favor of an arbitral tribunal.

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[291] Alexis Mourre and Luca Brozolo, 'Towards Finality of Arbitral Awards: Two Steps Forward and One Step Back' (2006) 23(2) Journal f International Arbitration 174.

[292] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3179.

[293] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 193.

[294] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 674.

[295] Amokura Kawharu, 'The Public Policy Ground for Setting Aside and Refusing Enforcement of Foreign Arbitral Awards' (2007) 24(5) Journal of International Arbitration 498.

[296] Michael Huwang and Su Zihua, 'Egregious Errors and Public Policy: Are the Singapore Courts Too Arbitration Friendly?' in Michael Huwang, *Selected Essays on International Arbitration* (SIAC 2013) 53.

The possibility of an arbitral award being flagrantly in violation of the fundamental mandatory rules of a jurisdiction cannot be ruled out altogether. In such cases, courts may deem fit the go behind the award in order to ascertain whether such derogation from the mandatory rules would constitute violation of public policy. Therefore, limited judicial review may be seen as a necessary evil to prevent abuse of autonomy that the parties and the arbitral tribunals enjoy in international commercial arbitration.[297] Arbitral awards tainted with allegations of corruption, fraud, absence of due process may call for a limited judicial review.[298]

For example, the French Court of Appeal annulled an ICC award for being in violation of international public policy and for being tainted by fraud.[299] In the setting-aside application the award was challenged for being in violation to public policy as it was allegedly obtained by forging evidence and the tribunal had failed to comply by the mandatory laws of the Republic of Lao – the governing law. Similarly, the German Federal Court of Justice annulled an arbitral award on the ground of public policy owing to the incorrect application of *res judicata* by the tribunal.[300]

Notwithstanding the differences in opinion and approaches in scholarship and judicial discourse over the scope of judicial review of international arbitral awards during annulments proceedings, the fact remains that the Model Law cannot be

[297] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3358.

[298] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP 2008) 196.

[299] *Société MK Group v. S.A.R.L Onix and Société Financial Initiative* 15/21703, Court of Appeal of Paris, 16 January 2018; Nataliya Barysheva and Valentine Chessa, 'Société MK Group v. S.A.R.L Onix abs Société Financial Initiative, Court of Appeal of Paris, 16 January 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

[300] BGH – I ZB 9/18, Federal Court of Justice of Germany, 11 October 2018; Richard Kriender, 'BGH – I ZB 9/18, Federal Court of Justice of Germany, I ZB 9/18, 11 October 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

understood as favoring unabated judicial intervention in garb of public policy violation. As such an interpretation of public policy would go squarely against the underlying aim and objective of the Model Law - that calls for promoting "finality of arbitral awards and legal certainty".[301]

A substantial deference to the findings of arbitral tribunals, both in case of law as well as facts - unless the arbitral award is contaminated with egregious errors, will serve the cause of international commercial arbitration regime. It is very important that an application to seek annulment of international arbitral awards is not confused with an appeal against the award. National courts, therefore, may hold an international award against the public policy of the seat only when there is a clear violation of the most fundamental mandatory rules.

Summary

There is no denying in the fact that party autonomy is perceived as one of the most striking and appealing features of international commercial arbitration. With tremendous scope for customizing the dispute settlement mechanism as per the expectations of the parties, international commercial arbitration not only prevents parties from falling victim to the otherwise complex litigation system, it also incentivizes the development of cross-border trade in its own way.

Notwithstanding the private nature of international arbitration that offers neutrality and independence in dispute resolution, the fact remains that it cannot afford to completely alienate or isolate itself from the control of State. The control of State over arbitration, which basically runs through the national courts, however,

[301] Amokura Kawharu, 'The Public Policy Ground for Setting Aside and Refusing Enforcement of Foreign Arbitral Awards' (2007) 24(5) Journal of International Arbitration 491.

must not be read in negative sense. As a matter of fact, national courts play a significant role in legitimizing the arbitration process.

Another significant role that the national courts play is to safeguard the fundamental interests of the legal system that they represent. The tool that national courts may resort to, in order to uphold the State sovereignty and to prevent the celebrated party autonomy in arbitration process from violating the legal system's fundamental notions of morality and justice, is the doctrine of public policy.

Public policy marks its presence in the arbitration process right from the inception to the end. In the pre-enforcement stages of international commercial arbitration, which can be broadly identified as the stage of arbitral proceedings and the annulment proceedings, public policy gets to play a significant role.

At the very beginning of the arbitral proceedings, where the arbitral tribunals are expected to decide on the issue of arbitrability of the subject matter of the arbitration agreement, relevant public policy consideration, even though indirectly, do influence the decision of the tribunal. Though arbitrability in itself stands as a distinct principle and a separate ground, to both annul or refuse enforcement of arbitral awards, its genesis may at times invite arbitral tribunals to take into account various public policy consideration while deciding on the issue of arbitrability.

An essential role that public policy plays, in order to uphold the sovereignty of a legal system in view of the liberty granted to parties and arbitral tribunals under the regime of international arbitration, comes to fore in context of application of laws in arbitral process. Though the parties and arbitral tribunals enjoy significant freedom vis-à-vis choice of laws that would govern the arbitral process, the autonomy is not without limits.

Public policy may not only restrict the afore-mentioned choice by disallowing application of certain laws, it may also mandate the parties or the tribunal to apply those laws or rules that otherwise would have been excluded on purpose. The rationale being that parties or arbitral tribunals must not get to use the autonomy provided in international arbitration to deviate from certain mandatory laws of the relevant legal system.

At this juncture it is also important to point out that national courts must not use compliance with mandatory rules as a tool to unnecessarily thwart the arbitration process. It is expected from the national courts to take a restricted view and not put all mandatory rules in the bracket of public policy. Only deviation from the most fundamental mandatory rules should qualify as violation of public policy.

The final pre-enforcement stage follows the issuing of arbitral award. The party aggrieved with the arbitral award may opt to approach the national court with an application to set aside the arbitral award. Violation of public policy, invariably, remains one of the grounds based on which the arbitral award can be challenged. Owing to inherent varying nature of public policy, the role of public policy at this stage has for long been a reason of controversy. The lack of consensus over the interpretation and application of public policy in annulment proceedings has the potential of severely damaging the credibility of international arbitration regime. An expansive interpretation of public policy exception can give unbridled authority to national courts to intervene and conduct a review of the arbitral awards, thereby adversely affect the notable features of arbitration, such as finality and legal certainty.

Having said that, one cannot discount the fact that though the significance of public policy exception during annulment proceedings is well acknowledged across

the jurisdictions, at the same time, there is a growing consensus over limiting the scope of public policy exception by restricting it to only the most fundamental mandatory norms of a legal system. It cannot be emphasized enough that in order to bring out more predictability and consistency, it is important for the national courts to uniformly approach international arbitral awards, while interpreting the public policy ground during the annulment proceedings.[302]

It would be safe to argue that public policy doctrine functions as a significant enabler of judicial control over the process of arbitration - which in turn guarantees a balance between the desired freedom from the obstacles of various States' laws and the legitimate expectation of such States to protect the fundamentals of their legal system. Although perceived mostly as a shield against violation of fundamental values of a forum State, it is important to appreciate that upholding arbitration agreements, parties' choice of laws, and arbitral awards may also be matters of public policy; therefore maximum restraint is desirable while interpreting it.[303]

[302] Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 171.

[303] Jan Paulsson, 'Metaphors, Maxims, and Other Mischief: The Freshfields Arbitration Lecture' (2014) 30(4) Arbitration International 638.

3. PUBLIC POLICY AS A GROUND TO REFUSE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: DECRYPTING THE NEW YORK CONVENTION

Introduction

Enforcement of an arbitral award is essentially the manifestation of the logical conclusion of an arbitration proceeding. One of the remarkable features of international commercial arbitration that makes it a preferred dispute resolution mechanism over the other ADR mechanisms is the final and binding nature of the arbitral awards. As a matter of established practice in international commercial arbitration, normally, once an award is issued it becomes binding on the parties.

Therefore, parties are expected to voluntarily comply by the terms of the award, without delay.[304] This idea is further set out in the relevant international convention, i.e. the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards - which happens to be the most popular multilateral treaty governing enforcement of foreign arbitral awards.

It cannot be emphasized enough that the credit for the popularity of international commercial arbitration, as a cross-border dispute resolution mechanism, to a great extent goes to the contribution of New York Convention *vis a vis* harmonization of procedure as far as recognition and enforcement of foreign arbitral awards is concerned.[305] It certainly won't be an exaggeration to state that the New York

[304] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 605; Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 2.

[305] Ines Medic, 'Significance of Mandatory Rules in International Commercial Arbitration', Paper presented at the 19th International Scientific Conference on Economic and Social Development

Convention has proven to be an epitome of successful multilateral treaties in the area of international commerce.[306]

Although, the New York Convention has been playing a role of catalyst in facilitating enforcement of foreign arbitral awards across the jurisdictions, it also provides a mechanism through which national courts may refuse to enforce such awards. Through an exhaustive list of grounds provided under Article V of the New York Convention, national courts – where enforcement is sought, are empowered to control the fate of foreign arbitral awards.

Violation of public policy is one of the ground listed under Article V, based on which a national court can refuse enforcement of a foreign arbitral award. Though not one of the most successful grounds to refuse enforcement of a foreign arbitral award, it is remains a quite often-invoked ground – owing to its peculiar inherent character.[307] Given the controversies, as discussed in previous chapters as well, attributed to the concept of public policy, it has achieved the status of being a notorious ground under the New York Convention – having the potential to frustrate the overall arbitration process.

Melbourne, Australia (Feb. 2017) 39; S Greenberg and others, *International Commercial Arbitration, An Asia-Pacific Perspective* (CUP 2011) 411.

[306] ICCA, *Guide to the Interpretation of the 1958 New York Convention – A Handbook for Judges* (ICCA 2011) 15; K Vibhuti, *Enforcement of Foreign Commercial Arbitral Awards: International and Indian Perspectives* (Tripathi Publications 1994) 22; Dimitra Tsakiri, 'The New York Convention's Field of Application with respect to the Enforcement of the Arbitration Agreement' in Maththias Scherer (ed), ASA Bulletin (Kluwer Law International, 2018) Vol. 36, No. 02, 364.

[307] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 255; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G Bermann (eds), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 60.

As a continuation of the previous chapter, this chapter essentially concerns the enforcement stage of international commercial arbitration and the manner in which it can get affected by the application of doctrine of public policy. Given the scope of the thesis, the discussion on enforcement of foreign arbitral awards and the role of public policy thereof is limited to the realm of New York Convention only. The chapter, as the title states, basically investigates and analyses the greater scheme of enforcement of foreign arbitral awards under the New York Convention and the manner in which public policy exception fits into it. As lack of a precise definition of public policy remains the core reason with regard to the problems attributed to the concept, it becomes extremely important to identify the scope of public policy exception as perceived under the New York Convention.

Accordingly, a surgical analysis of the significant and relevant international instruments, i.e. the New York Convention and the UNCITRAL Model Law, by examining their *travaux préparatoires,* is provided. The discussion not only helps in understanding the intent of the drafters of the documents but also lays down a comprehensive road map as to how the public policy exception is expected to be interpreted and applied by the national courts – as and when raised as a defense to enforcement of foreign arbitral awards.

This chapter further investigates into the critical issues associated with the interpretation and application of the public policy exception, helping in identifying the scope of the exception under the New York Convention. Taking into account the relevant scholarly work and the judicial discourse from across the jurisdictions, the need of restrictive interpretation of the public policy exception is argued. Also, an analysis is provided on the judicial trend and the expected response of national courts in matters

where the public policy exception is invoked as a tool for reviewing the merits of the arbitral award – be that on account of erroneous application of law or facts.

The chapter also delves into the not much discussed classification of the ground of public policy as a ground to refuse enforcement of foreign arbitral awards under the New York Convention. The significance of 'substantive public policy' and 'procedural public policy' and the scope of invoking these principles at the enforcement stage are discussed at length. An allied issue, concerning the possible overlap between the grounds covering procedural irregularities as provided under Article V (1) and the ground of procedural public policy, is also analyzed.

Last but not the least, the chapter looks into the scope and significance of the varying levels and standards of public policy, i.e. domestic public policy, international public policy and transnational public policy. The discussion mostly revolves around the distinction and relevance of the various standards of public policy, and how they interact with the greater scheme of the New York Convention.

3.1 Enforcement Proceedings and the Role of Public Policy Exception

In international commercial arbitration, once the arbitral proceedings are over and an award is issued, the award-debtor is expected to honor the award. However, as a matter of fact, the award-debtor may not be willing to do so for a variety of reasons, including challenging the arbitral award at the seat of arbitration or for that matter simply disregarding the arbitral award. It deserves to be mentioned here that if we take into account the statistics, when it comes to voluntary compliance of arbitral awards by parties, the percentage is significantly on a higher side.[308]

[308] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82 (1) Arbitration 2; Pricewaterhouse Coopers and Queen Mary University of London, International Arbitration:

However, in a scenario where the award-debtor fails to honor the award, it is imperative to have a mechanism that enables judicial enforcement of arbitral awards.[309] Since after rendering the award the arbitral tribunal turns *functus officio*, generally leaving no room for an appeal against the award, the award creditor can immediately get the award recognized and enforced through a relevant national court in accordance with the New York Convention.

Recognition and enforcement of foreign arbitral awards is vital in shaping the success of international commercial arbitration as a transnational dispute resolution mechanism.[310] New York Convention, as mentioned above, facilitates recognition and enforcement of the foreign arbitral awards; therefore, taking the award issued by a private tribunal to its logical conclusion. New York Convention ensures that a foreign arbitral award under its aegis is put at the same pedestal as a decision of any national court – paving way for its enforcement through national courts.[311]

It is imperative to note at this juncture that this assurance with regard to the recognition and enforcement of foreign arbitral awards provided under the New York Convention is not absolute in nature. The Convention, under Article V, provides for an exhaustive list of grounds based on which the award-debtor can challenge the enforcement of a foreign arbitral award.[312] And it is expected from the national courts to

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Corporate Attitudes and Practices 2008 (2008) 14. <https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf>

[309] S Greenberg and others, *International Commercial Arbitration, An Asia-Pacific Perspective* (CUP 2011) 411.

[310] Mahmudin Nur Al-Gozaly, 'The Judicial Expansive Attitude towards Public Policy in Enforcement of Foreign Arbitral Awards in Indonesia' (2014) 15 J. Opinio Juris 142.

[311] ibid 143; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 1.

[312] The national courts where enforcement is sought may refuse to enforce foreign arbitral awards based on any of the seven grounds listed under the New York Convention. See Article V of the New York Convention.

play a significant role in ensuring that the aggrieved party has not been robbed of justice in the arbitration process that it had relied upon for the settlement of dispute.[313] Therefore, underlining that the role of national courts in success of international arbitration is extremely vital.[314]

One of the grounds under Article V of the New York Convention, based on which the award-debtor can request the court, or the court can *sua sponte* refuse the enforcement of the foreign arbitral award, is the violation of public policy of the State where the enforcement is sought.[315] It is relevant to highlight here that when public policy is being referred to under Article V (2)(b) of the New York Convention, the reference is made to the public policy of the place where enforcement is sought.[316]

Broadly speaking, public policy exception plays an extremely important role in ensuring that the international arbitration regime does not distance itself from the essential values of justice identified and practiced across the jurisdictions.[317] For

[313] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 14.

[314] ibid 13.

315 Article V (2) of the New York Convention reads:

> "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) …
>
> b) The recognition and enforcement of the award would be contrary to the public policy of that country".

See Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3651.

[316] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 225; Riesman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 140; Aakanksha Kumar, 'Foreign Arbitral Awards Enforcement and the public Policy Exception – India's Move Towards Becoming an Arbitration-Friendly Jurisdiction' (2014) 17(3) Int'l A.L.R 76.

[317] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 200.

example, in *Z v. Y* [318] the enforcement of the award issued by China Guangzhou Arbitration commission was challenged before the High Court of Hong Kong. The argument made was that the enforcement of the award would violate public policy as it was tainted by illegality and that the award-debtor was not given proper notice with respect to the appointment of the arbitral tribunal. The court accepted the arguments and held the tribunal had indeed failed to take into account the issue of inherent illegality of the agreement; therefore enforcement of such an award would offend the principles of justice and violate the public policy.

Even though there is no denying in the significance of violation of public policy being an exception to refuse enforcement of a foreign arbitral award, as it serves as a safeguard mechanism against the possibility of the violation of fundamental tenets of a legal system, the interpretation and application of the exception by various national courts have caused some concerns.[319] The concerns and apprehensions attributed to the public policy exception exist essentially due to the lack of a precise definition of the doctrine of public policy. Change in public policy within a jurisdiction with change in times only adds to the ambiguity and confusion. Thereby, leaving it as an open-ended and a fluid concept, which national courts can use to serve both just and unjust interests – making it the most controversial grounds for refusal of foreign arbitral awards.[320]

[318] [2018] HKCFI 2342, High Court of Hong Kong, Court of First Instance, HCMP 1771/2017, 18 October 2018; Briana Young, Z v. Y [2018] HKCFI 2342, High Court of Hong Kong, Court of First Instance, HCMP 1771/2017, 18 October 2018, A contribution by the ITA Board of Reporters, Kluwer Law International.

[319] G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in, G. Bermann (ed) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 60; Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3647.

[320] Judith Gill and David Baker, The Public Policy Exception Under Article V 2(b) of the New York Convention: Lessons from around the World (2016) 18(2) Asian Dispute Review 74.

Therefore, with this background in mind, before we delve into the various manifestations, dimensions, classifications, and issues related to interpretation and application of public policy exception, it might be helpful to begin with a brief account on the New York Convention and the position of public policy exception under the New York Convention.

3.1.1 Public Policy Exception under the New York Convention: An Overview

The New York Convention is claimed to be one of the most effective 'international legislation in the entire history of commercial law'.[321] It succeeded the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 (hereinafter Geneva Convention), which was adopted by the League of Nations for the purposes of providing a mechanism to enable enforcement of foreign arbitral awards. As far as the ground of public policy exception is concerned, the Geneva Convention provided that for enforcement of an arbitral award it was necessary for the award to be in compliance with the public policy or the principles of the law of the country in which enforcement was sought or relied upon.[322]

[321] Michael Mustil, 'Arbitration History and Background' (1989) 6 Journal of International Arbitration 43; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in, G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 71.

[322] Convention on the Execution of Foreign Arbitral Awards, 1927.

> Article 1: "In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made… shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory… to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.
>
> To obtain such recognition or enforcement, it shall, further, be necessary:

With increasing reliance on international commercial arbitration as a dispute resolution mechanism, and growing concerns with regard to certain shortcomings in the Geneva Convention; in 1953 the International Chamber of Commerce (hereinafter the ICC) put forth a proposal before the United Nations Economic and Social Council (hereinafter, ECOSOC) to adopt a new treaty on recognition and enforcement of arbitral awards.[323] It was based on that initiative of the ICC that the New York Convention was adopted in 1958.

It is important to underline that for a regime like international arbitration it was axiomatic to have an effective mechanism of ensuring recognition and enforcement of the awards by national courts. Though the New York Convention was perceived as the best bet to bring greater harmonization with regard to procedures dealing with enforcement of foreign arbitral awards and to overcome the existing challenges in context of enforcement of foreign arbitral awards, retaining State sovereignty was non-negotiable for the contracting parties.[324]

…

(e) That 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". (Emphasis added)

[323] U.N. Doc E/C-2/373, *Statement submitted by the ICC to UN ECOSOC, Travaux Préparatories – Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention (13 March, 1953)* (28 October 1953); Albert Jan Van Den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers 1981) 7; May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the United States and England' (2006) 23(3) Arizona Journal of International & Comparative Law 749.

[324] Fali S. Nariman, 'Introduction to the New York Convention – The Convention and Sovereignty, at the Conference on Judicial Dialogue on the New York Convention' (23rd November 2013) India Habitat Center, New Delhi; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 65.

Public policy exception in the New York Convention was seen as the manifestation of the retention of sovereignty of contracting parties. Van den Berg, in his extensive work on New York Convention argues that public policy has the function of acting as a "guardian of the fundamental moral convictions of policies of the forum".[325] It is also argued that in absence of ground of public policy exception the New York Convention would not have seen light of the day, as no contracting party would have accepted the proposal to not have a say at all in enforcement of foreign arbitral awards - particularly given the possibility that arbitral awards could violate public policy of the enforcing State.[326]

As mentioned earlier, the New York Convention under Article V provides an exhaustive list of grounds, based on which the enforcing court may refuse to recognize or enforce a foreign arbitral award. Violation of public policy of the enforcing State is listed as one of the grounds for refusal to recognize or enforce a foreign arbitral award, under Article V (2)(b). It is relevant to point out that for an award to be refused enforcement on the ground(s) listed under Article V, in particular under Article V (1), the award debtor has to raise a challenge before the enforcing court. However, the grounds provided under Article V (2), i.e. arbitrability and public policy, can be invoked by the enforcing court on its own motion - as these serve the purpose of protecting the fundamental interests and policies of the enforcing State.[327]

[325] A Van den Berg, *The New York Arbitration Convention of 1958 (*Kluwer Law & Taxation Publishers 1981) 360.

[326] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 217; U.N. Doc E/Conf. 26/AC. 42/Sr.7, *Comment of the Delegation of the U.K., Committee on Recognition and Enforcement of Foreign Arbitral Awards, Travaux Préparatories – Summary Record of the Seventh Meeting* (29 March 1955) 7; U.N. Doc E/Conf. 26/AC. 42/Sr.14, *Comment of the Delegation of Iran, UN Conference of International Commercial Arbitration, Travaux Préparatories – Summary Record of the Fourteenth Meeting* (12 September 1958) 3.

[327]William W. Park, *Arbitration of International Business Disputes* (OUP 2006) 307.

The key concern with regard to interpretation and application of the concept of public policy is the dynamic nature of the concept that makes it difficult to settle with one static definition.[328] As far as the legislative history of the New York Convention is concerned, it does not provide any specific guidelines with regard to interpretation of this provision.[329] Lack of a clear and universally accepted definition of public policy has been the reason behind it being extremely contentious when it comes to its application.[330]

What may be public policy in one State need not be necessarily a matter of public policy in another State.[331] Courts, across the jurisdictions, have come up with varying standards of interpretation and application of public policy exception, thereby sometimes leading to situations where efficiency and effectiveness of international commercial arbitration has been severely compromised. Even though the application of public policy exception under the New York Convention has not achieved an alarming success rate, still the prevailing inconsistency and ambiguity leaves enough room for encouraging the award debtor to hamper the efficiency of arbitration.[332]

One of the most often quoted and accepted definitions of public policy in context of refusal to enforcement of foreign arbitral award was laid down by the U.S. Court of Appeals in *Parsons case*[333], where is held that enforcement of a foreign arbitral award

[328] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 132.

[329] Reisman, Craig et al, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 140.

[330] Rashad Rana and Michelle Sanson, *International Commercial Arbitration* (Thomas Reuters 2011) 310.

[331] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 124.

[332] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 255.

[333] *Parsons & Whittemore Overseas Co. v Societe Generale de L'Industrie duPapier* (1974) 508 F. 2d 2nd Cir. 969; Lord Goldsmith, 'An Introduction to International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 5.

should be denied 'only where enforcement would violate the forum's most basic notions of morality'. Some of the well-recognized examples of violation of public policy include corruption or fraud, smuggling, drug trafficking, serious irregularities in the arbitration proceedings, violation of competition law, and lack of reasons in award.[334] The Court of Appeal at Hamburg, on similar lines, in its attempt to provide a comprehensive definition of public policy in German context observed that:

> 'Apart from violations of basic civil rights, an infringement upon public policy will result from violation of a rule concerning the fundamental principles of political and economic life. Public policy will also be infringed upon when the arbitral award is irreconcilable with the German concepts of justice'. [335]

At the enforcement stage, public policy exception is expected to be invoked when recognition and enforcement has the potential of violating the basic notions of justice and morality of the State.[336] It is also argued that under the New York Convention there is an inherent bias towards a pro-enforcement interpretation of the ground of public policy in context of enforcement of foreign arbitral awards.[337]

While verifying the conformity of the foreign arbitral award with the fundamental notions of morality and justice, it is expected that the court should consider only its own

[334] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 256. See Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 722.

[335] January 26, 1989, [1992] YBCA, 491.

[336] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 706.

[337] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 67.

legal system's fundamental values and not evaluate the compatibility of the award with the law of the seat, law of the contract, or the law of the place of performance of the contract.[338] Issues concerning matters that are not directly related to forum's legal system are to be taken care of by the arbitral tribunal and the seat court.

Therefore, if a tribunal rules in favor of enforcement of a contract under its proper law, the forum where enforcement is sought must not conduct a review of tribunal's determination unless forum's most fundamental values are offended.[339] It is generally accepted that the New York Convention does not suggest re-examination of the merits of the case.[340] Public policy as a ground for refusal of the enforcement of foreign arbitral awards is to be taken as an exception to the general rule of recognition and enforcement.[341]

Having said that, even though the public policy exception, as understood, is to be interpreted and applied as an exception to the general rule of facilitating enforcement of foreign arbitral awards, the fact remains that it plays a pivotal role in ensuring that fundamental tenets of a legal system are not compromised.[342] It is, perhaps, because of this inherent inconsistency of the negative character and effect of the public policy

[338] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 258.

[339] Jan Paulsson, 'Metaphors, Maxims, and Other Mischief: The Freshfields Arbitration Lecture' (2014) 30(4) Arbitration International 637.

[340] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 706.

[341] ibid; *Eco Swiss China Time Ltd. V. Benetton International NV* [1999] ECR I-3055. The European Court of Justice observed that:

> '…it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment or refusal to recognize an award should be possible only in exceptional circumstances'.

[342] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 68.

exception on arbitral awards in relation to the general purpose of the New York Convention, public policy is at times referred to as a "double-edged sword: helpful as a tool, dangerous as a weapon".[343]

3.1.2 Interpreting Article V (2)(b) as Envisaged under the New York Convention

Van Den Berg, in his seminal work on New York Convention, emphasized upon the importance of uniform interpretation of the Convention by national courts across the jurisdictions.[344] He suggested that in order to interpret the New York Convention, like any other international treaty, resorting to the tools provided in the Vienna Convention on Law of Treaties of 1969 (hereinafter VCLT) could help a great deal in moving towards a harmonious application of the Convention.[345]

Similarly, taking a cue from Van Den Berg's argument, Marike Paullson argues that VCLT offers a 'teleological approach' that helps to decipher the true meaning of the text of the treaty in 'light of its purpose'.[346] Analyzing the concept of public policy through the prism of aims and objectives of the New York Convention can be useful in understanding and, perhaps, in taming this so called 'unruly horse'.

Keeping the significance of the guidance provided in the relevant provisions of the VCLT in background, applying the rules of interpretation as laid down under Article

[343] Loukas Mistelis, 'International Law Association – London Conference (2000) Committee on International Commercial Arbitration "Keeping the Unruly Horse in Control" or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 International Law Forum Du Droit International 248.

[344] A Jan Van Den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers 1981) 1.

[345] Ibid 4; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 44.

[346] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 44.

31[347] of the VCLT, one can appreciate that the expressions used in the New York Convention should be seen in the light of 'object and purpose' of the Convention -which essentially is to facilitate effective enforcement of foreign arbitral awards. This is clearly reflected in the objectives of the New York Convention described by the UNCITRAL, which reads:

> 'The Convention's principal aim is that foreign and non-domestic arbitral awards will not be discriminated against and it obliges Parties to ensure such awards are

[347] Article 31 of VCLT provides the general rule of interpretation. It reads:

> '1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.
>
> 4. A special meaning shall be given to a term if it is established that the parties so intended'.

recognized and generally capable of enforcement in their jurisdiction in the same way as domestic awards.'[348]

Also, taking a lead from the additional guidance provided under Art 32[349] of the VCLT, delving into the drafting history of the New York Convention, particularly in context of the ground of public policy exception, certainly aids to bring out more clarity on the interpretation and application of the provision.

The Geneva Convention, in its text, provided that for a foreign arbitral award to be enforced it was necessary for such award to not be "contrary to the public policy or the principles of law of the country" where enforcement was sought.[350] The latter part of

[348] UNCITRAL Secretariat, *The handbook on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York, 1958) 1.
<http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf>
See U.N. Doc E/C-2/373, *Statement submitted by the ICC to UN ECOSOC, Travaux Préparatories – Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention (13 March, 1953)* (28 October 1953) 7. See also, Article III of the New York Convention, which reads:

> 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.'

[349] Article 32 VCLT - Supplementary means of interpretation:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of first conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable".

[350] Art. 1(e) of the Geneva Convention.

the provision, i.e. "the principle of law of the country" was believed to cause significant hindrances in the enforcement of foreign arbitral awards as facilitated tremendous scope for judicial intervention.[351] Realizing the potential of misuse and abuse of this provision, the ICC Preliminary Draft Convention modified the relevant clause and under its Article IV provided:

> 'Recognition and enforcement of the award shall be refused if the competent authority to whom application is made establishes:
>
> a) that recognition and enforcement of the award would be contrary to public policy in the country in which it is sought to be relied upon.'[352]

Interestingly, in the initial response to the ICC Draft Convention, the drafting committee further narrowed down the scope of public policy by adding to the clause: "clearly incompatible with public policy or with fundamental principles of the law (ordre public) of the country in which the award is sought to be relied upon".[353] The words 'clearly' and 'fundamental' were apparently used to restrict the application of

[351] U.N. Doc E/C-2/373/Add. 1, *Statement submitted by the ICC to UN ECOSOC explaining the differences between Geneva Convention 1927 and the ICC proposed Convention, Travaux Préparatories – Enforcement of International Arbitral Awards, Statement Submitted by the ICC* (25 February 1954), at 2.

> 'The Geneva Convention stipulated that to be enforceable an award must conform not only to the will of parties, but to the law of the country. It is the reference of latter which caused the difficulties'.

[352] U.N. Doc E/C-2/373, *Statement submitted by the ICC to UN ECOSOC, Travaux Préparatories – Enforcement of International Arbitral Awards, Report and Preliminary Draft Convention (13 March, 1953)* (28 October 1953).

[353] U.N. Doc E/AC.42/4, *Report of the Committee on the Enforcement of International Arbitral Awards, Travaux Préparatories – The Draft Convention* (21 March 1955), at 13.

public policy exception only in cases where the award would "distinctly contrary to the basic principles of the legal system of the country where the award is invoked".[354]

Accordingly, the relevant provision in the draft convention was modified and the new version under Article IV (h) read:

> '[R]ecognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law ("ordre public") of the country in which the award is sought to be relied upon.'[355]

However, inclusion of the word "fundamental" in the clause was objected by the State representatives from India, Australia, the United Kingdom, and the representative of Federation of Indian Chamber of Commerce and Industries.[356] They argued that there was no 'clear legal meaning' for the expression under their respective national laws and that it was not different from 'principles of law'.[357] After further deliberations over the issue and acknowledging that changes proposed in the Draft Convention with regard to the public policy exception might give sufficient room to the national courts to interpret

[354] ibid.

[355] U.N. Doc E/2704, E/AC.42/Rev.1, *Report of the Committee on the Enforcement of International Arbitral Awards, Travaux Préparatories – The Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (28 March 1955), at 2 of Annex.

[356] ibid; U.N. Doc E/Conf.26/4, *UN Conference on International Commercial Arbitration, Travaux Préparatories – Activities of Inter-Governmental & Non-Governmental Organisations in the Field of International Commercial Arbitration* (24 April 1958), at 76.

[357] U.N. Doc E/AC.42/SR.7, *Summary Record of the Seventh Meeting, Travaux Préparatories – Committee on the Enforcement of International Arbitration* (29 March 1955); U.N. Doc E/Conf.26/4, *UN Conference on International Commercial Arbitration, Travaux Préparatories – Activities of Inter-Governmental & Non-Governmental Organisations in the Field of International Commercial Arbitration* (24 April 1958), at 76; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 222.

the exception broadly, it was proposed by the Working Party No. 3 and later on accepted by the Committee as well, to delete references to "subject matter thereof" and "fundamental principles of the law", restricting the provision to, '[T]he recognition or enforcement of the award would be incompatible with the public policy of the country in which the award is sought to be relied upon'.[358]

Finally, with slight modifications to the text prosed by the Working Party No. 3, the text on public policy exception was adopted by the drafting committee in the form as we have it in the New York Convention. It might also be of relevance here to point out that the drafting committee was wary of the distinct nature of the concept of public policy. Understandably, there was no conscious effort made to define public policy or for that matter to make a pitch for its uniform interpretation. Interpretation and application of public policy was left to the wisdom of the courts where enforcement would be sought. Thus, resulting in the text that we see under the Article V (2)(b) of the New York Convention, which expressly mentions that a foreign arbitral award may be refused enforcement if it would be "contrary to the public policy *of that country*".

Notwithstanding, the public policy ground was expected to be understood and interpreted by the national courts in the narrower sense of the term. The overall

[358] U.N. Doc E/Conf. 26/L.43, *Proposal of the Working Party No. 3, Travaux Préparatories – Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (03 June 1958); U.N. Doc E/Conf. 26/L.48, *UN Conference of International Commercial Arbitration, Travaux Préparatories – Consideration of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (04 June 1958); U.N. Doc E/Conf. 26/SR.17, *Comment of the Chairman of the Working Party No. 3 [Mr. De Sydow], Summary Record of the Seventeenth Meeting, Travaux Préparatories – UN Conference of International Commercial Arbitration* (12 September 1958), at 3.

> 'As regards Para 2(b) of Article IV, the Working Party felt that the provision allowing refusal of enforcement on grounds of public policy should not be given a broad scope of application. It is therefore agreed to recommend the deletion of the references, to the "subject matter of the award" and to "fundamental principles of the law".'

impression that one can deduce from the legislative history of the New York Convention is that it was the restrictive application of public policy exception that was strongly stressed upon throughout the discussions during the drafting process of the Convention.[359] This logically implies that the public policy exception, when interpreted and applied, should be read with the pro-enforcement bias of the New York Convention – as it primarily concerns with facilitating enforcement of foreign arbitral awards, thereby, promoting international commerce.[360]

This understanding with regard to pro-enforcement bias of the New York Convention, over the years, has been strongly advocated by various national courts – further solidifying and clarifying the position. For example, the United States Supreme Court observed:

> 'The goal of the Convention [New York Convention]… was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries...'.[361]

[359] U.N. Doc E/Conf. 26/2, *Note by the Secretary General, UN Conference of International Commercial Arbitration, Travaux Préparatories – Comments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (06 March 1958) at 5-12; U.N. Doc E/Conf. 26/AC. 42/Sr.14, *Comment of the Delegation of Japan, UN Conference of International Commercial Arbitration, Travaux Préparatories – Summary Record of the Fourteenth Meeting* (12 September 1958) at 7; U.N. Doc E/2822/Add. 4, *Comment of the Delegation of the Netherlands, Travaux Préparatories – Comments by Governments on the Draft Convention on Recognition and Enforcement of Foreign Arbitral Awards* (03 April 1956) 2.

[360] ICCA, *Guide to the Interpretation of the 1958 New York Convention – A Handbook for Judges* (ICCA 2011) 15.

[361] *Scherk v Alberto-Culver Co*., 417 U.S. 506 (1974).

Similarly, in *AJT v AJU*[362], the Singapore Court of Appeal while interpreting public policy clause in light of the pro-enforcement bias of the New York Convention held that, '[L]egislative policy is to give primacy to the autonomy of arbitral proceedings and uphold the finality of arbitral awards'.[363] The idea is also reflected in Art III of the New York Convention as it accentuates the State parties' commitment to recognize and enforce foreign arbitral awards, indicating the expectations from national courts while interpreting the grounds of refusal.[364]

Also, if we look at the language of Article V itself, the pro-enforcement bias inherent in the New York Convention becomes clearer.[365] The beginning of Article V (1) as well as Article V (2) reads that the courts '*may'* refuse recognition and enforcement of the foreign arbitral awards on the basis of the exhaustive list of grounds provided. Even though Article V (2)(b) of the New York Convention is perceived as a manifestation of the sovereign authority of national courts of the contracting States through which they can deny enforcement of a foreign arbitral award, the Convention clearly leaves it to the wisdom of the national courts to decide whether or not an award should be refused on the public policy ground - therefore providing courts with a 'permissive mandate'.[366] In other words there is no obligation on the national courts,

[362] [2011] SGCA 41.

[363] ibid [60].

[364] Article III of the New York Convention:

> 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award was relied upon, under the conditions laid down in the following articles….'

[365] Article V (2) of the New York Convention reads:

> 'Recognition and enforcement of an arbitral award *may* also be refused…' (Emphasis added).

[366] Shen Wei, *Rethinking the New York Convention: A law and Economics Approach* (Intersentia, 2013) 234; Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 160; U.N. Doc E/2822/Add.4, *Comment of Mr. Sanders, The Netherlands, Convention on Recognition and*

under the New York Convention, to refuse enforcement of a foreign arbitral award even if the requirements under Article V (2)(b) are met.[367]

The aforementioned discussion evidently suggests that in case of a possibility of several interpretations of public policy, courts are encouraged to resort to a narrow interpretation that favors enforcement of the arbitral award.[368] Not to discount the fact that an expansive interpretation of the public policy ground has the potential of vitiating New York Convention's essential purpose of removing obstructions to enforcement of foreign arbitral awards.[369]

It is also vital to take into account that international commercial arbitration essentially deals with international disputes, therefore, subjecting awards to policies that are 'peculiar only to enforcing system' and not to 'principles that are common to a plurality of states' – can prove to be counter-productive and discouraging.[370] Therefore, it is only logical to argue that the expectation from national courts is to entertain the ground of public policy violation only in cases where the contravention is clearly evident and in line with the understanding of the doctrine as established under the international best practices.[371]

Enforcement of Foreign Awards, Travaux Preparatories – Comments by the Government on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards (14 March 1956) at 9, Annex 1.

[367] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3428.

[368] ICCA, *Guide to the Interpretation of the 1958 New York Convention – A Handbook for Judges* (ICCA 2011) 15; see also, Gary Born, International Commercial Arbitration (Seconf edn, Kluwer Law International 2014) 3651.

[369] Shen Wei, *Rethinking the New York Convention: A law and Economics Approach* (Intersentia 2013) 247; Aakanksha Kumar, Foreign Arbitral Awards Enforcement and the public Policy Exception – India's Move Towards Becoming an Arbitration-Friendly Jurisdiction (2014) 17(3) Int'l A.L.R 76.

[370] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 313.

[371] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 222.

3.1.3 Public Policy Exception under the UNCITRAL Model Law: Echoing the New York Convention Interpretation

UNCITRAL Model Law on International Commercial Arbitration of 1986 (hereinafter Model Law) has majorly supplemented the New York Convention by providing "standards of management of arbitration proceedings" - covering all stages right from arbitration agreement to the enforcement of arbitral awards.[372] The importance of the Model Law can be ascertained from the fact that it remains the foundation of national arbitration law of a significant number of the countries.[373]

Article 34 of the Model Law provides grounds, including that of violation of public policy, based on which an arbitral award can be challenged before a national court for the purpose of being set-aside. And Article 36, identical to Article V of the New York Convention, lists down the grounds based on which enforcement of an award may be refused. Under Article 36 (1)(b)(ii), the Model Law provides that enforcement of an arbitral award may be refused if it violates public policy of the State where enforcement is sought.[374] Just like the New York Convention, the Model law does not provide a definition for public policy.

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[372] Ines Medic, 'Significance of Mandatory Rules in International Commercial Arbitration' (Feb. 2017) Paper presented at the 19th International Scientific Conference on Economic and Social Development Melbourne, Australia 39.

[373] UNCITRAL Status of countries that adopted Model Law. As on 15th of February 2019, the number of States is 80.

http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html

[374] Art 36 of the Model Law:

> "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> …
>
> (b) if the court finds that:
>
> …

During the drafting process of the Model Law, the provision of public policy exception – both in context of setting-aside of an award and refusal to enforcement of an award underwent a threadbare discussion.[375] Though most of the discussion on the doctrine of public policy took place in context of Art 34 of the Model Law, but the broader issues attributed to the concept of public policy and the conclusions and recommendation thereof are applicable to Art 36 as well.

Taking note of the trend followed by the national courts to distinguish the standards of public policy between 'international public policy' and 'domestic public policy' while interpreting Article V (2)(b) of the New York Convention, the Secretariat suggested to limit public policy ground to 'international public policy'.[376] However, due to lack of consensus amongst the members, primarily owing to two reasons; one, some members pointed out that it may lead to 'undesirable conflicting results under the Model Law and the New York Convention', and two, Working Group's observation that 'the term "international public policy" lacked precision', it was decided not to adopt the suggestions and keep the text as provided in the New York Convention.[377]

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State".

[375] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to The UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers 1989) 918; *Travaux Préparatoires*, UNCITRAL Model Law on International Commercial Arbitration (1985), in particular, Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration.
<http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_travaux.html>

[376] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to The Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers 1989) 919; A/CN.9/207, *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration* (14 May 1981) at para 21.

[377] Howard M. Holtzmann and Joseph E. Neuhaus, *A Guide to The Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law and Taxation Publishers

Interestingly some of the members, during the course of discussions on drafting Model Law, suggested deleting the provision on public policy exception.[378] The Indian delegation, for example, proposed that it would prefer to see the public policy exception deleted, both under Article 34 and Article 36.[379] The argument submitted was that the expression "public policy" was much "too vague and had very little to do with the law of arbitration".[380] However, the idea was opposed by some other prominent delegations like observer for ICC and the U.K. delegation.[381]

The delegation of United Kingdom, in particular, stressed upon retaining the public policy exception as a safeguard mechanism against serious procedural injustices committed during the arbitration proceedings, therefore, proposed to include 'serious procedural injustice' under the ambit of violation of public policy.[382] In fact, the U.K. delegation also pointed out that the expression "public policy" does not reflect the same meaning as the counterpart in civil law, i.e. "*ordre public*" – which included procedural injustices as well.[383]

On the other hand, the delegation of the United States of America strongly supported retention of the subparagraph, citing apprehensions that a 'radical departure

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1989) 919; A/CN.9/233, *Report of the Working Group on International Contract Practices on the work of its fifth session* (24 February - 04 March 1983) at para 154 & 160.

[378] *Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration, 318th Meeting* (11 June 1985) at para 34-39. The proposal was moved by the delegation of India and supported by the delegations of Sweden, Yugoslavia, Iran, Nigeria, and Singapore.

[379] *Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration, 318th Meeting* (11 June 1985) at para 34. See, *Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration, 330th Meeting* (19 June 1985) at para 7.

[380] ibid.

[381] ibid, para 40-41.

[382] ibid, para 41.

[383] *Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration, 324th Meeting* (14 June 1985) at para 21.

from the New York Convention' would harm harmonious application of law and further argued, "retention would enhance the acceptability of the Model Law".[384] The Chairman, taking into account the concerns raised by the delegation of U.K., clarified that the ground of public policy refers to procedural public policy as well, and is not confined to substantive public policy only.[385]

Finally the Commission decided to retain the paragraph, and made the following observations with regard to interpretation of the ground of public policy:

> 'In discussing the term "public policy", it was understood that it was not equivalent to the political stance of international policies of a State but comprised the fundamental notions and principles of justice. It was also noted that, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of "ordre public", principles of procedural justice were regarded as being included.'[386]
>
> …
>
> 'It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting-aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances relating to the manner in which an award was arrived at.'[387]

[384] ibid, para 48.

[385] ibid, para 42&45.

[386] A/40/17, *Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session, Supplement No. 17* (3-21 June 1985) para 296.

[387] ibid, para 297.

The interpretation of the public policy exception as prescribed under the UNCITRAL Model Law has been relied upon and accepted by national courts across the jurisdictions. For example, the Ontario Superior Court, in a recent decision, relying upon the interpretation suggested under the UNCITRAL Model Law held that it is a narrowly construed defense. The court observed:

> 'It must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. Examples of public policy grounds for refusing to enforce an arbitral award are fraud, corruption, bribery and similar serious cases'.[388]

Even though the scholarly commentaries on the New York Convention and the Model Law, coupled with the rich judicial discourse, significantly contributed in understanding of the public policy except in context of enforcement of foreign arbitral awards, a need was felt by the stake-holders to bring more clarity on the issue. As a result, the International Law Association (hereinafter ILA) Committee on International Commercial Arbitration conducted an exclusive study, for six years, on the issue of public policy as a ground for refusing recognition and enforcement of international arbitral awards.[389] The study culminated into two reports, an interim report and a final report, which delved in great detail over the

[388] *Entes v Kyrgyz Republic* [2016] ONSC 7221.

[389] A. Sheppard, 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitrational International 217-248; Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 249-263.

issues and concerns attributed to the ground of public policy and also listed some recommendations to overcome the contentious issues.

The Final Report clearly recommends that finality of arbitral awards should be given priority, except for in 'exceptional circumstances' where the enforcement of the foreign arbitral award would violate 'international public policy'.[390] It further recommended that in order to conclude that the enforcement of the arbitral award would violate international public policy, the national court should take into account the international best practices on the issue by taking a cue from the practice of other national courts and the relevant scholarly work.[391] Overall, the impression given by the reports was that public policy exception under the New York Convention should be interpreted keeping in mind the pro-enforcement bias of the Convention and the need of applying the exception restrictively.

3.2 Restrictive Interpretation of Public Policy

As already discussed in the foregoing sections, the inclusion of the public policy exception in the list of grounds placed under Article V of the New York Convention was intended to enable the national courts to refuse enforcement of an arbitral award in case its enforcement would violate the fundamental notions of morality and justice of that State. Though the text of the relevant provision in the New York Convention does not prescribe limits as to the discretion of national courts in this regard, there is greater consensus on restrictive interpretation of the provision.[392]

[390] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 250.

[391] ibid 259.

[392] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3651.

One of the logical arguments supporting the narrow or restrictive interpretation of the public policy exception is that in absence of such interpretation the underlying policy of the New York Convention that aims at facilitating enforcement of foreign arbitral awards would fail.[393] This, as a matter of fact, was raised and discussed during the process of drafting New York Convention where need of restrictive interpretation of public policy exception was stressed upon.[394]

On the contrary, expansive interpretation of public policy exception arguably runs the risk of failing the very purpose and system of arbitration.[395] An unrestrained interpretation and application of public policy could very well lead to a situation where a judge may refuse enforcement of arbitral awards based on her own whims and fancies under the garb of public policy.[396]

Owing to the lack of harmony with regard to the interpretation and application of the public policy exception, it is only axiomatic to see courts in different jurisdictions adopting varying approaches while interpreting the concept of public policy. Not to mention that it's fluid character that changes not only spatially but also temporally, further augments the problem.[397] However, it deserves to be mentioned here that a

[393] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International, 2016) 224.

[394] See, for example, U.N. Doc. E/Conf. 26/SR, *Comment of Japanese delegation, Convention on Recognition and Enforcement of Foreign Arbitral Awards, Travaux Préparatories, Summary records of the Fourteenth Meeting* (12 September, 1958) at 7.

[395] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 130.

[396] Rashid Rana and Michelle Sanson, *International Commercial Arbitration* (Thomas Reuters 2011) 310.

[397] Lord Goldsmith, 'An Introduction to International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 7; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 65; Loukas Mistelis, ''Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 Int'l Law forum Du Droit Int'l 248.

general trend across the jurisdictions has been to encourage restrictive interpretation in order to facilitate the enforcement of foreign arbitral awards.[398]

In addition to plenitude of scholarly work supporting restrictive interpretation of the public policy exception, there is plethora of court decisions from across the jurisdictions favoring this view. For example, a Swiss Court on restrictive interpretation and application of the public policy exception under the New York Convention noted:

> 'Under Art V (2)(b) CNY, recognition and enforcement of an arbitral award may also be refused if the competent authority where the recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country. As an exception clause, public order is interpreted *restrictively*, especially as regard the recognition and enforcement of foreign awards, where its scope is narrower…'[399] [Emphasis added]

Similarly, a German court while emphasizing on narrow interpretation of the public policy exception noted that for concluding that public policy of Germany has been violated, there should be 'violation of basic civil rights, 'violation of a rule concerning the fundamental principles of political and economic life', and violation of the notions of justice.[400] A German Court advocating for restrictive interpretation in a

[398] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 130; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 69; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 60.

[399] *BGer 4A_374/2014*, First Civil Law Court, 26 February 2015, at para 4.2.2.

[400] Court of Appeal of Hamburg [1989] YBCA, at 491; Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 73.

matter where tribunal's denial of a motion of taking evidence was argued as violation of public policy, noted:

> 'German *ordre public* is only violated if the foreign decision is the result of a procedure which differs from the fundamental principles of German procedural law in such a way that under the German legal system it cannot be considered the result of a fair and constitutional procedure, because it contains substantial errors touching upon the very foundation of public and economic life.'[401]

The Supreme Court of Lima in a recent decision reiterated the adopted the same line of argument. In *D.P Trade S.A.*[402], parties entered in a sale-purchase agreement. Metalyck, the buyer, failed to pay the agreed price which led to initiation of arbitration by the seller, D.P.Trade. Metalyck refused to participate in the arbitration. Subsequently, the Arbitration Institution of the Swiss Chambers issued an award in favor of D.P.Trade. D.P.Trade filed for enforcement in Lima, and Metalyck chose to stay away from the enforcement proceedings. During the enforcement proceedings the Superior Court of Justice of Lima on its motion analyzed whether the subject matter was arbitrable and whether the enforcement of the award would violate the public policy of Peru. The court, applying restrictive interpretation, concluded that enforcement of the award would not violate the Peruvian international public policy.

The trend is no different in French courts that are, by and large, perceived as arbitration-friendly courts because of their narrow interpretation of public policy

[401] CLOUT case no. 371, Hanseatiches Oberlandesgericht Bremen (2) [30 September 1999] Sch 4/99.

[402] *D.P Trade S.A. v Metalyck S.A.C.*352-2017 [2018] Superior Court of Justice of Lima, 05 March 2018; Fernando Salaverry, 'D.P Trade S.A. v. Metalyck S.A.C, Superior Court of Justice of Lima, 352-2017, 05 March 2018', A Contribution by the ITA Board of Reporters, Kluwer Law International.

exception.[403] Likewise, courts in Canada, United States, England, Singapore, Hong Kong, and in many other States have favored restrictive interpretation of the ground of public policy exception.[404]

Even though the majority opinion, both in terms of judicial discourse as well as scholarship, has been in favor of restrictive interpretation, there have been voices raising concerns about the potency of the 'restricted form' of public policy exception.[405] The principle argument made is that arbitrators are not expected to be "necessarily sensitive" towards the public interests, and are more likely to have greater interest in settlement of the disputes without bothering about the relevant public policy concerns.[406]

Also, the fluidity of the concept of public policy, which contributes in its varying understanding both geographically as well as temporally, has resulted in many instances where courts got enticed to interpret this exception broadly enough to sit as appellate authorities against the arbitrator's decision – and ultimately refuse enforcement of the

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[403] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 160; Decision of the *Cour de Cassation* [2008] XXXIII YBCA, at 493

[404] *Entes Industrial Plants Construction & Erection Contracting Co. Inc. v The Kyrgyz Republic, et al* [2016] ONSC 7221, Superior Court of Justice – Ontario, at para 5. The court while elaborating on the interpretation of public policy ground observed:

> 'It is a narrowly construed defence. It must fundamentally offend the most basic and explicit principles of justice and fairness… or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal.'

See *Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v STET International S.p.A. et al.* [2000] 49 O.R. (3d) 414; *Vervaeke v. Smith* [1983] 1 AC 145; *Heibei Import & Export Corporation v. Polytek Engineering Company Limited*, [1999] XXXIV YBCA, at 668; *Aloe Vera of America, Inc. v Asianic Food (S) Pte Ltd and Anr.* [2006] SGHC 78; *Republic of Argentina v. BG Group PLC* [2011] 764 F. Supp. 2d, D.C. Circuit, at 39.

[405] Joel Junker, 'The Public Policy Defence to the recognition and Enforcement of Foreign Arbitral Awards' (1997) 7 California West Int. Law Journal 228.

[406] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 75.

award.[407] As a result, there are examples on record where national courts in some jurisdictions have resorted to a greater scrutiny of arbitral awards by way of invoking and preferring wider interpretation of public policy exception.[408]

For example, the Polish jurisprudence on the interpretation and application of public policy exception reflects the tendency towards favoring wider interpretation.[409] Similarly, there have been phases in Indian jurisprudence where the courts, including the Supreme Court, have called for resorting to expansive interpretation of public policy.[410]

In a recent decision, the Turkish Court of Cassation resorted to expansive interpretation of public policy exception when it ruled that enforcement of an award resulting in reduction of income of the State would be contrary to public policy of Turkey.[411] In another decision, a Turkish Court refused to enforce a Swiss based arbitral award for arbitral tribunal's failure to apply Turkish procedural laws. The court was of the opinion that since the arbitration agreement provided for Switzerland as the seat of arbitration and Turkish law as the governing law of agreement, the tribunal should have applied Turkish procedural law as opposed to Swiss procedural law.[412]

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[407] Wasiq Dar, 'Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South-Asian Perspective' (2015) 2(4) European Journal of Comparative Law and Governance 318.

[408] S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 69. The author particularly criticizes Turkey, Japan, Vietnam and China for favoring expansive interpretation of the public policy exception.

[409] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 159.

[410] *Oil and Natural Gas v Saw Pipes* [2003] AIR SC 2629; *Phulcahnd Exports Ltd v OOO Patriot* [2011] 10 SCC 300.

[411] Decision No. 2017/3322, 13th Civil Chamber, Court of Cassation [16 March 2017].

[412] Decision No. 1052, 15th Civil Chamber, Court of cassation [10 March 1976].

Similarly, a Malaysian Court suggested expansive interpretation of public policy exception when it hinted that it would have refused enforcement of a foreign arbitral award in case it was established that the award-creditor was indeed an Israeli firm.[413] It based its opinion on the fact that trade with State of Israel was prohibited in Malaysia, hence in violation of public policy. The court observed:

> 'When a Malaysian Court is considering the issue of public policy in Malaysia, Malaysian governmental policy, Malaysian moral values and all other relevant factors the prevailing in Malaysia.'[414]

Likewise, the Supreme People's Court of China resorted to expansive interpretation of public policy of China, which includes 'Social and public interest'. In *Heavy Metal*[415] case the issue before the court was whether enforcement of the award would be contrary to the social and political interests of China. The dispute involved banning of performances of a U.S. rock band in China after is engaged in allegedly 'outrageous acts'. Though the tribunal awarded in favor of the band, the Supreme Court refused enforcement of the award finding that the breach of contract on part of the rock band, owing to hurting the national sentiments, was in manifest disregard of the Chinese public policy.

An important and relevant point of inquiry under the larger issue of interpretation of public policy as a ground to refuse enforcement of foreign arbitral award is to figure out as to what is the scope of interference that an enforcing court may resort to. Largely, what is required to be investigated is whether or not the courts

[413] *Harris Adacom Corp v Perkom Sdn Bhd* [1994] 3 MLJ 504.

[414] ibid.

[415] *U.S. Prod. Co. Ltd. v China Women Travel Agency* [1997] Jing Ta No. 35; see also, A Maurer, The Public policy Exception under the New York Convention (Juris 2012) 322.

can review the merits of the award, and how much deference should be giving to the findings of the arbitral tribunal – both in case of facts as well as law.

3.2.1 Review of Merits of the Award

There are no specific guidelines provided under any international treaty or under any national law on arbitration with regard to the power of a judge to review an award at the enforcement stage while it is being challenged on the ground of violation of public policy. However, the general understanding, looking at the practice followed by national courts in some of the leading arbitration-friendly jurisdictions suggests that judges more often than not restrain from reviewing the awards and generally defer to the tribunal's decision.[416] In fact, it is argued that there is more or less a consensus on the issue across the jurisdictions that courts should refrain from engaging into reviewing a foreign arbitral award - therefore not sit as an appellate authority.[417]

One of the reasons of restricting the ambit of public policy exception under the New York Convention was to ensure that national courts observe restraint with regard to the review of arbitral awards.[418] Accordingly, it is expected that the courts during the enforcement proceedings would only examine whether or not an award can be enforced,

[416] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 160; Elliot Geisinger & Alexandre Mazuranic, 'Challenge and Revision of the Award' in, Elliot Geisinger & Nathalie Voser (eds), *International Arbitration in Switzerland: A Handbook for Practitioners* (Kluwer, 2013) 249.

[417] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 863; Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 160.

[418] U.N. Doc. E/AC.42/SR.7, *Comments of Mr. Mehta – India, Mr. Wortley – U.K., Mr. Dennermark – Sweden, Convention on Recognition and Enforcement of Foreign Arbitral Awards, Travaux Préparatories, Summary Record of the Seventeenth Meeting* (29 March 1955), at 4.

without evaluating whether or not the arbitral tribunal was correct in arriving at a decision.[419] A Hong Kong Court, in *A v. R*[420], highlighting the concerns attributed to the review of merits of an arbitral award observed that:

> 'Public Policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The Court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a case. To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration.'[421]

A similar line of argument was adopted by a court in Germany where it had to decide on the enforcement of a foreign arbitral award issued by a tribunal seated in Russia. The Court of Appeal of Celle made the following observation:

> 'The objective incorrectness of the arbitral award because of the mere incorrect application of law, incorrect interpretation of a contract or erroneous determination of the facts is not a ground for annulment since there can be no review of the merits… Rather, there is a violation of public policy only when the arbitral award violates a norm which regulates basic principles of fairness.'[422]

[419] A Maurer, *The Public policy Exception under the New York Convention* (Juris 2012) 101; Decision of the Paris Court of Appeal [2007] XXXII YBCA, at 287.

[420] *A v R* (2009) 3 H.K.L.R.D. 397.

[421] ibid.

[422] No. 8 Sch 6/05 [2007] XXXII YBCA, at 325; A Maurer, The Public policy Exception under the New York Convention (Juris 2012) 108-109.

The court further noted:

> 'The issue is not whether a German judge would have reached a different result based on mandatory German law. Rather, there is a violation of international public policy only when the consequence of the application of foreign law in the concrete case is so at odds with the German provisions as to be unacceptable according to German principles.'[423]

Though a general policy of refraining from reviewing the merits of the award is favored in most of the jurisdictions, it cannot be overlooked that in 'exceptional circumstances' courts may look into the merits of the case to decide whether the enforcement of award would violate public policy. In particular, when allegations suggesting involvement of criminal offences like money laundering, smuggling, terrorism etc. are brought to the attention of the courts.[424] National courts at certain occasions have displayed a tendency to review the arbitral awards when the issue of public policy is raised, however, as a matter of exception and not a rule.[425]

For example, the Italian Supreme Court in a case held that the Court of Appeal could review the merits of the foreign arbitral award as the damages awarded in the case

[423] ibid; Oberlandesgericht Frankfurt, [2009] XXXIV YBCA, at 530. In the case at hand, the Court of Appeal observed:

> 'There is no review of the merits, that is, the incorrectness of the arbitral award on the merits is not a ground for annulment; possible erroneous decisions of the arbitral tribunal must be accepted'.

[424] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 130.

[425] Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds.), *International Arbitration and Public Policy* (Juris, 2015) 177; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 68.

at hand were excessive and appeared to be of punitive nature, hence potentially in violation of Italian international public policy.[426] Emphasizing on restrictive interpretation of public policy exception and giving deference to the findings of the arbitral tribunal, the Court of Appeal of New Zealand held that the scope of review of arbitral awards was very limited. The court observed:

> 'In principle, it might be thought that unless it is so *obvious* that what has occurred is contrary to public policy… the limited nature of judicial review of arbitral awards will require that the arbitrator's findings of fact and law be respected.'[427] [Emphasis added]

Though there is no denying in the fact that certain exceptional circumstances might demand review of merits of the awards, it is important to point out that review of merits of the awards must not be confused with revision of merits. The former, to some degree, is an acceptable practice, but the latter is not allowed, as the enforcing court cannot sit as an appellate authority.

3.2.2 Error of Facts or Law

Finality of an arbitral award is a quintessential feature of international commercial arbitration. Evaluating the application of facts or law by an arbitral tribunal to arrive at an award would, most likely, end up making the enforcing court an appellate court - something that was never envisaged by the authors of the New York Convention.

[426] n. 1183, Cass. 19 January 2007, La nuova giurisprudenza civile commentate, September 2007, 981.

[427] *Amaltal Corp. Ltd. v Maruha (NZ) Corp. Ltd.* [2004] N.Z.L.R. 614/627(C.A.); A Maurer, *The Public Policy Exception under the New York Convention* (Juris, 2012) 152.

Therefore, considering that the error of facts or law *per se* can be included into the rubric of public policy exception would be a fallacy.[428]

Judiciary, in most of the jurisdictions, has put in efforts to treat international arbitration more 'liberally', encouraging deference to party autonomy and discouraging excessive judicial intervention.[429] This approach is in recognition of the fact that an expansive interpretation of public policy exception can open the doors towards the peril of turning the provision of public policy exception into an excuse for reviewing the merits of the award – therefore prejudicing 'the finality of the arbitral awards'.[430]

The Supreme Court of Victoria made a similar observation in *Sauber Motorsport.*[431] In the instant case the applicant had argued that the award should not enforced as, among other reasons, the arbitral tribunal had erred in determining the contractual obligations and that there was breach of natural justice owing to the non-notification of arbitration to an interested party. The court while deciding against the applicant, noted:

[428] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 129.

[429] A. Armer Ríos, A. Jana, K. Kranenberg, *"Article V (1) (b)' in Kronke et al. Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Wolters Kluwer 2010) 231; Shen Wei, *Rethinking the New York Convention: A law and Economics Approach* (Intersentia 2013) 239; Article 190 (2)(e) of the Swiss PIL, which provides that the error in application of law by arbitral tribunal does not *per se* escalate to violation of the international public policy of Switzerland.

[430] Giuditta C. Moss, *International Commercial Arbitration: Party Autonomy and Mandatory Rules* (Tano Aschehoug 1999) 362; Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 171; Aakanksha Kumar, 'Foreign Arbitral Awards Enforcement and the public Policy Exception – India's Move Towards Becoming an Arbitration-Friendly Jurisdiction' (2014) 17(3) Int'l A.L.R 76.

[431] *Sauber Motorsport AG v Giedo Van Der Grade Bv & Anr.* S APCI 2015 0020, 12 March 2015.

> 'In order to establish that the enforcement of an award would be contrary to public policy by reason of a breach of natural justice what must be shown is real unfairness and real practical injustice. Courts should not entertain a disguised attack on the factual findings or legal conclusions of an arbitrator "dressed up as a complaint about natural justice". Errors of fact or law are not legitimate bases for curial intervention. Unfairness in any particular case will depend upon context, and all circumstances of that case.'[432]

The Court of Appeal in New Zealand while deciding on the issues whether error of law or facts on part of the arbitral tribunal could be considered as contrary to public policy, observed:

> 'A serious and fundamental error of law or fact could result in an award being contrary to the public policy of New Zealand…However, such a threshold was high and mere mistakes would not suffice…. This required it to be shown that a substantial miscarriage of justice would result if the award stood because the impugned finding was fundamental to the reasoning or outcome of the award.'[433]

The Singapore courts have consistently maintained that when it comes to error in application of law or facts, on its own, it cannot be held in violation of the public policy of Singapore.[434] Mere error of law or facts on part of a tribunal is not open to judicial scrutiny. Establishing a cause and effect relationship between such error of law or facts

[432] ibid [8]. The court relied on the analysis provided in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* [2014] 311 ALR 387.

[433] *Downer-Hill Joint Venture v Government of Fiji* [2005] 1 N.Z.L.R. 554/570; A Maurer, The *Public Policy Exception under the New York Convention* (Juris, 2012) 152.

[434] Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing 2011) 185; *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41, at 56-57.

with violation of 'identified' public policy is an essential prerequisite to refuse enforcement of an arbitral award.[435]

On the contrary, there have been instances where national courts have considered arbitral awards in disregard of law as contrary to public policy. For example, in *Luzon Hydro*[436], the Philippines Court of Appeal held that the award issued in Singapore was in violation of law as it manifestly disregarded the law of Philippines. The tribunal, in the instant case, had applied the principle of 'costs follow the event', which according to the court disregard of the substantive law of Philippines, given that 'cost follow the event' was an 'alien' principle - therefore violated public policy.[437] Interestingly 'cost follow the event' principle is a well-accepted and adopted principle in many jurisdictions, however, the court in the case at hand disregarded that fact and opted for a rather parochial approach while interpreting public policy.

The Indian Supreme Court in *Phulchand*[438] followed similar approach where it held that an arbitral award that is 'patently illegal' could be refused enforcement on the ground of public policy. The court noted:

> 'There is merit in the submission of learned senior counsel that in view of the decision of this Court in *Saw Pipes Ltd*., the expression 'public policy of India' used

[435] Warren B. Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9 Singapore Year Book of International Law 266; Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing 2011) 119; *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd (2004) 2 SLR (R) 494*, 19.

[436] *Luzon Hydro Corporation v Hon. Rommel O. Baybay & Transfield Phillipines Inc* [2007] YBCA XXXII, at 456.

[437] ibid 472.

[438] *Phulcahnd Exports Ltd v OOO Patriot* [2011] 10 SCC 300. See details of the case at Section 4.3.2.3, Chapter 4.

> in Section 48 (2)(b) has to be given wider meaning and the award could be set aside, 'if it is patently illegal'.'[439]
>
> Similarly, courts in Russia have on several occasions refused enforcement of foreign arbitral awards on the ground of violation of public policy for misapplication of Russian law on the part of arbitral tribunals.[440]

Refusing enforcement of foreign arbitral awards based on error of facts or law can only help in expanding the scope of judicial intervention, encouraging the courts to sit as appellate authorities. Such a practice would thereby damage the elementary feature of the arbitration regime that supports finality of arbitral awards.[441] However, it cannot be negated that in case of some serious irregularities on part of arbitral tribunals the national courts may intervene to safeguard forum's public policy. A restrictive approach, where national courts would intervene only in cases of serious irregularities in application of facts or law affecting the public policy, should be seen as being reflective of the balanced approach envisaged under the New York Convention.

3.3 Classification of the Public Policy Exception

The concept of public policy, as a ground to refuse enforcement of arbitral awards, is generally classified into two forms - substantive public policy and procedural public policy. The term 'public policy' is understood to encompass 'fundamental principles of

[439] ibid, para 13.

[440] A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2010) 224; Boris Karabelnikov and Dominik Pellew, 'Enforcement of International Arbitral Awards in Russia – Still a Mixed Picture' (2008) 19(1) ICCA Bulletin 72; *AO Slovenska Konsolidachana A.S. v KB SR Yakimanka*, [2008] XXXIII YBCA, at 654.

[441] Michael Hwang and Shaun Lee, 'Public Policy as Grounds for Annulment of or Non-Recognition or Enforcement of Arbitral Awards in East Asia' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 216.

law and justice in substantive as well as procedural respects.[442] Broadly speaking, substantive public policy concerns with the subject matter of the arbitral award, and on the other hand, procedural public policy deals with the procedure pursuant to which the award is arrived at.[443]

National courts, through the public policy exception, act to safeguard the forum's fundamental interest from both procedural as well as substantive point of view.[444] As already discussed, public policy as understood under the New York Convention deals with not just the fundamental substantive norms of a legal system but also the matters dealing with the essential due process requirements.[445] A proposition to this effect was discussed at length and finally adopted during the drafting process of Model Law as well.[446]

A relatively recent decision of the Brazilian Superior Court of Justice can be of help to clarify as to how the substantive norms and the procedural requirements of a

[442] International Law Association (ILA) Committee on International Commercial Arbitration, 'Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (London, 2000) at 349.

[443] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 76; Fernando Mantilla-Serrano, Towards a Transnational Procedural Public Policy (2004) Vol. 20, No. 04 Arbitration International 335.

[444] Discussed above under Section 3.1.3. See Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1), Arbitration 3; Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 171.

[445] Jan Paulsson, *The Idea of Arbitration* (OUP 2013) 132; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 60.

[446] *Summary records for meetings of the UNCITRAL Model Law on International Commercial Arbitration, 324th Meeting* (14 June 1985) at para 42&45; Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia '(2003) 19(1) Arbitration International 76.

legal system can be a representation of its public policy.[447] The case at hand involved a U.S. seated arbitral award issued under the auspices of ICC. As the award-creditor filed for enforcement of the award in Brazil, it was challenged on the ground of violation of public policy of Brazil.

The principle arguments put forth were that the Chairman of the arbitral tribunal had failed to disclose material facts affecting his impartiality and independence, therefore, violating the fundamental principles of natural justice. Also, that the 100 million US dollar indemnity fee awarded by the tribunal was in violation of the relevant Brazilian law on the matter, hence against the public policy.

The Court while delving into the allegations found out and held that due process requirements are part and parcel of Brazilian constitutional principles and guarantees, therefore, failure on part of the arbitrator to disclose the relevant facts questioned his impartiality and independence. On the issue of awarding indemnification fee, the court held that the awarded indemnification exceeded the limits of the arbitration agreement as the tribunal instead of taking into account the extent of damage relied on the financial evaluation of the business. The court further noted that since the Brazilian law does not identify indemnification of 'eventual or hypothetical damages', therefore the award was in violation of the Brazilian public policy.

The refusal to enforce the arbitral award, in the case at hand, for lack of impartiality and independence of the arbitrator reflects the procedural public policy aspect. And the refusal to enforce the arbitral award due to the indemnity fees awarded is a manifestation of invoking the substantive public policy.

[447] See, *ASA Bioenergy Holding AG & Ors. v Adriano Giannetti Dedini Ometto & Anr.* [2017] Foreign Award No. 9412-Ex, Superior Court of Justice of Brazil, 19 April 2017.

3.3.1 Substantive Public Policy

Substantive public policy, essentially, concerns with the substantive rights and obligations of the parties that are intertwined with the subject matter of the award.[448] An award, enforcement of which can result in violation of fundamental principles of law of the State where enforcement is sought, can be refused for being contrary to the substantive public policy of such State. Such rights and obligations can be closely connected or can influence the State's public policy on issues like anti-trust laws, environmental laws, economic laws like foreign exchange regulations, criminal jurisprudence including prohibition of activities involving terrorism, slavery, drug trafficking, corruption etc.[449]

When it comes to practice, a generally accepted norm is that the substantive rights and obligations decided by the arbitral tribunal should be taken as the final word without being made subject to 'appeal'. However, as provided under the New York Convention, the enforcing courts may refuse to enforce the award if its 'enforcement' would contravene forum's substantive public policy.

For example, in a matter before the Supreme Court of Austria, the question before the court was whether an interest rate of seventy three percent per year with daily capitalization would be in violation of Austrian public policy.[450] The Supreme Court held that such excessive rate of interest would be in violation of the Austrian law on

[448] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82 (1) Arbitration 4; Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 27.

[449] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 4; Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 27; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 70.

[450] *Buyer v Seller* [2005] XXX YBCA, at 421-436.

debts and would also facilitate unjust enrichment of the award-creditor – hence against Austrian public policy. Similarly, violation of Sharia law i.e., the fundamental principles of Islamic law, like the principles governing interest (*Riba*) is considered as violation of the substantive public policy in many jurisdictions that rely on Sharia law.[451]

A U.S. District court refused enforcement of part of the foreign arbitral award as it awarded an additional post-award interest in case of delay in payments on part of the award-debtor.[452] The court found the additional interest to be punitive in nature, hence contrary to the U.S. public policy.

Even though the national courts may have a divergent views on the specific issues while considering violation of substantive public policy, the understanding remains that in matters of international arbitration, courts should resort to narrow interpretation of public policy – keeping the possibility of parochial treatment of arbitral awards at bay. Violation of substantive public policy must not be confused with violation of a mandatory provision of law of a legal system.

Various national courts have clarified this while emphasizing that in order to refuse enforcement of a foreign arbitral award on the ground of violation of public policy the threshold remains higher.[453] The violation should rise to the level of fundamental foundations of the legal order; i.e. if the enforcement of award would manifestly disrupt the fundamental notions of morality and justice of the State.[454]

[451] Inye Yang, 'A Comparative Review on Substantive Public Policy in international Commercial Arbitration' (2015) 70 (2) Dispute Resolution Journal 54.

[452] *Laminoirs-Trefileries-Cableries de Lens, S.A., v Southwire Co.* [1980] 484 F. Supp. 1068.

[453] See, for example, *Thales Air Defense v GIE Euromissile* [2004] Paris Court of Appeal; *Tensacciai v. Terra Armata*, Swiss Supreme Court [2006]; Seller v. Buyer [2004] XXIX YBCA, 697-699.

[454] S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 55.

It needs to be appreciated that it is not the misapplication or error of law or fact on part of the arbitral tribunal that *per se* attracts the ground of public policy, but the effect of enforcement of an award that is tested on the touchstone of public policy. Nevertheless, courts may decide to refuse enforcement of foreign arbitral awards where enforcement of the arbitral award would result in giving recognition to criminal activities like terrorism, money laundering, smuggling, corruption, etc.[455]

3.3.2 Procedural Public Policy

Procedural public policy broadly concerns the rules of procedure that the parties as well as the arbitral tribunals are expected to abide by, during the arbitration proceedings.[456] In case of procedural public policy it is not the content of the award itself but the manner in which the arbitral tribunal arrives at an award, which is tested at the yardstick of public policy.[457] The violations that may be considered under the notion of procedural public policy by the enforcing forum include, but are not limited to, fraud, lack of impartiality and independence of the arbitrator, lack of equal treatment to the parties in terms of providing fair notice and fair opportunity to be heard, disregarding the *res judicata* effect of an award in the same subject-matter, and may even include lack of reasons in award.[458]

[455] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 130.

[456] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 4.

[457] Inae Yang, 'Procedural Public Policy Cases in international Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal; *London Export Corp. v Jubiker Coffee Roasting Ltd* [1958] 2 All ER 411.

[458] Stephen Schwebel and Susan Lahne, 'Public Policy and Arbitral Procedure' in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration* (Kluwer Law and Taxation Publishers 1986) 205-208; Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 4; Richard Kreindler, 'Standards of Procedural International

Public policy at the place of enforcement of award, arguably, also has a function to ensure that the procedure in which arbitration was conducted can be justified.[459] It was discussed and confirmed during the drafting process of the Model Law that the ground of public policy exception included the procedural matters as well, not covered otherwise under the list of grounds to refuse enforcement of an award under the Model Law – which basically is a replica of the New York Convention in that regard.[460] However, it is pertinent to note that violation of such procedural rights does not always on its own result in refusal to enforce of a foreign arbitral award. National courts may require the party alleging violation of public policy to show the impact of denial of a procedural right on the outcome of the arbitration.[461]

It is also important to note that the concept of procedural public policy must not be confused with the civil procedural rules under the *lex fori.* Santiago Court of Appeals in a recent decision highlighted the demarcation when it held that procedural public policy could be invoked only when the fundamental procedural rules of justice are violated, and not in case of every or any violation of the domestic procedural rule.[462]

The concept of procedural public policy and its application thereof has gained currency across many jurisdictions.[463] For example, the national law on arbitration in

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Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 17; Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 342.

[459] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 858.

[460] ibid 756.

[461] Richard Kreindler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray(eds), *International Arbitration and Public Policy* (Juris 2015) 12.

[462] *Ingeniera Proyersa Limitada v Steag GMBH* [2016] No. 2685-2016.

[463] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3333; Karl-Heinz Bockstiegel, Public Policy as a Limit to Arbitration and its Enforcement (2008) 2 Dispute Resol. Int'l 129.

the Netherlands and Sweden expressly provides for procedural public policy as part of the general public policy exception to the enforcement of arbitral awards.[464] These provisions broadly consider the fundamental procedural rights granted to parties in their respective legal systems as matters of procedural public policy.[465]

Likewise, national courts of many jurisdictions have also specifically identified procedural public policy as an inherent facet of the public policy exception. A Swiss court in a recent decision made relevant observations in this regard.[466] The first civil law court in Switzerland observed:

> 'There is a breach of public order where recognition or enforcement of a foreign award clashes intolerably with Swiss conceptions of justice. A foreign award may be incompatible with the Swiss legal system not only because of its material content, but also because of the procedure which it is derived. In this context Swiss public policy requires compliance with basic rules of procedure derived from the Constitution, such as the right to fair trial and the right to be heard.'[467]

In *G.W.L. Kersten*[468], the Amsterdam Court of Appeal refused to enforce a foreign arbitral award on the ground of violation of procedural public policy as the claimant had failed to share the statement of claim with the respondent. Similarly, a German Court refused to enforce a foreign arbitral award because the award-creditor had concealed the

[464] See Article 1065 (1)(e) of the Netherlands Code of Civil Procedure and Article 33 (2) of the Swedish Arbitration Act (SFS 1999:116).

[465] Jean-Francois Poudret and Sebastin Besson, *Comparative Law of International Arbitration – Translated by Stephen Berti and Annette Ponti* (Second edn, Sweet & Maxwell 2007) 756.

[466] *BGer 4A_374/2014*, First Civil Law Court, 26 February 2015.

[467] ibid, at para 4.2.2.

[468] *G.W.L. Krersten & Co. BV v Societe Commerciale Raoul-Duval et Cie* [1994] XIX YBCA, at 708-09.

fact that the parties had reached at a settlement agreement, which included termination of pending arbitrations between the parties.[469] The court considered it as an act of fraud, therefore in violation of the German international public policy.

Even though the application of procedural public policy as a ground to refuse foreign arbitral awards is seen as an established practice in the international commercial arbitration arena, there have been certain apprehensions attributed to it. One of the most notable concerns raised against the use of procedural public policy to refuse enforcement of foreign arbitral awards has been its potential to be expansively interpreted, which can be abused by the parties - resulting in failure of the very purpose of having limited number of grounds for refusing enforcement of arbitral awards.[470]

For example, a recent decision of the Austrian Supreme Court faced some criticism for widening the ambit of procedural public policy. In the case at hand the Austrian Supreme Court recognized lack of 'sound' reasoning in the award as violation of fundamental principle of Austrian legal system – hence violation of Austrian procedural public policy.[471] Though absence of reasoning is considered as violation of procedural public policy in many jurisdictions, raising the bar to 'sound' reasoning in the case at hand is what was perceived as an expansive interpretation of procedural public policy.

Ensuring certain procedural measures during the arbitral proceedings are not doubt of fundamental importance, however, not all procedural faults necessarily touch

[469] *Seller v. Buyer* [2004] XXIX YBCA, 771-775.

[470] Francisco Blavi, 'The Role of Public Policy in International Commercial Arbitration' (2016) 82(1) Arbitration 5; Richard Kreindler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 11.

[471] Docket 18 OCg 3/16i, Supreme Court of Austria, 08 September 2016.

the threshold of public policy.[472] It cannot be discounted that procedural public policy can be strategically used as a weapon to derail the arbitration process at the enforcement stage, particularly, when the aggrieved party chooses not to avail relevant remedies available during the arbitral proceedings and the annulment proceedings.

It is therefore expected from the national courts, where enforcement is sought, to interpret procedural public policy restrictively in order to fail the designs of frustrating the arbitration process. Resorting to the standard test of due process can be an effective mechanism to keep in check the misuse or abuse of procedural public policy.

For example, a German court in a recent decision noted that courts should apply restrictive interpretation when violation of procedural public policy is raised.[473] The matter concerned a construction agreement. The tribunal seated in Germany issued an arbitral award in favor of the applicant. The applicant filed for enforcement before the Higher Regional Court of Frankfurt. Respondent objected enforcement citing violation of public policy.

The argument put forth was that the arbitral tribunal had violated respondent's right to be heard, as it was denied the permission to call the Managing Director as a witness. Also, the tribunal had failed to provide the transcripts of the hearings to the respondent. The court rejected the arguments and emphasized that procedural public policy should be interpreted narrowly and deference should be given to the findings and decisions of the tribunals on procedural matters.

Procedural public policy, no doubt, provides an effective safeguard mechanism to keep in check the gross procedural irregularities in the arbitral process. However, an

[472] Karl-Heinz Bockstiegel, 'Public Policy as a Limit to Arbitration and its Enforcement' (2008) 2 Dispute Resol. Int'l 128.

[473] See, 26 Sch 3/18, Higher Regional Court of Frankfurt am Main, 06 June 2018; Richard Kriendler, 'OLG Frankfurt am Main – 26 Sch 3/18, Higher Regional Court of Frankfurt am Main, 26 Sch 3/18, 06 June 2018', A Contribution by the ITA Board of reporters, Kluwer Law International.

expansive and whimsical interpretation of this ground can only derail the larger objective served by the international arbitration regime. Therefore, national courts must be careful while considering the refusal of a foreign arbitral award on ground procedural public policy, and invoke it only in cases where serious procedural irregularity has affected the final outcome of the arbitration.

3.3.3 Differentiating Procedural Public Policy from Article V (1)(b) and Article V (1)(d)

Article V (1)(b) of the New York Convention provides that enforcement of a foreign arbitral award may be refused if the party challenging the enforcement establishes that it "was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". Art V (1)(d), on the other hand, deals with the irregularities concerning "the composition of arbitral authority" and "the arbitral procedure". Both the grounds, broadly, deal with the compliance of due process requirements during the arbitration proceedings that include issues covered under the principles of natural justice.

As these two particular grounds listed in the Convention, arguably, do cover the concerns with regard to procedural justice during the arbitration proceedings, application of procedural public policy under Article V (2)(b) is sometimes perceived as duplication of the grounds that are already covered.[474] The overlap has also been criticized as being superfluous having the potential of expanding the scope of judicial

[474] Inae Yang, 'Procedural Public Policy Cases in international Commercial Arbitration' (2014) 69(4) Dispute Resolution Journal 60; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 60; G Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 164.

intervention under the garb of violation of public policy.[475] However, there is a general understanding that the existence of Article V (1)(b) and Article V (1)(d) does not *per se* rule out the application of Article V (2)(b) in matters concerning procedural injustice.

Having said that, it is equally important to note that not all procedural defects during the arbitral process justify application of Article V (2)(b).[476] There can be some procedural faults that merely form part of the mandatory rules of enforcing court's legal system, therefore would not attract refusal of enforcement of an arbitral award on the ground of violation of public policy.[477]

For example, in *Lou Wai Lou Real Estate Co Ltd*[478] the parties entered into a sales agreement. The agreement provided for arbitration as the dispute settlement mechanism. As dispute arose between the parties, the buyer initiated arbitral proceedings before the Guangzhou Arbitration Commission in China. The seller received the notice of arbitration at a place that according to her was not her place of residence at that time. The notice of hearing sent to the same address was not received by the seller and was returned to the Commission. The arbitral commission, in accordance with the relevant rules of the commission, deemed the notice to be

[475] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3333; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 60. See CLOUT Case No. 146, Moscow City Court (10 November 1994). In a setting aside proceedings the Moscow City Court declined to consider unequal treatment of parties by the arbitral tribunal as violation of public policy. The Moscow City Court noted in that 'procedural infringement has no relevance to the notion of public policy'.

[476] Richard Kreindler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris, 2015) 14.

[477] Karl-Heinz Bockstiegel, Public Policy as a Limit to Arbitration and its Enforcement (2008) 2 Dispute Resol. Int'l 129.

[478] *Lou Wai Lou Real Estate Co. Ltd. v. He Zhilan* [2015] HKCFI 664, HCMP 3202/2013, 24 April 2015.

delivered.

Accordingly, the arbitral proceedings took place and an *ex parte* award was issued in favor of the buyer. The seller filed for setting-aside of the award before the Intermediate People's Court of Guangzhou on the ground of improper notice and for not providing her an opportunity to present her case - the application, however, was rejected.

Meanwhile the buyer had sought enforcement of the award in Hong Kong and the Hong Kong Court of First Instance allowed it. The seller, thereafter, filed an application to set-aside the enforcement order on the same grounds as raised during the annulment proceedings. The court found merits in the arguments and noted that failure to serve the notice attracted Hong Kong Arbitration Ordinance 95 (2), which is similar to Art V (1)(b) of the New York Convention. The court did not, however, consider that the award was in violation of public policy of Hong Kong.

As the relationship between Article V (1)(b) and Article V (1)(d) with Article V (2)(b) is quite nuanced and the effect of procedural public policy does sometimes appear to be overlapping with the grounds under Article V (1), a further investigation on the issue can help in bringing out more clarity. Two essential issues that need to be analyzed here are; a) which fundamental principles of due process need to be taken into account during the enforcement proceedings - that of the seat of arbitration or of the forum where the enforcement is sought, and, b) if compliance with due process requirement is covered under Article V (1)(b) and Article V (1)(d), why should such requirements be covered under Article V (2)(b) as well?

As far as the New York Convention is concerned, it does not explicitly mention or clarify as to which State's due process requirements and standards does Article V (1)(b) refer to. As a result of the practice followed by most of the national courts, the

understanding developed is that the reference under Article V (1)(b) is made to the due process requirements as per the relevant *lex arbitri*.[479] And the only viable reason of keeping this option of raising it as a ground for refusal of enforcement, despite there being a likelihood of raising this ground during the annulment proceedings as well, is the possible scenario where the award-debtor may not have an option of getting the award set-aside.[480] As far as the due process requirements under Art V (2)(b) or the procedural public policy are concerned, those refer to the fundamental procedural requirements in accordance with the *lex fori*.

Two simple scenarios can help best in understanding the reasons behind including due process requirements under the ground of public policy exception to refuse enforcement of a foreign arbitral award. Consider a situation where the award-debtor does not participate in the enforcement proceedings and the award has been procured in serious violations of the minimum standards of due process as expected in the enforcing State. In such a scenario the enforcing court may resort to Art V (2)(b) as it provides enough room to the enforcing court to refuse enforcement of such an arbitral award - owing to the fact that in absence of challenge to the award by the award-debtor the court would be in a position to *sua sponte* invoke the ground and safeguard enforcing State's fundamental notions of morality and justice.[481]

Also, in a situation where the threshold of due process requirements is much lower under *lex arbitri* in comparison to that of *lex fori*, the enforcing courts may invoke the ground of procedural public policy to refuse an award, enforcement of which otherwise would have the potential to violate the fundamental notions of

[479] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 183.

[480] ibid.

[481] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 339; S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 55.

morality and justice of the enforcing State.

Though it is clear that the option of raising violation of procedural public policy as a ground to refuse enforcement serves as a safeguard mechanism against injustice done to the aggrieved party, courts are usually reluctant to entertain a complaint where it can be shown that the complaining party had failed to raise the concerns during pre-enforcement stages - when it was evidently possible.[482] The rationale being that the award-debtors should be prevented from using the provision of public policy exception to avail strategic or other benefits, thereby derailing the arbitration process.

3.4 Different Levels of Public Policy

Public policy does not vary only in context of its content, across the jurisdictions; it may very well vary in terms of the levels at which it operates. It is for these reasons that public policy has achieved the distinction of being called a 'chameleon concept'.[483] Public policy is essentially national in character, but national legal systems or national courts may choose to opt for different standards of public policy depending upon various considerations. For example, the standard or level of public policy applied by courts in matters purely governing their own citizens can be different form the standard of public policy applied in a matter involving an international element.[484]

[482] Richard Kreindler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 19.

[483] Olivier Van Der Haegan, 'European Public Policy in Commercial Arbitration: Bridge Over troubled Water?' (2009) 16 Maastricht J. of Euro. & Comp. Law 458.

[484] Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 24; Wasiq Dar, 'Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South-Asian Perspective' (2015) 2(4) European Journal of Comparative Law and Governance 318.

As discussed in the first chapter as well, national courts may resort to varying standards of public policy, keeping in mind the relevant policy of that State *vis a vis* matters involving international element.[485] Some national laws on arbitration explicitly acknowledge the distinction between various standards of public policy that are applied for refusing enforcement of arbitral awards – depending upon whether the award emanated from a purely domestic arbitration or an international arbitration. For example, under the French national law on arbitration and the law of arbitration in Portugal, a foreign arbitral award may be refused enforcement on the ground of violation of 'international public policy'.[486]

In some jurisdictions, despite the absence of any such distinction in the national arbitration law, the national courts have displayed the tendency towards resorting to international public policy or transnational public policy with an objective of restricting the scope of public policy exception in context of enforcement of foreign arbitral awards.[487] Whereas in some cases, even though courts do recognize the need of having a restrictive approach while interpreting public policy in matters of international commercial arbitration, they do not expressly accept any distinction in standards of public policy.[488]

[485] See discussion under Section 1.5 of Chapter 1.

[486] Articles 1520(5) and 1514 of the French New Code of Civil Procedure of 1981; Articles 46 (3)(b)(ii), 54 and 56(1)(b)(ii) of the Portugal Arbitration Law of 2011.

[487] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 599. See *Ste Grands Moulins dr Starsbourg v Cie Continentale France*, Court of Cassation, France, 15 March 1988, [1991] YBCA, at 129; see also, [1996] XXI YBCA, at 617.

[488] G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 63; Olivier Van Der Haegan, 'European Public Policy in Commercial Arbitration: Bridge Over troubled Water?' (2009) 16 Maastricht J. of Euro. and Comp. Law 458; *Allsop*

By and large, through legislations or judicial decisions, consistent efforts have been made to harmonize the interpretation and application of public policy exception in context of international awards by restricting its scope to 'international' or 'transnational' public policy, as against the otherwise relatively expansive interpretation under 'domestic public policy'.[489]

3.4.1 Domestic Public Policy

Domestic public policy, broadly speaking, is the public policy of a State which regulates the matters not involving any international element. In more lucid terms, it can be stated that in case of arbitration, where only one State is associated with it, i.e. when all the parties and transactions involved in the arbitration process belong to the same country, courts may apply domestic public policy.[490]

Domestic public policy is basically a stricter version of national public policy, as it does not allow derogation from any mandatory rules of the forum. Owing to strict effect, it is argued that in context of international arbitration, domestic public

Automatic Inc v Tecnoski [1997] XXII YCBA, 725, 4 Dec. 1992; *COSID Inc. v Steel Authority of India Ltd*., [1986] XI YBCA, at 507.

[489] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 251. See relevant legislations of Algeria, France, Lebanon, Portugal, and the OHADA Arbitration Law. See Richard Kriendler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 9.

[490] Keneth-Michael Curtin, 'Redefining Public Policy in International Arbitration of Mandatory National Laws' (1997) 64(2) Defense Counsel Journal; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 63.

policy should not be entertained as a bar to enforcement of arbitral awards.[491] The argument is grounded on the rationale that rules of public policy applicable in domestic context may not necessarily be applicable in international matters.[492]

Keeping in view the aims and objectives of the New York Convention that essentially emphasize on finality of arbitral awards and facilitation of the enforcement of foreign arbitral awards, it is only logical to put in place a mechanism where the national courts do not get to hinder enforcement under the garb of strict interpretation of public policy exception. In case of purely domestic arbitrations, however, the national courts may not be any such obligations.

For example, in case of France, the domestic arbitral awards have to pass the test of domestic public policy of France, which is much expansive and includes mandatory provisions of French law as well.[493] Similarly, in case of Germany, in matters dealing with annulments proceedings, domestic awards are subjected to domestic public policy (*ordre public interne*).[494]

In India, the national law on arbitration does not as such differentiate between domestic public policy and international public policy. However, the recent amendments in the national arbitration law do provide for a relatively expansive scope of interpreting and applying the public policy exception in case of purely domestic arbitration awards. The introduction of an additional ground of 'patent illegality' in

[491] S.I. Strong, 'Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns' (2008) 30 U. Pa. J. Int'l Law 67.

[492] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 74.

[493] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 160.

[494] ibid 161.

context of setting-aside of a purely domestic arbitral award makes this position under Indian law evident.[495]

3.4.2 International Public Policy

International public policy is a narrower version of the national public policy of a State, which takes into account only the fundamental notions of morality and justice of the State. What essentially differentiates international public policy from domestic public policy is that under international public policy not every derogation from mandatory rules of the forum would be considered as violation of public policy.[496] International public policy is applied in matters involving international elements or character, i.e. in awards emanating from international arbitrations.

International public policy, even though a manifestation of the national public policy of a State, represents a narrower version of the State's public policy. Owing to its restrictive nature, it is argued that public policy under the New York Convention essentially refers to international public policy.[497] The rationale being that international arbitral awards should be kept at a higher pedestal as they cannot be refused

[495] See, Section 34 (2A) of the national arbitration law of India (amended in 2015) reads:

> 'An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:
>
> Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence'.

[496] Olivier Van Der Haegan, 'European Public Policy in Commercial Arbitration: Bridge Over troubled Water?' (2009) 16 Maastricht J. of Euro. & Comp. Law 459.

[497] S Greenberg and others, *International Commercial Arbitration, An Asia-Pacific Perspective* (CUP 2011) 461; E. Giallard and J. Savage (eds.), *Fouchard Giallard Goldman on International Commercial Arbitration* (Kluwer, 1999) 996-997.

enforcement for non-compliance with domestic requirements, unless such requirements are of fundamental importance to the legal system of the forum.[498]

A quintessential reason behind encouraging application of international public policy in case of foreign arbitral awards is to promote restrictive interpretation of public policy and to ensure minimum judicial interference.[499] The expectation is that by applying the standards of international public policy the courts would invoke the public policy ground restrictively – paving the way for upholding and encouraging party autonomy and finality of arbitral awards.[500]

National courts, in many jurisdictions, in order to restrict the scope of public policy exception and to create conducive environment for enforcement of foreign arbitral awards, have supported the idea of resorting to international public policy.[501] For example, under the French legal system, in case of international arbitral awards, only international public policy is applicable – which is understood to have a restrictive interpretation and generally comprises of 'rules and matters of fundamental importance which the French legal system requires to be respected even in situations of an international character'.[502] In *Société Thales Air Defense*[503], a French court observed:

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[498] Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 599; G. Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 63.

[499] See discussion in *Ste Grands Moulins dr Starsbourg v Cie Continentale France*, Court of Cassation, France, 15 March 1988, [1991] YBCA, at 129; [1996] XXI YBCA, at 617.

[500] Richard Kreindler, 'Standards of Procedural International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 13.

[501] Lord Goldsmith, 'An Introduction to International Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 7; Nigel Blackby and others, *Redfern and Hunter on International Arbitration* (Sixth edn, OUP 2015) 599.

[502] *Lebanese Traders Distributors et Consultants LTDC v Société Reynolds,* Paris Court of Appeal, 27 October 1994, [1994] Rev Arb 709; Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement

> 'The violation of public policy must be 'flagrant, effective and real' in order to justify non-enforcement of foreign awards. Accordingly, not all contravention of public policy falls within the scope of the public policy exception and mere violation of domestic public policy may not suffice to justify non enforcement'.

Similarly, the House of Lords in *Kuwait Airways*[504] observed:

> 'In recent years, particularly as a result of French Scholarship, principles of international public policy… have been developed in relation to subjects such as traffic in drugs, traffic in weapons, terrorism, and so forth'.

In Germany the courts usually apply the standards of international public policy in cases dealing with enforcement of foreign arbitral awards.[505] It is interesting to note that, although, Indian and Singaporean national courts in several judgments have supported narrow interpretation of the public policy exception, the courts have not explicitly accepted the distinction between domestic and international public policy.[506]

Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 160; Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 25.

[503] *Société Thales Air Defense v GIE Euromissile et al*. (2004), Rev. Arb. No. 1, 94.

[504] *Kuwait Airways Corportation v. Iraqi Airways Company and Ors.* [2011] 1 Lloy'ds Rep., 161.

[505] Johannes Koepp and Agnieszka Ason, 'An Anti-Enforcement Bias? The Application of the Substantive Public Policy Exception in Polish Annulment Proceedings' (2018) 35(2) Journal of International Arbitration 161.

[506] See, for example, *Renusagar Power Co. Ltd v. General Electric Co.* [1994] AIR SC 860. See, Nish Shetty, 'Public Policy and Singapore Law of International Arbitration'; in, *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (25 March, 2015) 1.

Expanding the scope of public policy exception in case of foreign arbitral awards is seen as a counter-productive measure as it defeats the very purpose of the New York Convention, which is to eliminate the pre-existing impediments to enforcement of foreign awards.[507] Therefore, narrow interpretation of public policy, by virtue of invoking the exception only when international public policy is offended, can help in striking the right balance between the pro-enforcement policy of the New York Convention and the exercise of control over the arbitral awards by the enforcing court.[508]

3.4.3 Transnational Public Policy

Transnational public policy, also referred to as truly international public policy, is an axiomatic concept that suggests that public policy exception under the New York Convention should be seen through the prism of universally accepted standards of public policy. Transnational public policy and international public policy are argued to be closely related, though transnational public policy is considered to further narrow down the scope of public policy exception in context of international arbitral awards.[509]

The idea of transnational public policy develops an understanding of public policy that is not sourced in or limited to just one jurisdiction, but transcends beyond nations.[510] Basically, comprising of legal principles that do not belong to a particular

[507] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 140.

[508] Lew, Mistelis and Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 721; Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 167.

[509] Mark Buchanan, 'Public Policy and International Commercial Arbitration' (1988) 26 American Business Law Journal 512.

[510] Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 335.

jurisdiction or legal system.[511] Corruption, bribery, terrorism and drug trafficking, violation of UN resolutions, violation of the right to be heard or right of equal treatment, can be cited as some examples of transnational public policy.[512]

The rationale behind applying transnational public policy in case of international arbitral awards is that in case of transnational commercial transactions, public policy should be seen as a manifestation of the 'norms of conduct' that are universally accepted across the jurisdictions.[513] For example, the Swiss Supreme Court held that an arbitral award would be considered in violation of transnational public policy if it "disregards essential and widely recognized values which, in accordance with views prevalent in Switzerland, must lie at the foundation of any legal order".[514]

The overall premise of transnational public policy, which essentially promotes restrictive interpretation of public policy, is based on an idea that supports the understanding of public policy exception that favors aims and objectives of the New

[511] Pierre Mayer, 'Effect of International Public Policy in International Arbitration' in Julian Lew and Loukas Mistelis (eds), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 62.

[512] Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 28; E. Giallard and J. Savage (eds), *Fouchard Giallard Goldman on International Commercial Arbitration* (Kluwer, 1999) 821; Pierre Mayer, 'Effect of International Public Policy in International Arbitration' in Julian Lew and Loukas Mistelis (eds.), *Pervasive Problems in International Arbitration* (Kluwer Law International 2006) 63.

[513] Vasselina Shaleva, 'The 'Public Policy' Exception to the Recognition and Enforcement of Arbitral Awards in the Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19(1) Arbitration International 75.

[514] 4P.278/2005, 08 March 2006, 24 Bull. ASA 521; Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 26.

York Convention.[515] Though the concept of transnational public policy has managed to make inroads in scholarship and in some judicial discourse, it hasn't yet reached the level where it could be called as the prevailing viewpoint on interpretation and application of the public policy exception under the New York Convention. In fact, there has also been an argument made that transnational public policy does not as such bring anything significantly new on table, as it is just an extension of international public policy.[516]

Be that as it may, the fact remains that the concept of transnational public policy has surpassed from being just an idea to a well acknowledged principle guiding interpretation and application of the public policy exception. And examples like the provision on public policy exception under the OHADA uniform arbitration law and the developing concept of EU public policy only substantiate such claims.[517] The endeavor has been to apply transnational public policy in context of refusal of enforcement of foreign arbitral awards with an aim to create an environment of consensus on what public policy should include – thereby making the public policy ground more predictable.[518]

[515] Mayer and Sheppard, 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19(2) Arbitration International 251; M. Pryles, 'Reflections on Transnational Public Policy' (2007) 24(1) Journal of Int. Arb. 2.

[516] A Jan Van Den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (Kluwer Law and Taxation Publishers 1981) 360.

[517] See Article 26 & 31 of the OHADA Arbitration Act; *Asturcom Telecomunicaciones SL v Cristina Rodriguez Nogueira*, Case C-40/80 [2009] ECR I – 9579. See Olivier Van Der Haegan, 'European Public Policy in Commercial Arbitration: Bridge Over troubled Water?' (2009) 16 Maastricht J. of Euro. & Comp. Law 460.

[518] Stephen Jagusch, 'Issues of Substantive Transnational Public Policy' in Devin Bray and Heather Bray (eds.), *International Arbitration and Public Policy* (Juris 2015) 25; Fernando Mantilla-Serrano, 'Towards a Transnational Procedural Public Policy' (2004) 20(4) Arbitration International 335.

Summary

The effectiveness of international commercial arbitration, as a cross-border dispute settlement mechanism, is essentially reflected by the efficiency of getting the arbitral awards enforced. With sixty years since the New York Convention came into force, it has only strengthened the edifice of the international arbitration regime by facilitating the much-needed harmonization, across the jurisdictions, as far as enforcement of foreign arbitral awards is concerned.

Not only does the New York Convention provide a resolute mechanism to substantially assure the enforcement of foreign arbitral awards in contracting States, it also enables the national courts of enforcing States to retain the sovereign right of safeguarding the fundamental interests of their legal system. The provision of public policy exception under the New York Convention is the manifestation of such safeguard mechanism.

The public policy exception provided in the New York Convention, arguably, is an acknowledgement of the right of the enforcing State to exercise supervisory role and control over the fate of foreign arbitral award. However, an undefined doctrine like public policy, which gives enormous scope to national courts to intervene and refuse enforcement of arbitral awards, can be used a potent tool by the national courts to satisfy hostile or parochial interests, and ultimately throttle the aims and objectives of the New York Convention.[519] Notwithstanding the indispensability of the public policy exception, abuse of the doctrine by parties or national courts must be avoided by all means. Otherwise, enforcement of an arbitral award in itself can result into a serious legal battle, ultimately depriving the bonafide party of the fruits of arbitration.

[519] Michael Hwang and Shaun Lee, 'Public Policy as Grounds for Annulment of or Non-Recognition or Enforcement of Arbitral Awards in East Asia' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 183.

Though there are no written rules that lay down the approach that national courts should adopt while interpreting the ground of public policy, the inference one can draw from the interpretation of relevant international instruments coupled with scholarly work and judicial discourse, favors restrictive application of the exception. The general impression that one can gather from interpretation of the New York Convention is that there presumptive obligation to recognize and enforce foreign arbitral awards, in other words a pro-enforcement bias.[520]

Keeping the pro-enforcement bias of the New York Convention in mind, national courts in most of the jurisdictions have played a major role in developing, to a great extent, a sort of consensus has developed in favor of narrow interpretation of public policy. As a consequence, the attempts to frustrate the arbitral process in general and enforcement proceedings in particular, by manipulating the national courts, stand significantly controlled.

The judicial trend of recent past in context of interpretation and application of both, substantive public policy and procedural public policy, by and large, clearly reflects that national courts have become more accommodative when it comes to international commercial arbitration. Development and wide acceptance of the concepts like international public policy and transnational public policy, which facilitate restrictive interpretation of the public policy exception, has further promoted an arbitration-friendly environment. There has been a gradual shift in the approach of most of the national courts from merely tolerating international commercial arbitration to effectively contributing in its development.[521]

[520] Gary Born, *International Commercial Arbitration* (Second edn, Kluwer Law International 2014) 3410.

[521] Piero Bernardini, 'The Scope of Review in Annulment Proceedings' in Devin Bray and Heather Bray (eds), *International Arbitration and Public Policy* (Juris 2015) 167.

Having said that, it would be pre-mature to state that the problems attributed to the interpretation and application of the public policy exception under New York Convention have been alleviated to a desirable level. To begin with, it is impossible to conceive a static definition of public policy, as the concept itself is dynamic in nature. Also, one cannot turn a blind eye to the fact that there are still many jurisdictions where restrictive interpretation of public policy exception is yet to become order of the day. In absence of a panacea to overcome the issues concerning interpretation of the public policy exception, the best bet can be to appreciate that public policy of favoring enforcement of a foreign arbitral award should not always remain subservient to the public policy of refusing the same award – hence the need for courts to carefully walk the tightrope.

4. INDIA'S TRYST WITH THE PUBLIC POLICY EXCEPTION

Introduction

Arbitration in India, in a more organized form, has come a long way since the early twentieth century. If we look at the evolution of the formal and organized arbitration in India, like many other jurisdictions, it was perceived as a logical and promising response to the prevailing concerns attributed to the overburdened and cumbersome national judiciary. Though, this most certainly may not have been the only reason to introduce, promote, and facilitate international commercial arbitration in the country. The desire of providing and supporting a neutral dispute settlement mechanism with an aim to encourage international commerce and entice foreign investors must have factored in.

Be that as it may, the fact remains that with its share of booms and busts *vis-à-vis* the practice of arbitration, India is still struggling to achieve the status of an 'arbitral friendly' jurisdiction. If not all, some of the credit for such opprobrium undoubtedly goes to the inconsistent and unpredictable approach followed by courts in India in context of interpretation and application of the public policy exception.

The difficulty in enforcing foreign arbitral awards in India is fairly well known in the global arbitration community.[522] India, which happens to be a noteworthy emerging market and a significant trading partner of various developed and developing nations, has had a dubious distinction of showing considerable ambiguity

[522] Vyapak Desai and others, 'Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India' in Nakul Dewan (ed), *Enforcing Arbitral Awards in India* (LexisNexis 2017) 210.

in interpretation and application of the public policy exception.[523] Owing to the interventionist approach of the Indian courts, India as such is not looked up to as an arbitration friendly jurisdiction.[524] The incessant discussion over the controversial adjudication process in India, particularly at the post-award stage, has not helped the case of putting India on the global arbitration map.[525] Not only have the foreign parties been apprehensive about the outcomes of arbitration in India, even the natives who have to engage in international commercial arbitration prefer other jurisdictions.[526] A commentator quite aptly summed up this unpromising scenario when he quipped that, 'arbitration in India is not for the faint hearted'.[527]

To be fair with the policy makers of India, it deserves a mention that in the recent past various relevant quarters have expressed interest and intentions of boosting the cause of developing India into a pro-arbitration jurisdiction. However,

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[523] Amdia Renderio, 'Indian Arbitration and "Public Policy"'(2011) 89(3) Texas Law Journal 726; Arthad Kurlekar and Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged Under the Public Policy Exception' (2016) 32 Arbitration International 180.

[524] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 445; Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 221.

[525] Arjit Oswal and Balaji Krishnan, 'Public policy as a Ground to Set Aside Arbitral Award in India' (2016) 32 Arbitration International 651; Jory Canfield, 'Growing Pains and Coming-of-Age: The State of International Arbitration in India' (2014) 14 Pepp. Disp. Resol. L.J. 338.

[526] See, for example, SIAC Annual Report of 2017, at 14. In the year 2017, Indian parties topped the list of 'Foreign Users' of Singapore International Arbitration Centre. The number (176) was more than the double of the country numbering after India on the list. Singapore International Arbitration Center, *Annual Report 2017* (2017).

<http://www.siac.org.sg/images/stories/articles/annual_report/SIAC_Annual_Report_2017.pdf>

[527] Christopher Gardner, 'Arbitration in India: The Challenges of the 21st Century' (2012) 01 NALSAR ADR Review 70.

the erratic state of affairs displayed by Indian courts, particularly, in interpreting the public policy exception has somewhat put it into a tight spot.[528] Though one may find it difficult to pinpoint all the factors that are responsible for the intrusive approach that the courts in India, at times, resort to by relying on the tool of public policy exception, the usual suspects may be spotted. The traditionalist approach of Indian courts in understanding and interpreting the legal framework of arbitration does figure in the list.[529] The imperceptible suspicion of Indian judges towards the arbitral process and the belief that tribunals have taken over the jurisdiction of courts in certain matters is also believed to have added to the problem of excessive judicial intervention.[530]

This Chapter provides a comprehensive evaluation of the approach of the Indian legislature and courts towards the public policy exception, particularly in context of the enforcement of foreign arbitral awards. To lay the background, in order to put the analysis into perspective, the legislative history as far as the arbitration framework in India, with special attention to public policy exception, is concerned - is discussed. The discussion includes glimpses from the pre-independence era as well, which are important because of the noteworthy influence on the post-independence legislative and judicial discourse on the issue at hand.

The main focus, however, will remain on analyzing the landmark decisions of the Supreme Court of India, which reflect the inconsistency and unpredictability of Indian jurisprudence on the issue. The critical analysis of Indian judiciary in its

[528] Amdia Renderio, 'Indian Arbitration and "Public Policy"'(Feb. 2011) 89(3) Texas Law Journal 699.

[529] Daniel Mathew, Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance (2015-16) 3(1) Journal of National Law University, Delhi 107.

[530] Christopher Gardner, 'Arbitration in India: The Challenges of the 21st Century (2012)' 1 NALSAR ADR Review 69.

approach towards the interpretation and application of the public policy exception is followed by an assessment of the recent developments that have emerged. For the purpose of examination, the chapter also takes into account the relevant Law Commission Reports and the recent amendments to the national arbitration law of India. The idea is to not only look into the reasons behind the concerns raised with regard to the interpretation and application of the public policy exception by India courts in context of international commercial arbitration, but also to identify the steps taken to better the position and to gauge the improvements made – if any.

4.1 A Brief Account of Evolution of Legislative Framework on Arbitration in India with Focus on the Public Policy Exception

Alternate dispute resolution mechanism in India is not a phenomenon of recent past. Traces of arbitration and mediation, *albeit,* in less formal arrangement, can be found in the way *Panchayats*, i.e. the village level institutions manned by elderly council comprising of five members – called the *Panchas,* functioned.[531] As a matter of fact, this dispute-settlement mechanism is still prevalent in some parts of the country and quite effective for out of court settlements of petty civil disputes. Though claiming that the formal legal arbitration regime that exists in India is a derivative or progeny of *Panchayats* would be a slightly far-fetched argument.

If we look at the formal framework of arbitration in India, it was during the British colonial rule, more specifically in the later nineteenth and the early twentieth

[531] Tushar K. Biswas, *Introduction to Arbitration in India: The Role of the Judiciary* (Kluwer Law International 2013) 7-8. See *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technological Services* [2012] 9 SCC 552, at para 32.

century, that India witnessed major developments.[532] For a more lucid understanding and to put things into perspective, it would only make more sense to trace the history and developments in the area of arbitration law and practice in India by delving into the chain of events that took place in the pre-independence and the post-independence period – given the fact that all those events and developments have significantly influenced the arbitration jurisprudence that exists in India as of today.

4.1.1 Pre-Independence Era

The first formal and comprehensive codified law on arbitration in India was introduced in the year 1899 as the Indian Arbitration Act of 1899 (Indian Act No. 9 of 1899), though made applicable to the presidency towns only, i.e. the city of Bombay, Madras, and Calcutta. The legislation was substantially based on the then existing British law on arbitration. This was followed by enactment of the Code of Civil Procedure in 1908, the Second Schedule of which entirely dealt with law on arbitration. It was this Act of 1908 that introduced most of the territory of India to arbitration. Over the years, a need was felt to reform the arbitration laws in India to catch up with the demands on ground - resulting into a significant move in that direction.

A more comprehensive structure of legislations on arbitration was established. The Arbitration Act of 1899 and the Second Schedule the Code of Civil Procedure of 1908 were repealed and replaced by the Arbitration Act of 1940, paving the way for an all-inclusive arbitration law for entire British India. The new national arbitration law was based on the English Arbitration Act of 1934. The Arbitration Act of 1940

[532] Daniel Mathew, Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance (2015-16) 3(1) Journal of National Law University, Delhi 108.

along with the Arbitration (Protocol and Convention) Act of 1937 – the enabling Act for the Geneva Protocol on Arbitration Clauses 1923, laid the foundation of the modern day arbitration regime in India. The enforcement of foreign arbitral awards was governed by the Arbitration (Protocol and Convention) Act of 1937, as India was a signatory of the Geneva Protocol of 1923.

As far as the public policy exception is concerned, even though the Arbitration Act of 1940 did not make any specific mention, the Arbitration (Protocol and Convention) Act of 1937 did stipulate violation of public policy of India as a ground for refusal to enforce foreign arbitral awards in India.[533] However the legislation, like the national arbitration laws of majority of the jurisdictions, did not provide any explanation or guidance with regard to interpretation of the concept of public policy. Courts, for the purpose of interpretation and application of the concept of public policy would largely rely upon the understanding of the concept as accepted under the Indian Contract Law.[534]

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[533] Section 7 (1) (e) of the Arbitration (Protocol and Convention) Act of 1937 reads:

> 'Conditions for enforcement of foreign award:
>
> (1) In order that foreign award may be enforceable under this Act it must have
>
> …
>
> (e) been in respect of a matter which may lawfully be referred to arbitration under the law of India and enforcement thereof must not be contrary to the public policy or the law of India.'

[534] Section 23 of the Indian Contract Act, 1872 deals with lawfulness of the considerations and objects of agreements. It reads:

> 'What considerations and objects are lawful, and what not. - The consideration or an object of an agreement is lawful, unless… the court regards it as immoral, or opposed to public policy'.

See Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance '(2015-16) 3(1) Journal of National Law University, Delhi 116.

The Indian Contract Act requires the courts to hold the consideration or object of an agreement as unlawful if the same is in violation of the public policy.[535] In *Bhagwant Ghenuji Girme*[536] the court described public policy as a 'principle under which freedom of contract or private dealings is restricted by law for the good of the community'. Pertinent to mention that courts were also wary of the potential misuse and abuse of the doctrine of public policy, so emphasized that though courts have an obligation to safeguard the public policy, but at the same time the courts have a duty to uphold the sanctity of parties' agreement(s).[537]

[535] See, for example, *Shrinivas Das Lakshminarayan v Ram Chandra Ramrattandas* [1919] 21 BOMLR 788, at para 6. The Bombay High Court while delving into the concept of public policy made the following observation:

> 'It is no doubt open to the Court to hold that the consideration or object of an agreement is unlawful on the ground that it is opposed to what the Court regards as public policy. This is laid down in Section 23 of the Indian Contract Act and in India therefore it cannot be affirmed as a matter of law… that no Court can invent a new head of public policy, but …"public policy is always an unsafe and treacherous ground for legal decision" may be accepted as a sound cautionary maxim…'.

[536] *Bhagwant Ghenuji Girme v Gangabisan Ramgopal* [1940] 42 BOMBLR 750, at para 11/

[537] Tushar K. Biswas, *Introduction to Arbitration in India: The Role of the Judiciary* (Kluwer Law International 2013) 119. See *Gopal Tihadi v Gokhei Panda & anr.*, AIR 1954 Ori 17, at para 11

> 'The expression 'public policy' has nowhere been denned & its meaning varies from judge to judge and depends upon the facts and circumstances of each case… A contract may be declared unlawful on the ground that it is contrary to public policy, because, it has been either enacted or assumed to be, by common law, unlawful and not because a Judge or a Court had a right to declare that it is, in his or their view, contrary to public policy. He must find, the facts and he must decide whether the facts so found do or do not come within the principles of public policy, recognised by the law, which the suggested contract is infringing or is supposed to infringe. What is contrary to public policy must be determined by well-established principles of law and not by the fine-spun speculations of social reformers or visionary theorists'.

4.1.2 Post-Independence Period

With the Constitution of independent India coming into force in 1950, like much other national legislations, all laws governing matters related to arbitration in India continued to remain in force post-independence as well.[538] A major reform, just over a decade after attaining independence, which India witnessed in the legal framework of arbitration, was with regard to international commercial arbitration, in particular, the recognition and enforcement of foreign arbitral awards. India was one of the original signatories of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. After ratifying the New York Convention on 13th of July 1960, the Foreign Awards (Recognition and Enforcement) Act of 1961 was enacted by the Indian legislature as the enabling legislation for the New York Convention.

India, like several other countries who were party to the New York Convention, had two reservations in relation to the Convention. One, that India will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State; and second, that India will apply the Convention only to differences arising out of legal relationship, whether contractual or not, that are considered commercial under the national law.[539] Despite these reservations, by and large, the idea remained not just to ensure smooth facilitation of recognition and enforcement of foreign arbitral awards but also to demonstrate India's sincerity towards the importance of international trade and commerce.

[538] Fali S. Nariman, 'National Report for India (2015)' in Paulsson and Bosmon (eds), *International Handbook on Commercial Arbitration* (Kluwer Law International 2018) 49.

[539] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017). See Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).

However, when it came to the equation between arbitration as system and the national judiciary, things had already started hitting a rough patch – to say the least. From the beginning itself, the judiciary of independent India seemed to have an uncongenial relationship with arbitration.[540] This state of affairs were painstakingly highlighted by the Calcutta High Court in *Saha & Co.*[541], where it observed:

> 'The law of arbitration is the law of private courts. It was born with high hope for simplicity but exists today in despair in a miscellaneous patchwork of complex decisions which no private arbitrator can be expected to master to avoid their mischiefs or obey their salutary commands. It suffers today under a fourfold curse. So far as the arbitrators are concerned, the situation is one of helplessness verging on resignation. So far as the Courts are concerned, arbitration appears as a prolific source of litigation where commonsense always fights a losing battle with an increasingly technical jurisprudence. As for the disputants themselves before the arbitrators, the attitude is one of heads I win and tails you lose, and if the head does not go the way a party wants, he immediately takes resort to the public courts of the land to upset the apple cart. As for legislation, the statutes of arbitration are Jerry-built structures suffering from divided loyalties precariously balanced between sympathy with private courts of litigant's choice and a nostalgia for public courts which are expected to exercise a kind of paternal control over them. Like all hybrids, this crossbreeding has produced one of the most defective and unreliable species of legal creatures. This fourfold curse has effectively laid its stronghold to make the law of arbitration a cripple which walks permanently on the crutches of legal precedents. It is no exaggeration to say that almost every controversial

[540] Tushar K. Biswas, *Introduction to Arbitration in India: The Role of the Judiciary* (Kluwer Law International 2013) 16.

[541] *Saha & Co. v Ishar Singh Kripal Singh* [1956] AIR Cal. 321.

> arbitration of any importance always waits for a second bout of legal fight in the public courts proving the truth of the old cynical statement that only fools go to arbitration because they pay two sets of costs, one before the arbitrators and the other before the courts where they come home to roost.'[542] [Emphasis added]

Similar sentiment was expressed by the Supreme Court of India in *Guru Nanak Foundation v. Rattan Singh*[543], where the court noted:

> 'Interminable, time consuming, complex and expensive court procedures impelled jurists to search for an alternative forum, less formal, more effective and speedy for resolution of disputes avoiding procedural claptrap and this led them to Arbitration Act, 1940. However, the way in which the proceedings under the Act are conducted, and without an exception challenged in Courts have made lawyers laugh and legal philosophers weep. Experience shows and law reports bear ample testimony that the proceedings under the Act have become highly technical accompanied by unending prolixity, at every stage providing a legal trap to the unwary. Informal forum chosen by the parties for expeditious disposal of their disputes has by the decisions of Courts been clothed with legalese of unforeseeable complexity'.[544]

The Law Commission of India, as well, in its 76th Report while deliberating over the Arbitration Act of 1940, flagged the problems caused due to some of the provisions in the Act. However, the report didn't seem as harsh on the Act as the

[542] ibid, at para 81.

[543] *Guru Nanak Foundation v Rattan Singh* [1981] AIR SC 2075.

[544] ibid, at para 1.

judiciary was. It didn't portray the problem to be serious enough.[545] With the result, the then existing legislative framework with respect to arbitration in India, essentially comprising of the Arbitration Act of 1940 and the Foreign Awards (Recognition and Enforcement) Act of 1961, continued to govern arbitration and related matters until the year 1996.

4.1.2.1 The Indian Arbitration and Conciliation Act of 1996

The Indian Arbitration and Conciliation Act of 1996 (hereinafter, IACA) consolidated the three existing national laws on arbitration, i.e. the Arbitration Act of 1940, which governed the domestic arbitrations; Arbitration (Protocol and Convention) Act of 1937, which governed the foreign awards under the Geneva Convention of 1927; and the Foreign Awards (Recognition and Enforcement) Act of 1961, which was the enabling Act for the New York Convention. Therefore, establishing a more comprehensive framework of arbitration law in India. As India witnessed major economic reforms in early 1990s, introduction of a new and robust law on arbitration was only a logical step in the direction of promoting international trade and inviting foreign investments.[546]

[545] Law Commission of India, *Report on Arbitration Act of 1940* (Law Commission Report No. 76, 1978), at para 1.3.

> 'Practical experience of the working of the Act has shown that though, by and large, the scheme of the Act is sound, some provisions have in actual working caused difficulties and resulted in delay and needless expense. Although we have come across criticism of the Act in one or two judicial pronouncements, we do not think that the Act suffers from any radical defect or on that score it should be thrown out lock, stock and barrel'.

[546] Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 223; Jory Canfield, 'Growing Pains and Coming-of-Age: The State of International Arbitration in India' (2014) 14 Pepp. Disp. Resol. L.J. 340.

The IACA is based on the UNCITRAL Model law on International Commercial Arbitration. The mechanism of interaction between the national courts and the arbitration process is well laid down in the IACA. Apart from other responsibilities, courts are expected to facilitate the enforcement of the foreign arbitral awards - though with sufficient room to refuse any such enforcement on the basis of limited grounds provided in the Act, including the ground of violation of public policy of India.

One of the noteworthy reasons for enacting a completely new law, on lines of the Model Law, was to bring India on the global arbitration map and to further the larger agenda of the economic reforms that India witnessed in early 1990s.[547] Also, taking into account the experiences that led to the criticism of the earlier legal framework, it was felt necessary to introduce a legal regime that would uphold party autonomy with a minimum possible judicial intervention.[548] Out of the several changes that were brought about by IACA, one significant change in comparison to the 1940 Act was most certainly the emphases on minimum interference by the courts in the arbitration process. For example, the IACA brought a major relief in form of doing away with the court's power to remit an award on ground of 'error of law', which was possible under the 1940 Act.[549]

[547] Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 69. See *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technological Services* [2012] 9 SCC 552, at para 38.

[548] Arjit Oswal and Balaji S. Krishnan, 'Public policy as a Ground to Set Aside Arbitral Award in India' (2016) 32 Arbitration International 652; Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 223.

[549] Section 16(1) of the Arbitration Act of 1940 read:

'(1) The Court may from time to time remit the award or any matter referred to arbitration to the arbitrators or umpire for reconsideration upon such terms as it thinks fit,

As far as the public policy exception is concerned, Section 34 (2)(b)(ii) of the IACA recognizes violation of the public policy of India as a ground to set-aside an arbitral award. With regard to the enforcement of foreign arbitral awards, Chapter I and II of the Part II of IACA, and its Second and Third Schedules provide the required mechanism. Chapter I of Part II deals with the foreign awards made in the contracting States to the New York Convention. And for enforcement of any other foreign arbitral award, courts rely upon the Geneva Protocol of 1923 and the Geneva Convention of 1927 – for which Chapter II of IACA enlists the relevant provisions.

For the purpose of this thesis, only the first chapter of Part II of the IACA, which deals with the New York Convention awards, is relevant. Section 48 (2)(b) of the IACA, which is modeled on the lines of the New York Convention's Article V (2)(b) provides that the recognition and enforcement of a foreign award may be refused if the same runs contrary to the public policy of India. Explanation to the section in the Act, in its original form, i.e. before the amendment, provided that without prejudice to the generality of the clause (b), an award would be considered to be against public policy of India if the making of the award was induced or affected by fraud or corruption.

The IACA, like most of the national laws on arbitration, did not provide any specific guidance as to interpret the ground of public policy exception. Absence of any such guidance, as will be discussed in the later parts of this chapter, resulted into diverging opinions and interpretations emerging from the courts on the issue - ensuing in profound confusion and controversy. Interestingly there is also an argument made that the lack of guidance in the IACA was intentional – considering that a new

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…

(c) Where an objection to the legality of the award is apparent upon the face of it'.

understanding of some of the concepts in the new law will evolve afresh, which would be in line with the international standards.[550] However, if one looks at the developments that followed the enactment of IACA, matters definitely did not move in that direction.

The way courts started interpreting the IACA, in particular the misadventures with the public policy doctrine in context of foreign arbitral awards, clearly suggests that courts in India were not much enthusiastic about breaking away from the legacy they inherited from the previous law on arbitration. Despite the fact that while exercising the authority to investigate the effects of enforcement of a foreign arbitral award in India, courts at the best were expected to sit as a reviewing authority and not as an appellate authority – a series of decisions emerging from Indian courts suggest that the latter was preferred.

4.2 Judicial Discourse on the Public Policy Exception: An Overview

In earlier years of post-independence period, Indian courts did not witness much of a debate on the ground of public policy exception in context of international commercial arbitration. Foreign arbitral awards were usually challenged on the ground of violation of public policy for being contrary to the India law – as the Arbitration (Protocol and Convention) Act of 1937 in Sec. 7(1)(e) explicitly mentioned this ground.[551] Therefore, not leaving much scope for discussion - as the awards had to simply pass the litmus test of conformity with Indian law.

[550] Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2015-16) 3(1) Journal of National Law University, Delhi 115.

[551] See, for example, *Mury Exportation v D. Khaitan & Sons Ltd.* [1956] AIR Cal 644; *Pratabmull Rameshwar v. K.C. Sethia Ltd.* [1960] AIR Cal 702; *Bakubhai and Ambalal Ltd. v Bengal Corporation Pvt. Ltd* [1962] AIR Cal 1.

One of the landmark decisions, where the Supreme Court of India discussed the scope and concept of the doctrine of public policy, though not directly in relation to matters dealing with international commercial arbitration, is *Central Inland Water Transport.*[552] This decision is of relevance here because the observations made by the court on the concept and application of public policy were subsequently referred to by the courts in matters of arbitration as well.[553] The court while attempting to explain the concept and its possible interpretations noted that:

> 'From the very nature of things, the expressions "public policy", "opposed to public policy" or "contrary to public policy" are incapable of precise definition. Public policy, however, is not the policy of a particular government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take the place of old, transactions which were once considered against public policy are now being upheld by the courts and similarly where there has been a well-recognized head of public policy, the courts have not shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of public policy. There are two schools of thought - "the narrow view" school and "the broad view" school. According to the former, courts cannot create new heads of public policy whereas the latter countenances judicial law-making in this area. The adherents of "the narrow view" school would not invalidate a contract on the

[552] *Central Inland Water Transport Corporation Limited & Anr. v Brojo Nath Ganguly & Anr* [1986] AIR SC 1571.

[553] See, for example, *Renusagar Power Co. Ltd v General Electric Co* [1994] AIR SC 860; *Oil and Natural Gas v Saw Pipes* [2003] 5 SCC 705; *Damodar Valley Corporation v Central Concrete & Allied* [2007] (3) ARBLR 531 Cal.

> ground of public policy unless that particular ground had been well-established by authorities… It is thus clear that the principles governing public policy must be and are capable, on proper occasion, of expansion or modification. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.'[554]

The decision clearly reflects the express inclination of the Indian Supreme Court towards the "broad view school", which supports wider interpretation of the public policy ground. Interestingly, this opinion was completely contrary to the opinions laid down on the issue in past, where "narrow interpretation" of public policy was advocated. For example, in *Gherulal Parakh*[555], the Supreme Court of India while discussing the issues concerning interpretation of the doctrine of public

[554] *Central Inland Water Transport Corporation Limited & Anr. v Brojo Nath Ganguly & Anr* [1986] AIR SC 1571, at para 2.6.

[555] *Gherulal Parakh v Mahadeodad Maiya & Ors.* [1959] AIR SC 781; *Gopi Tihadi v Gokhhei Panda & Anr.*[1954]AIR Ori 17, at para 11. In this case the Orissa High Court was of the firm opinion that the courts must exercise restrain while interpreting public policy, and must not take the liberty of creating new heads of public policy. The court observed:

> 'A court cannot invent a new head of 'public policy'. A contract may be declared unlawful on the ground that it is contrary to public policy, because, it has been either enacted or assumed to be, by common law, unlawful and not because a Judge or a Court had a right to declare that it is, in his or their view, contrary to public policy. He must find, the facts and he must decide whether the facts so found do or do not come within the principles of public policy, recognised by the law, which the suggested contract is infringing or is supposed to infringe. What is contrary to public policy must be determined by well-established principles of law and not by the fine-spun speculations of social reformers or visionary theorists'.

policy acknowledged that 'public policy' by its very nature is a varying concept, therefore making it 'treacherous and unstable ground for legal decision'. The court further noted:

> 'Two observations may be made with some degree of assurance. First, although the rules already established by precedent must be molded to fit the new conditions of a changing world, it is no longer legitimate for the Courts to invent a new head of public policy. A judge is not free to speculate upon what, in his opinion, is for the good of the community. He must be content to apply, either directly or by way of analogy, the' principles laid down in previous decisions. He must expound, not expand, this particular branch of the law. Secondly, even though the contract is one which prima facie falls under one of the recognized heads of public policy, it will not be held illegal unless its harmful qualities are indisputable'.[556]

This was, perhaps, the beginning of the chronic problem of 'inconsistency' with regard to interpretation of the ground of public policy by Indian courts, which eventually became the root cause of the related issues that India witnessed in matters concerning international commercial arbitration. The decisions of Indian courts dealing with matters of international commercial arbitration, where issue of public policy was involved, continued to be marred with controversies – owing to the inconsistency in approach towards interpreting public policy. This, in turn, severely affected the image of India as a jurisdiction *vis-à-vis* international arbitration. As discussed and analyzed in this chapter, the courts in India – including the Supreme Court, kept on oscillating the position on interpretation of 'public policy' like a

[556] *Gherulal Parakh v. Mahadeodad Maiya & Ors.* [1959] AIR SC 781, para 11.

pendulum. Changing the allegiance from 'narrow interpretation' to 'wider interpretation' and then back to 'narrow interpretation'.

4.3 The Turbulent Past

As stated above, post-independence, the relationship between the Indian courts and arbitration as a dispute settlement mechanism did not go as per plans. Despite the enactment of the new national law on arbitration in the year 1996, the Indian courts, continued to carry the baggage of inconsistency and struggled to reach any stability – especially in context of the interpretation and application of the ground of public policy.[557] It is evident from the fact that interpretation of the public policy exception, as a ground to refuse enforcement of foreign arbitral award, has been nothing but erratic - to the extent that it has severely hampered the Indian aspirations of becoming an arbitration-friendly and an investment-friendly jurisdiction.[558]

A series of decisions by the Indian Supreme Court in this context has continuously affected the course of arbitration jurisprudence in India. For the purpose of clarity and to put the analysis into perspective, it is only logical to chalk out the journey of varying interpretations of the Supreme Court of India on the public policy ground, in matters concerning international commercial arbitration. One of the earliest landmark decisions, which concerned enforcement of foreign arbitral awards and involved detailed discussion on the ground of public policy, was *Renusagar Power Co. Ltd v. General Electric Co.*[559]

[557] Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 69.

[558] ibid 70.

[559] [1994]AIR SC 860.

4.3.1 *Renusagar* Decision: Laying the Roadmap

Renusagar decision, of the Supreme Court of India, was elemental in the sense that it took upon to delve into great detail the issue of public policy in context of international commercial arbitration. It was for the first time in India judicial history that the Supreme Court made an attempt to lay down guidelines for a better understanding and interpretation of the public policy exception in context of enforcement of foreign arbitral awards.

Renusagar, an Indian company, had entered into sales and services agreement with General Electric Co., a U.S. based company. Parties had opted for arbitration as the dispute resolution mechanism, and accordingly the ICC tribunal at Paris, deciding in favor of General Electric, settled the dispute. The award-creditor initiated enforcement proceeding in India, which was resisted by Renusagar on multiple grounds – including violation of public policy. The argument made was that the award directed for payment of interest on regular interest or compensatory interest, which was contrary to the then statute dealing with foreign exchange regulation in India (Foreign Exchange Regulation Act), and would result in unjust enrichment of General Electric – therefore against public policy.

The Indian Supreme Court rejecting Renusagar's argument pointed out that while applying the public policy exception rule in case of arbitral awards, a distinction must be made between the application of the doctrine as one sees in the field of conflict of laws (read, private international law) and the one in case of purely municipal matters.[560] As far as foreign arbitral awards are concerned, the court was of

[560] ibid, at para 51.

the opinion that the yardstick followed in the field of conflict of laws should be applied, i.e. limited application of the doctrine of public policy. Advocating narrow interpretation of public policy, the court was also of the view that mere violation of an Indian law will not suffice to conclude that public policy of India has been violated.[561]

While trying to connect the purpose of the existing law on arbitration with the general economic and commercial policy of India, with the purpose of describing the correct approach of interpreting the national arbitration law, in general, and 'public policy', in particular, the Court made the following observation:

> 'Keeping in view the object underlying the enactment of the Foreign Awards Act, this Court has also favoured a *liberal construction* of the provisions of the said Act.'[562] [Emphasis added]

In its attempt to provide some sort of parameters to interpret the public policy exception, as laid down in Section 7 (1)(b)(ii) of the Foreign awards (Recognition and Enforcement) Act of 1961, and as envisaged in the New York Convention, the Supreme Court of India made the following observations:

> 'Article V(2)(b) of the New York Convention of 1958 and Section 7 (1)(b)(ii) of the Foreign Awards Act do not postulate refusal of recognition and enforcement of a foreign award on the ground that it is contrary to the law of the country of

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> 'A distinction is drawn while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.'

[561] ibid, at para 65.

[562] ibid, at para 64.

> enforcement and the ground of challenge is confined to the recognition and enforcement being contrary to the public policy of the country in which the award is set to be enforced. There is nothing to indicate that the expression "public policy" in Article V(2)(b) of the New York Convention and Section 7 (1)(b)(ii) of the Foreign Awards Act is not used in the same sense in which it was used in Article 1(c) of the Geneva Convention of 1927 and Section 7 (1)(b)(ii of the Protocol and Convention Act of 1937. This would mean that "public policy" in Section 7 (1)(b)(ii) has been used in a *narrower sense* and in order to attract to bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7 (1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.'[563] [Emphasis added]

With regard to the issue of compensatory damages, taking a cue from the decision laid down on the issue in other common law countries - including England and Australia, the Supreme Court concluded that the award directing payment of compound interest couldn't be regarded as against public policy.[564]

[563] ibid para 66.

[564] ibid, at para 91 & 92.

Renusagar was a groundbreaking judgment in a sense that it carried a message that Indian courts were willing to adopt international best practices in order to promote and encourage international commercial arbitration. And the message was amply clear as the Indian Supreme Court was of considerate opinion that the doctrine of public policy should be interpreted narrowly, when raised as a ground to challenge the enforcement of a foreign arbitral awards. To guide Indian courts towards arriving at a restricted interpretation of public policy, it outlined that an award can be in violation of the public policy only if it was against; i) the fundamental policy of Indian law; ii) the interests of India; or iii) justice or morality.

Pertinent to mention, it also considered the question whether courts should look into the merits of the award during enforcement proceedings. The court strongly advised against it, while noting:

> 'In our opinion, therefore, in proceedings for enforcement of a foreign award under the Foreign Awards Act, 1961, the scope of enquiry before the court in which award is sought to be enforced is limited to grounds mentioned in Section 7 of the Act and does not enable a party to the said proceedings to impeach the award on merits. II. Bar to the enforcement of the award under Section 7(1)(a)(ii) of the Act.'[565]

The decision continued to guide Indian courts for a long period of time, until the controversial developments started coming to fore in context of setting-aside of arbitral awards and other related issues in jurisprudence on arbitration - which eventually affected the enforcement of foreign arbitral awards involving public policy ground, as well.

[565] ibid, at para 37.

4.3.2 Judicial U-Turn

There was a series of decisions, starting primarily from the *Saw Pipes*[566] judgment of the Supreme Court of India, which put the Indian jurisprudence into a conundrum where the major objectives of the law on arbitration, i.e. minimum judicial interference and the finality of arbitral award, seemed to be openly challenged.[567] The strong and arbitration friendly foundation laid down in *Renusagar*, in context of interpreting public policy exception as a ground for refusal of foreign arbitral awards, started to gradually erode. Though some of the decisions did not directly or immediately deal with the public policy doctrine in context of international commercial arbitration, nonetheless they left an impact on the understanding and application of the concept – as became evident from the approach followed by Indian courts in the later decisions.

4.3.2.1 The *Saw Pipes* Saga

Oil and Natural Gas Corporation (ONGC), an Indian Public-Sector Undertaking, had entered into a sales agreement with an Italian supplier, Saw Pipes. On failing to supply the goods on time, Saw Pipes asked for an extension – which was agreed upon by ONGC, subject to the condition of recovery of liquidated damages for delay in accordance with the contract. ONGC deducted that amount at the time of making payment, which Saw Pipes challenged before the tribunal. The tribunal decided in

[566] *Oil and Natural Gas v. Saw Pipes* [2003] AIR SC 2629.

[567] Arjit Oswal and Balaji S. Krishnan, 'Public policy as a Ground to Set Aside Arbitral Award in India' (2016) 32 Arbitration International 652.

favor of Saw Pipes holding that deduction of amount was erroneous as ONGC failed to justify the loss it suffered from delay in delivery of goods.

Deciding on the annulment proceedings, the Supreme Court of India held that tribunal erred in going against the express provision of contract dealing with liquidated damages, therefore violating Section 28 (3) of IACA.[568] The court was of the opinion that proving actual loss was not required when liquidated damages are agreed to in the agreement.

> '… when parties have expressly agreed that recovery from the contractor for breach of the contract is pre-estimated genuine liquidated damages and is not by way of penalty duly agreed by the parties, there was no justifiable reason for the arbitral tribunal to arrive at a conclusion that still the purchaser should prove loss suffered by it because of delay of goods'.[569]

The court concluded that since the arbitral award was in violation of the IACA, it suffered from error of law - therefore could be set-aside on the ground of violating the public policy of India. The Court relied upon the principles underlying the IACA, the Contract law of India, and the Constitution of India, while interpreting the doctrine of public policy – and concluded that if an award is in contravention to law, it could not be validated. Moreover, the court advocated for a wider interpretation of the ground of public policy. The court observed:

> '…for achieving the object of speedier disposal of dispute, justice in accordance with law cannot be sacrificed. In our view, giving limited jurisdiction to the

[568] *Oil and Natural Gas v. Saw Pipes* [2003] AIR SC 2629, at para 54.

[569] ibid, at para 40.

court for having finality to the award and resolving the dispute by speedier method would be much more frustrated by permitting patently illegal award to operate. Patently illegal award is required to be set at naught, otherwise it would promote injustice.'[570]

…

'Therefore, therefore, in 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 stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in 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 public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case, it is required to be held that the award could be set aside if it is contrary to: a) fundamental policy of Indian law; or b) the interest of India; or c) justice and morality, or d) in addition, if it is patently illegal'.[571]

The Saw Pipes decision was quite strongly criticized, across the board, for its expansive interpretation of public policy. The argument put forth was that the decision went against the underlying philosophy of the IACA and the purpose of public policy exception – as envisaged under the New York Convention.[572] It reflected a dramatic shift from the approach followed in the *Renusagar* decision.

[570] ibid, at para 29.

[571] ibid, at para 30.

[572] Aakanksha Kumar, 'Foreign Arbitral Awards Enforcement and the Public Policy Exception: India's Move Towards Becoming an Arbitration-Friendly Jurisdiction' (2014) 17(3) Int. A.L.R 80; Daniel

The Supreme Court suggested that the idea of narrow interpretation would be inimical to safeguarding the public interests - hence called for wider interpretation of the public policy exception.[573] While interpreting the public policy exception, the Supreme Court opined that any award, which, *prima facie*, is in violation of Indian statutory provisions, would be violating the public policy of India. Therefore added 'patent illegality' to the grounds of public policy violation. Even though the court did caution that such patent illegality should not be of trivial nature and must strike the 'root of the matter', the 'patent illegality' argument still came as a serious blow to the Indian ambition of becoming an arbitration friendly jurisdiction.[574]

The reintroduction of the ground of 'error of law' was seen as major flaw in the *Saw pipes* decision. Allowing the courts to extend the public policy exception to 'patent illegality' basically empowered the courts to review the merits of the award.[575] The unleashed use of the ground of 'patent illegality' provided a greater possibility of its judicial misuse – not only in terms of the final outcome but the process as well.[576]

It is important to note here that in *Saw Pipes*; the court was concerned with an award issued in India – hence was directly concerned with the interpretation of public policy under Section 34 (2)(b)(ii) of the IACA. This interpretation was not laid down

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Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2015-16) 3(1) Journal of National Law University, Delhi 122.

[573] Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38 (1) Stature Law Review 71.

[574] *Oil and Natural Gas v Saw Pipes* [2003] AIR SC 2629, at para 30; Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 71; Ashutosh Kumar and others; 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 473.

[575] Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2015-16) 3(1) Journal of National Law University, Delhi 123.

[576] ibid 126.

as a precedent or made applicable to cases that involved the enforcement of a foreign arbitral awards. Even though the decision had no immediate influence on foreign arbitral awards, as is discussed in the later parts of this chapter, the findings of this decision, particularly the 'patent illegality' and 'wider interpretation' argument did get extended to Section 48 (2)(b) of IACA as well, by virtue of the *Phulchand*[577] decision.

4.3.2.2 The *Bhatia* Misadventure

This decision of the Supreme Court of India opened up a Pandora's box, as it paved the way for courts in India to intervene in the international arbitration proceedings seated outside India. The repercussions were very serious as a whole gamut of issues got involved, and the Indian jurisprudence in the field of arbitration law developed in a way that damaged India's reputation in the arbitration world.

In *Bhatia International v. Bulk Trading S.A. & Anr.*[578], the claimant in a Paris seated ICC arbitration approached the Indian courts for a relief of injunction against the respondent to prevent it from disposing off the business assets located in India. Since the application involved a matter dealing with a foreign-seated arbitration, Indian courts under the Part II of Chapter I of the IACA had no jurisdiction to provide the sought relief – as there is no provision dealing with interim relief in that part of the IACA.

The provision for interim relief is present only in the Part I of the IACA, however that part deals with arbitrations seated in India. The question before the Supreme Court was whether it could resort to Part I of the IACA in order to provide

[577] *Phulcahnd Exports Ltd v OOO Patriot* [2011] 10 SCC 300.

[578] *Bhatia International v Bulk Trading S.A. & Anr* [2002] AIR 4 SC 1432.

relief in case of a foreign-seated arbitration. The Supreme Court of India decided to grant interim relief by resorting to the relevant provision laid down in the Part I of IACA. It further went ahead to hold that the Part I of the IACA in its entirety is applicable to foreign-seated arbitrations - with the exception where such application was expressly or impliedly excluded by the parties. The court noted:

> 'To conclude we hold that the provisions of Part I would apply to all arbitrations and to all proceedings relating thereto. Where such arbitration is held in India the provisions of Part I would compulsory apply and parties are free to deviate only to the extent permitted by the derogable provisions of Part I. In cases of international commercial arbitrations held out of India provisions of Part I would apply unless the parties by agreement, express or implied, exclude all or any of its provisions. In that case the laws or rules chosen by the parties would prevail.'[579]

This is the point where the international commercial arbitration regime in India was placed on a regressive track and trajectory. Among other adverse consequences, the most astounding one was that now the Indian courts could even set aside a foreign seated arbitral award, which was in blatant contravention to the essential features of both Model Law and the New York Convention. Not to forget, the wider interpretation of the public policy exception, which until then was limited only to awards made in India, was now extended to the matters involving enforcement of foreign arbitral awards as well.

[579] ibid, at para 32.

The immediate fall back was witnessed in *Venture Global*[580]. It is a noteworthy noticeable example where the court set aside and extended the wider interpretation of public policy to a foreign arbitral award. In this case a U.S. based Company initiated setting aside proceedings in India against an award issued in favor of an Indian company, in a London seated LCIA arbitration. Taking a cue from the *Bhatia* judgment, the Supreme Court of India held that since Part I of the IACA was applicable on arbitrations seated outside India as well - it could set-aside the foreign-seated arbitral award.[581] And based on the principle of expansive interpretation of 'patent illegality', as laid down in *Saw Pipes*, the foreign arbitral award was set-aside for violating the public policy of India.[582]

Therefore, in post-*Bhatia* period, with application of Part I on foreign-seated arbitral awards as well, the foreign arbitral awards ran the risk of being subject to greater judicial scrutiny – which included the requirement of the award being compliant with Indian law to avoid being declared 'patently illegal'.[583] It deserves a mention here that the expansive or wider interpretation of the ground public policy was applicable only in matters where 'setting-aside' proceedings against an arbitral award were initiated, notwithstanding the fact whether the arbitral award was

[580] *Venture Global v Satyam Computers Services Ltd* [2008] AIR SC 1061; Aakanksha Kumar, 'Foreign Arbitral Awards Enforcement and the Public Policy Exception: India's Move Towards Becoming an Arbitration-Friendly Jurisdiction' (2014) 17(3) Int. A.L.R 80.

[581] ibid, at para 17.

[582] ibid, at para 19. The Supreme Court observed:

> '…the judgment-debtor cannot be deprived of his right under Section 34 to invoke the public policy of India, to set aside the award. As observed earlier, the public policy of India includes - (a) the fundamental policy of India; or (b) the interests of India; or (c) justice or morality; or (d) in addition, if it is *patently illegal*. This extended definition of public policy can be bypassed by taking the award to a foreign country for enforcement'. [Emphasis added]

[583] Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2015-16) 3(1) Journal of National Law University, Delhi 129.

domestic or foreign. However, it wasn't long enough before the Supreme Court of India directly extended the 'patent illegality' ground to interpret public policy exception in case of foreign arbitral awards under Sec. 48(2)(b) of the IACA.

4.3.2.3 The *Phulchand* Fiasco

Phulcahnd[584] decision of the Supreme Court of India is of considerable importance because it relied on the *Bhatia* principle and went a step further to extend the expansive interpretation of public policy exception, as laid down in *Saw Pipes*, to proceedings dealing with enforcement of foreign arbitral awards.

In the case at hand, an Indian seller entered into a sales agreement with a Russian buyer. The dispute was referred to ICC Arbitration before the Chamber of Commerce and Industries, Russian Federation. The tribunal decided in favor of the buyer, holding the seller liable for breach of contract. The enforcement of award was resisted on the ground that the terms of award were in violation of the Indian contract law – hence in violation of the Indian public policy.

Though the court concluded that in the instant case the award did not violate the public policy of India, nevertheless the court agreed with the argument that the ground of public policy should be given a wider interpretation. It observed the interpretation of public policy, as understood in case of setting-aside proceedings under Section 34 (2)(b)(ii) of IACA - which included the ground of 'patently illegal', could be extended in matters dealing with enforcement of foreign arbitral awards as well. The Supreme Court of India noted:

> 'There is merit in the submission of learned senior counsel that in view of the decision of this Court in *Saw Pipes Ltd*., the expression 'public policy of India'

[584] *Phulcahnd Exports Ltd v OOO Patriot* [2011] 10 SCC 300.

used in Section 48 (2)(b) has to be given wider meaning and the award could be set aside, 'if it is patently illegal'.'[585] [Emphasis added]

'Patent illegality', which until then was a ground to be considered only in setting aside proceedings, owing to its extension to Section 48(2)(b) of the IACA, could now very well affect foreign arbitral awards as well.[586] Contrary to what was envisaged in the New York Convention, the Supreme Court of India decided to opt for an expansive interpretation of Article V (2)(b), receiving a severe backlash.

One of the major repercussions of *Phulchand* decision was that during the enforcement proceedings of a foreign arbitral award, the award-debtor could request the court to review the award in order to test its compliance with Indian laws. Therefore, providing enough room to courts to expand the scope of judicial intervention under the garb of public policy exception - facilitating a greater opportunity to the aggrieved party to increase the possibility of frustrating the arbitral process in general.[587]

4.4 Judicial Atonement

After the major debacles that Indian jurisprudence witnessed due to a series of Supreme Court decisions, directly or indirectly, influencing the fate of foreign arbitral

[585] ibid, at para 13.

[586] Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 71.

[587] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 468.

awards in India – the Supreme Court of India did take upon itself to rectify its position and reassure the world that things can and will be put back on track.

The first step in that direction was to rectify the error of *Bhatia*, which had changed the course of arbitration, particularly international commercial arbitration, in India. And then the judiciary took a proactive step to fix the problem, with regard to interpretation of public policy in context of foreign arbitral awards, which *Phulchand* had resulted into.

4.4.1 *BALCO*: A New Dawn in the Indian Arbitration Discourse

In *Bharat Aluminium Co (BALCO)*[588], an Indian based corporation and a US based company entered into a sales and services agreement. The governing law for the contract was the Indian Law, but the English Law governed the arbitration agreement. In London seated arbitration, the tribunal issued two arbitral awards. The Indian party approached courts in India and initiated setting aside proceedings – relying on the *Bhatia* and *Venture Global* judgments. When the initiation of proceedings where challenged and the matter finally landed before a five-judge bench of the Supreme Court of India, the court overruled the principle laid down in *Bhatia* and all other subsequent judgments that upheld the *Bhatia* principle, with prospective effect. The court observed:

> 'In our opinion, a plain reading of Section 2(2) makes it clear that Part I is limited in its application to arbitrations which take place in India. We are in agreement with the submissions made by the Learned Counsel for the Respondents, and the interveners in support of the Respondents, that Parliament

[588] *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technological Services* [2012] 9 SCC 552.

> by limiting the applicability of Part I to arbitrations which take place in India has expressed a legislative declaration. It has clearly given recognition to the territorial principle. Necessarily therefore, it has enacted that Part I of the Arbitration Act, 1996 applies to arbitrations having their place/seat in India.'[589]
>
> …
>
> 'For the reasons stated above, we are unable to support the conclusion reached in *Bhatia International* and *Venture Global Engineering*, that Part I would also apply to arbitrations that do not take place in India.'[590] [Emphasis added]

The *BALCO* decision came as a major relief as it reversed the controversial precedent laid down in *Bhatia International*. It held that courts in India could not exercise jurisdiction over the arbitral proceedings seated outside India. The message was clear enough for the courts in India that they could no longer set aside a foreign award, instead could take cognizance of foreign arbitral awards only under Chapter I of Part II of the IACA - in context of awards covered under the New York Convention.[591]

The Court was of the view that there was no intention of the legislature to allow overlapping of Part I with Part II of the IACA – hence both were to be seen as completely segregated from each other. This came as a major confidence booster for all those existing and potential foreign parties who had serious apprehensions about the extended judicial intervention at the hands of Indian courts in matters dealing with international commercial arbitration, particularly in case of enforcement of foreign

[589] ibid, at para 63.

[590] ibid, at para 76.

[591] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 474.

arbitral awards against the Indian parties.[592] Also, it undid the effect of *Bhatia* and *Saw Pipes* with regard to interpretation of public policy, in context of foreign arbitral awards, which had resulted in decisions like *Venture Global* where the wider interpretation of public policy and the 'patent illegality' ground was extended to foreign-seated awards as well. Despite the comfort that *BALCO* decision brought, the interpretation of public policy advocated in *Phulchand* was still in place and continued to haunt the stakeholders of international commercial arbitration.

4.4.2 *Shri Lal Mahal*: Restoring Confidence

Shri Lal Mahal Ltd. v. Progetto Grano Spa[593] decision came as a major breakthrough and was welcomed unequivocally in the Indian jurisprudence, as far as interpretation of public policy exception in case of foreign arbitral awards was concerned. It over-ruled the *Phulchand* decision and turned the clock back to understanding and application of public policy as laid down in *Renusagar*. The court reiterated that public policy doctrine should be construed narrowly, and the ground of 'patent illegality' was removed from the scope of Section 48 (2) (b) of the IACA.

An Indian wheat seller had entered into a sales agreement with an Italian buyer. There was a dispute with regard to the quality of the wheat supplied. A London seated arbitral tribunal decided in favor of the buyer. The aggrieved seller, while arguing against the enforcement of the award, pointed out that since the tribunal rejected the quality certificate issued by the agency agreed upon by the parties in their contract –

[592] Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 231; Jory Canfield, 'Growing Pains and Coming-of-Age: The State of International Arbitration in India' (2014) 14 Pepp. Disp. Resol. L.J. 337.

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

the tribunal's decision was in contravention to the contract, therefore according to the *Phulchand* precedent it was 'patently illegal'.

Making it amply clear that interpretation of public policy in *Phulchand* was bad in law, the court held that the correct approach is to keep the matters governed by Sec. 48 (2) (b) of IACA at a different pedestal in comparison to the ones covered under sec. 34 (2)(b)(ii). The Supreme Court held that:

> 'We accordingly hold that enforcement of foreign award would be refused Under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* is not applicable where objection is raised to the enforcement of the foreign award Under Section 48(2)(b).'[594]
>
> …
>
> 'It is true that in *Phulchand Exports Limited v. O.O.O. Patriot*, a two-Judge Bench of this Court speaking through one of us accepted the submission made on behalf of the Appellant therein that the meaning given to the expression "public policy of India" in Section 34 in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that… the expression "public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.'[595]

[594] ibid, at para 27.

[595] ibid, at para 28.

Confirming that interpretation laid down in *Renusagar* is the correct manner of approaching issues involving application of the public policy ground in context of enforcement of foreign arbitral award, the court observed:

> 'In our view, what has been expressly stated by this court in *Renusagar* Power *Co. Limited v. General Electric Co.* with reference to Section 7 (1)(b)(ii) of the Foreign Awards Act must apply equally to the ambit and scope of Section 48 (2)(b) of the 1996 Act. In *Renusagar Power Co. Limited v. General Electric Co.* it has been expressly exposited that the expression 'public policy' in Section 7 (1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression 'public policy of India' Section 7 (1)(b)(ii) of the Foreign Awards Act was held to mean 'public policy of India'. A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in Renusagar. For all this there is no reason why *Renusagar Power Co. Limited v. General Electric Co.* should not apply as regards the scope of inquiry under Section 48 (2)(b). Following *Renusagar Power Co. Limited v. General Electric Co.*, we think that for the purposes of Section 48 (2)(b), the expression 'public policy of India' must be given a narrow meaning and the enforcement of foreign award would be refused on the ground that is contrary to public policy of India if it is covered by one of the three categories enumerated in *Renusagar Power Co. Limited v. General Electric Co*. Although the same expression 'public policy of India' is used both in Section 34 (2)(b)(ii) and Section 48 (2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our view, its application differs in degree insofar as these two sections are concerned. The application of 'public policy in India' doctrine for the purposes of Section 48 (2)(b) is more limited than the

application of the same expression in respect of the domestic arbitral award.'[596] [Emphasis added]

It is worth mentioning here that the court did not hold anything against the decision laid down in *Saw Pipes*, as far as the wider interpretation of public policy in context of the awards made in arbitrations seated in India is concerned, therefore validating the inclusion of 'patent illegality' ground to interpret and apply of public policy in case of such awards. The court noted:

'We have no hesitation in holding *Renusagar Power Co. Limited v. General Electric Co.* must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Oil and Natural Gas Corporation Limited v. Saw Pipes Limited* would govern the scope of such proceedings.'[597]

The decision, overruling *Phulchand*, was appreciated across the board for its pro-arbitration approach and was seen as a major step towards curtailing unnecessary judicial intervention in matters dealing with international commercial arbitration.[598] The court's observation, that courts in India when seized of a matter related to enforcement of a foreign arbitral award should refrain from exercising appellate

[596] ibid, at para 25.

[597] ibid, at para 26.

[598] Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 71; Aakanksha Kumar, 'Foreign Arbitral Awards Enforcement and the Public Policy Exception: India's Move Towards Becoming an Arbitration-Friendly Jurisdiction' (2014) 17 (3) Int. A.L.R 83; Arthad Kurlekar and Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged Under the Public Policy Exception' (2016) 32 Arbitration International 180.

jurisdiction, was also an appreciable step towards reaffirming that India aims at being perceived as an arbitration-friendly jurisdiction.[599]

The decision gave an underlying impression that the courts in India do identify the need of having a distinction between domestic public policy and international public policy.[600] Though it would be incorrect to state that the Indian courts strictly recognize this distinction, as the general understanding followed by courts in India is that rules of public policy that would be taken into account would only be that of 'public policy of India'.[601] As of today, it is this decision of *Shri Lal Mahal* that continues to guide the Indian courts in interpreting 'public policy' for the purposes of Section 48 (2)(b) of the IACA.

4.5 Western Geco and Associate Builders: A Mixed Bag

Not so long after the *Shri Lal Mahal* decision, the Supreme Court of India came out with two more significant decisions that had a direct influence on the interpretation of the public policy ground. Pertinent to mention that both the judgments, *Western Geco.*[602] and *Associate Builders*[603], involved setting-aside of India seated arbitral awards.

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[599] *Shri Lal Mahal Ltd v Progetto Grano Spa* [2014] 2 SCC 433, at para 45. The Supreme Court observed:

> 'While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed'.

[600] Ashutosh Kumar and others, 'Interpretation and Application of the New York Convention in India' in G. Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 470.

[601] Fali S. Nariman, 'National Report for India (2015)' in Paulsson and Bosmon (eds), *International Handbook on Commercial Arbitration* (Kluwer Law International 2018) 53.

[602] *Oil and Natural Gas Corporation Ltd v Western Geco International Ltd.* [2014] 9 SCC 263.

[603] *Associate Builders v Delhi Development Authority* [2015] AIR SC 620 .

The decisions are of relevance here because they represent the ever-criticized inconsistency in the approach of Indian courts in the interpretation and application of the ground of public policy, as in the former the court seemed to go overboard by expanding the scope of public policy ground while the later prescribed a restrained approach.[604] Also, the further expansion in *Western Geco* of the 'Fundamental Policy of Indian Law' - which was listed as a ground for invoking public policy exception by the Supreme Court in *Renusagar* and other subsequent judgments, created space for extensive judicial intervention which had the potential of affecting not only India seated international arbitral awards but foreign arbitral awards as well.

4.5.1 Western Geco

Oil and Natural Gas Corporation Ltd. (ONGC), and Indian based corporation, entered into a sales and services agreement with Western Geco, a U.K. based company. As the dispute with regard to payments arose between the parties, matter was referred to the arbitral tribunal seated in India. The tribunal decided in favor of Western Geco, and thereafter ONGC moved an application to set-aside the award. The argument put forth was that the award was in violation of the public policy of India as the tribunal had failed to appreciate the facts ONGC presented. Western Geco rebutted by arguing that court could not look into the merits of the award and sit as an appellate authority under Sec. 34 of the IACA.

Looking into the scope of the public policy ground, the court taking a cue from the *Saw Pipes* decision agreed on holding a wider interpretation of public policy.

[604] Arthad Kurlekar and Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged Under the Public Policy Exception' (2016) 32 Arbitration International 181.

While exploring as to what could include 'Fundamental Policy of Indian Law' as a constituent of public policy of India, the court observed:

> 'What then would constitute the 'Fundamental policy of Indian Law' is the question. The decision in *Saw Pipes Ltd.* does not elaborate that aspect. Even so, the expression must, in our opinion, include all such fundamental principles as providing a basis for administration of justice and enforcement of law in this country. Without meaning to exhaustively enumerate the purport of the expression "Fundamental Policy of Indian Law", we may refer to three distinct and fundamental juristic principles that must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law. The first and foremost is the principle that in every determination whether by a Court or other authority that affects the rights of a citizen or leads to any civil consequences, the Court or authority concerned is bound to adopt what is in legal parlance called a 'judicial approach' in the matter… Judicial approach ensures that the authority acts bonafide and deals with the subject in a fair, reasonable and objective manner and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, Tribunal or Authority vulnerable to challenge.'[605]
>
> …
>
> 'Equally important and indeed fundamental to the policy of Indian law is the principle that a Court and so also a quasi-judicial authority must, while determining the rights and obligations of parties before it, do so in accordance with the principles of natural justice. Besides the celebrated 'audi alteram partem' rule one of the facets of the principles of natural justice is that the

[605] *Oil and Natural Gas Corporation Ltd v Western Geco International Ltd.* [2014] 9 SCC 263, at para 26.

> Court/authority deciding the matter must apply its mind to the attendant facts and circumstances while taking a view one way or the other. Non-application of mind is a defect that is fatal to any adjudication.'[606]
>
> …
>
> 'No less important is the principle now recognised as a salutary juristic fundamental in administrative law that a decision which is perverse or so irrational that no reasonable person would have arrived at the same will not be sustained in a Court of law. Perversity or irrationality of decisions is tested on the touchstone of Wednesbury's principle of reasonableness. Decisions that fall short of the standards of reasonableness are open to challenge in a Court of law often in writ jurisdiction of the Superior courts but no less in statutory processes where ever the same are available.'[607]

The court decided to set-aside the award and concluded that the arbitral tribunal had erred as it failed to appreciate and draw inferences from the facts presented to it. The court also made an observation that if an arbitrator fails to draw inferences that ought to have been drawn, it would make the award susceptible to challenge.[608]

So, basically the court while elaborating on 'Fundamental Policy of Indian Law' as a ground to invoke the public policy exception came up with three indicators to conclude whether the public policy of India has been violated or not. It concluded that

[606] ibid, at para 28.

[607] ibid, at para 29.

[608] ibid, at para 31. The Supreme Court noted:

> 'What is important in the context of the case at hand is that if on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an arbitral tribunal that enjoys considerable latitude and play at the joints in making awards will be open to challenge and may be cast away or modified depending upon whether the offending part is or is not severable from the rest'.

public policy of India would be violated if there is i) violation of the principles of natural justice - i.e. the tribunal must have followed the principle of natural justice during the arbitral proceedings in terms of both; providing the parties equal opportunity to present its case and by applying its mind which was to be demonstrated by recording the reasons for the award, ii) failure to adopt a judicial approach - i.e. the awards should be reflective of a bona fide, fair, and objective approach on part of the tribunal, and iii) failure to meet the standards of the Wednesbury principles of reasonableness.[609]

The most concerning aspect of this decision was the fact that it provided ample space to courts to intervene into the merits of the award by relying on the extensive interpretation of 'Fundamental Policy of Indian Law' provided. Also, looking into the fact whether the arbitral tribunal was correct in interpreting the facts and drawing the logical inferences would be nothing short of making courts sit as appellate authorities under setting-aside proceedings or enforcement proceedings in case of foreign arbitral awards. Now wonder why *Western Geco* decision raised many eyebrows in the global arbitration community and was also severely criticized by the Law Commission of India – as discussed in the later parts of this chapter.[610]

4.5.2 Associate Builders

In *Associate Builders*, parties entered into a construction work related agreement. The arbitral tribunal seated in India issued an award in favor of Associate builders, which

[609] eS. Nariman, 'National Report for India (2015)' in Paulsson and Bosmon (eds), *International Handbook on Commercial Arbitration* (Kluwer Law International 2018) 56.

[610] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Supplementary Report, 2015) para 19; Arthad Kurlekar and Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged Under the Public Policy Exception' (2016) 32 Arbitration International 186.

was later set aside by the division bench of the Delhi High Court. The court had found flaw with the reasoning provided by the tribunal in arriving at the amount awarded. The question before Supreme Court was whether the division bench of the Delhi High Court, under the public policy ground, had exceeded its jurisdiction by interfering into a possible view of the arbitral tribunal based on the facts presented.

The court, while delving into the scope of the ground of public policy, relied on several judicial precedents laid down on the matter by the Supreme Court of India – including, affirming the principles laid down in *Western Geco* case.[611] While seconding on and elaborating upon the need of 'judicial approach' as discussed in *Western Geco,* the court was of the opinion that the arbitral tribunal's decision needs to be fair, reasonable, and objective', and not 'arbitrary and whimsical'.[612]

However, it deserves a mention that the court in the case at hand was by and large in favor of having a restrictive approach while interpreting the ground of public policy. In contravention to what was held in *Western* Geco, the court in the instant case vehemently opposed the idea of courts stepping into the shoes of arbitrators and concluding what ought have been the logical interpretation of the facts.[613] The court also observed that the division bench of the Delhi High Court had grossly erred by sitting as an appellate authority and deciding on 'errors of fact'. The Supreme Court noted:

'We are at a complete loss to understand how this can be done by any court

[611] *Associate Builders v. Delhi Development Authority* AIR 2015 SC 620, at para 12.

[612] ibid, at para 12; see also, Fali S. Nariman, National Report for India (2015); in Paulsson and Bosmon (eds), *International Handbook on Commercial Arbitration* (Kluwer Law International, 2018) 56.

[613] Dhruv Garg and Utkarsh Srivastava, The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence (2017) 38(1) Stature Law Review 73.

> under the jurisdiction exercised Under Section 34 of the Arbitration Act. …when it comes to setting aside an award under the public policy ground can only mean that an award shocks the conscience of the court. It cannot possibly include what the court thinks is unjust on the facts of a case for which it then seeks to substitute its view for the Arbitrator's view and does what it considers to be "justice". With great respect to the Division Bench, the whole approach to setting aside arbitral awards is incorrect. The Division Bench has lost sight of the fact that it is not a first appellate court and cannot interfere with errors of fact.'[614]

Though *Associate builders* decision was appreciated for emphasizing on and suggesting restrictive or narrow interpretation of the public policy – including, in case of application of Wednesbury principles of reasonableness, it fell short of providing any clarity or guidelines as to where courts should draw a line while applying the Wednesbury principles to test the reasonableness of the award. The apprehension remains that the application of Wednesbury principles of reasonableness under the garb of public policy, which has the potential of opening up the Pandora's box resulting in excessive judicial intervention during the setting-aside or enforcement proceedings of foreign arbitral awards, will continue to impair the image the India as far as arbitration-friendliness is concerned.[615]

4.6 Legislative Efforts: A Ray of Hope

The Indian legislature, with the assistance of the Law Commission of India, has been constantly making efforts to make the Indian arbitration law compatible with the

[614] *Associate Builders v Delhi Development Authority* [2015] AIR SC 620, at para 22.

[615] Dhruv Garg and Utkarsh Srivastava, The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence [2017] 38(1) Stature Law Review 70.

demands of the national and international stakeholders, and to match the international best practices. The interpretation and application of doctrine of public policy by Indian courts has been one of the major concerns upsetting the other legislative initiatives, as well, made in pursuit of turning India into an arbitration friendly jurisdiction. Nevertheless, some of the recent legislative initiatives, which include the resourcefulness of Law Commission of India, have made considerable efforts to tackle and settle the problems arising out of the inconsistent approach of Indian courts in interpreting and applying the public policy exception.

4.6.1 Law Commission Reports

Law Commission in India holds a significant position as far as legal reforms are concerned. It is established as an executive body by the government of the day, and its primary role is to look into the anomalies in the existing laws and the application thereof, and recommend necessary changes in the form of a report or an amendment bill that it presents to the Government of India.

As far as national law on arbitration and the relevant issues are concerned, the Law Commission has, until now, submitted three reports identifying the incongruities in the law and the necessary changes required.[616] On the issue of interpretation and application of the ground of public policy, noticeable efforts to bring about some changes were made by the Law Commission of India, through its 176th Report.[617]

[616] Law Commission of India, *Report on Arbitration Act of 1940* (Law Commission Report No. 76, 1978); Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 176, 2001) – The Arbitration and Conciliation (Amendment) Bill, 2001; Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 246, 2014).

[617] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Law Commission Report No. 176, 2001) – The Arbitration and Conciliation (Amendment) Bill, 2001.

Though it did identify the concerns associated with the oscillating positions taken by courts in the interpretation of the public policy ground, it felt that there was a need to provide wider scope to courts to intervene in case of purely domestic arbitral awards – therefore recommended to add 'error of law' and 'absence of reasons' as two additional grounds to set-aside an award.[618] No recommendations were made with regard to application of the public policy exception in case of foreign arbitral awards.

Interestingly, the recommendations did not find much support from the Parliament; as a result a committee was established to study the possible implications of the Law Commission's 176th Report.[619] The Committee sharply criticized the recommendations of the Law Commission's 176th Report to add 'error of law' as an additional ground. It noted:

> 'The Committee does not agree with the recommendation of the Law Commission to add "error of law apparent on the face of award giving rise to substantial question of law" as a new ground for setting aside the award. According to the Committee, it is the most misused ground of challenge under the 1940 Act. The case-law of the last half-century bears clear testimony to the gross misuse of "errors of law" as a ground of challenge to arbitral award by the dissatisfied parties resulting in interminable, time consuming, complex and expensive court proceedings.'[620]

The Report was ultimately shelved by the Parliament, and the proposed amendments did never see light of the day. It was only after the Law Commission

[618] ibid, see para. 2.26.1 – 2.26.5.

[619] Ministry of Law and Justice, *Justice Saraf Committee Report on Implications of the Recommendation of the Law Commission's 176th Report and Amendment Bill of 2003* (2005).

[620] ibid, at 121.

presented another detailed report[621] on introducing some major amendments in the IACA – including, in context of the interpretation and application of the public policy ground, the Parliament acknowledged and accepted the considerate endeavors of the Law Commission and passed the amended IACA in 2015, accordingly.

Law Commission of India in its 246th Report proposed amendments in the IACA to cure the existing anomaly in Indian jurisprudence. Acknowledging that the wider interpretation of public policy advocated by *Saw Pipes* resulted in unintended consequences, it was of the opinion that in case of purely domestic awards – i.e. excluding international commercial arbitrations seated in India, there should be a separate ground of 'patent illegality' for setting-aside an award.[622] However it clarified that the award should not be annulled for erroneous application of law or by re-appreciating the evidence.[623]

Also, the Report clarified that by having a separate ground on 'patent illegality' under Section 34, it would prevent the courts from engaging into an expansive construction of the ground of public policy – which would also help the cause of not letting such expansive interpretation extend to foreign arbitral awards, directly or indirectly.[624] Highlighting and advocating the need of restrictive interpretation of public policy, both under Section 34 and Section 48 of the IACA, the Report went a step further by recommending doing away with the "interests of India" reference made in the *Renusagar* decision with regard to interpretation of public policy.[625]

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

[622] ibid, at para 35.

[623] ibid.

[624] ibid, at para 36.

[625] ibid, at para 37.

Taking into account the vagueness attributed to the concept 'interest of India', the Report felt that it had the potential of 'interpretational misuse'.

Interestingly, the Supreme Court decisions in *Western Geco* and *Associate Builders* came out after the Law Commission submitted its 246th Report. Taking a note of the significance and possible impact of the interpretation and application of public policy, as laid down in these two decisions; the Law Commission decided to come out with a special supplementary report on public policy in which it highlighted the potential concerns raised by the inclusion of Wednesbury principles.[626]

The supplementary report was critical of the decisions and opined that the expansive interpretation of public policy by resorting to Wednesbury principles under the reference of 'Fundamental Policy of Indian Law' would open the floodgates and render the endeavor to encourage narrow interpretation of public policy nugatory.[627] The Report highlighted that such expansive interpretation by courts have the potential of a) further eroding the faith in arbitration process in India, both for individuals and business in and outside India; b) adversely affecting the endeavor of India to become a popular international arbitration destination; c) damage the investor's confidence in the judicial system of India.[628]

Even though the Report strongly criticized the application of Wednesbury principles of reasonableness, it fell short of expressly recommending its usage.

[626] Law Commission of India, Amendments to the Arbitration and Conciliation Act 1996 (Supplementary to Report No. 246, 2015), at para 4.

[627] ibid, at para 10.5; Dhruv Garg and Utkarsh Srivastava, 'The Unruly Horse Goes Further Astray: Defining 'Fundamental Policy of Indian Law' in Arbitral Jurisprudence' (2017) 38(1) Stature Law Review 74.

[628] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Supplementary to Report No. 246, 2015), at para 10.6. See Daniel Mathew, 'Situating Public Policy in the Indian Arbitration Paradigm: Pursuing the Elusive Balance' (2015-16) 3(1) Journal of National Law University, Delhi 135.

However, it did recommend including an explanation to Section 34(2) (b)(ii) and Section 48 (2)(b) of IACA, which would prohibit the courts from reviewing the merits of the dispute.[629]

4.6.2 The 2015 Amendments: Prescriptive Drafting

The complexities, controversies, and the possibilities of unbridled judicial intervention marring the Indian arbitration regime called for a major revamp in the text and context of the national arbitration law. Based on the 246th Report of the Law Commission of India on arbitration law and practice in India and taking into account the relevant industry practices, the Parliament of India passed the Arbitration and Conciliation (Amendment) Act of 2015, officially notified on the 1st of January 2016, effective from 23 October 2015. Among other things, one of the major objectives that the Amendment Act stresses upon is to reduce the unnecessary judicial intervention in the arbitral process.[630]

The Amendment Act has significantly raised the threshold as far as the challenge of arbitral awards on the ground of public policy is concerned. In case of international commercial arbitration, both under Section 34 (2)(b)(ii) and Section 48 (2)(b), the Amendment Act provides two 'Explanations' to bring more clarity on the

[629] Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Supplementary to Report No. 246, 2015), at para 10.6.

'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 in the merits of the dispute'.

[630] Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 235

application of the public policy exception.[631] The first Explanation provides that award would be considered to be in violation of public policy of India, only if, it's making was induced or affected by fraud or corruption; or it is in contravention with the fundamental policy of Indian law; or it is in conflict with the most basic notions of morality and justice.[632] And the second Explanation lays down an instruction to the courts that while determining whether the award is in contravention with the fundamental policy of Indian law, the courts will not review the merits of the dispute.[633] Pertinent to note that following the recommendations of the 246th Report of the Law Commission of India, 'interest of India' was not included in the explanations.

Also, a separate ground has been added under Section 34, allowing courts to set-aside a domestic award in case of 'patent illegality'. However, the new provision unambiguously mentions that an award cannot be set-aside merely on the ground of 'erroneous application of the law or by re-appreciation of the evidence'.[634] It is

[631] 'Explanations' usually follow the particular Section of the Code. It is a special feature present in several Indian statutes, which facilitates a better understanding of certain expressions used in the Code. 'Explanations' being part of the Code are binding on courts.

[632] Explanation 1 of the Section 34 (2)(b)(ii) and Section 48 (2)(b) reads:

> 'For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,
>
> (i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or
>
> (ii) it is in contravention with the fundamental policy of Indian law; or
>
> (iii) it is in conflict with the most basic notions of morality or justice.'

[633] Explanation 2 of the Section 34 (2)(b)(ii) and Section 48 (2)(b) reads:

> '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.'

[634] Section 34 (2A) reads:

> 'An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court, if the Court finds that the award is vitiated by patent illegality appearing on the face of the award:

important to note here that this additional ground does not apply on awards arising out of international commercial arbitrations seated in India. [635]

The Amendment Act as a whole, and in particular with regard to the interpretation of public policy doctrine, is a textbook example of prescriptive drafting. Through this Amendment Act, the legislature definitely has accomplished its job of putting in the best possible efforts to fix the existing anomalies in Indian arbitration regime, particularly those concerning the interpretation of the public policy ground. Now what remains to be seen is as to how the Indian judiciary will compliment by liberating itself from the tag of being provincial and paternalistic in its approach while interpreting the arbitration law.[636]

4.7 Recent Judicial Decisions: A Promising Trend

Given the history of inconsistent approach and the oscillating positions of the Indian courts *vis-à-vis* interpretation and application of the public policy exception, it might to be too soon to conclude that the relevant issues have been sorted out for good. However, it would be undeniably unfair to not to identify and appreciate the recent endeavors of the Indian judiciary, which complement and supplement the legislative efforts in this regard.

Post amendments in the national arbitration law, some of the key High Courts in India have come out with noticeable judgments with regard to interpretation and application of the public policy ground in context of enforcement of foreign arbitral

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Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by re-appreciation of evidence.'

[635] ibid.

[636] Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 235.

awards. The trend reflects the policy of following international best practices and encouraging narrow interpretation of public policy, as envisaged in the amendments made to the IACA.

4.7.1 *Prysmian Cavi* – Bombay High Court

In *Prysmian Cavi.*[637], enforcement of foreign arbitral award was challenged on the ground of violation of public policy of India. The principle arguments put forth by the respondents were that the award was an outcome of the non-application of mind on part of the tribunal, therefore against the fundamental policy of Indian law. Also, that the enforcement of certain parts of the award would violate certain provisions of the Foreign Exchange Management Act (FEMA), hence against the public policy of India.

Relying on expansive interpretation of fundamental policy of Indian law, laid down in *Western Geco* and *Associate Builders*, the respondents argued that since the tribunal had failed to take into account 'critical evidence', it had violated the principles of natural justice and conducted itself in a manner that reflects bias – hence failed to adopt a 'judicial approach' in its conduct and failed to adhere to the Wednesbury principles of reasonableness.[638] Rejecting the argument, the court in the case at hand was of the opinion that it would be wrong to rely on the expansive interpretation of public policy as laid down in *Western Geco,* as the position of law stands significantly changed post amendments in the IACA. The court noted:

'The 2015 amendments to Section 34 and 48 of the Act were on the basis of the

[637] *Prysmian Cavi E Sistemi S.r.I. v Vijay Karia and Ors* [2019] Arbitration Petition No. 442 of 2017, Bombay HC.

[638] ibid, at para 46-47.

> Supplementary Report no. 246 of the Law Commission of India and sought to prevent review on merits as done in the case of *Western Geco*… The Court revisited the findings in the arbitration and reviewed those findings to ascertain whether they were sustainable in the light of the evidence on record… This approach in *Western Geco*... amounted to a review on merits. The Supplementary Report refers to the wider interpretation of the term "public policy" by including the Wednesbury principle of reasonableness within the expression "fundamental policy of Indian Law" alluding to the possibility of a review on merits. It is such a review on merits that the legislature sought to do away with by introducing Explanation 2 to Section 34(2) and 48(2)… in my view consideration of the grounds raised by the respondents will involve detailed appreciation of evidence and its treatment by the tribunal which in my view is not permissible.'[639] [Emphasis added]

With regard to violation of the provision of FEMA, the court was of the opinion that it is fairly established now that mere contravention with Indian laws is not sufficient to hold a foreign arbitral award is in violation of the public policy of India – the enforcement of award must go against the fundamental policy of Indian law.[640]

4.7.2 *Cruz City* – Delhi High Court

In *Cruz City*[641], the applicant, Cruz City, a company established under the laws of Mauritius, entered into an agreement with Unitech Limited, a public company incorporated in India. As dispute arose between the parties, Cruz City filed for

[639] ibid, at para 72.

[640] ibid, at para 97.

[641] *Cruz City 1 Mauritius Holdings v. Respondent: Unitech Limited* [2017] (3) ARBLR 20 DHC.

arbitration before a tribunal under the aegis of London Court of International Arbitration, which issued an award in its favor. Cruz City filed for enforcement of the award before the Delhi High Court, which was challenged by Unitech on the ground of violation of public policy of India.

The argument put forth was that the enforcement of award would violate certain provision of the Foreign Exchange Management Act (FEMA), therefore would contravene the public policy of India. The court rejected the argument that mere violation of FEMA would constitute violation of the fundamental policy of Indian law. Relying on the Explanations provided in Section 48 (2)(b) of the IACA, the court pointed out that for establishing that enforcement of foreign arbitral award would violate public policy, it is important to identify that fundamental and substratal legislative policy would be harmed. In absence of which, the court noted, refusing enforcement to foreign arbitral award would frustrate the basic purpose of the New York Convention. The court observed:

> 'Contravention of any provision of an enactment is not synonymous to contravention of fundamental policy of Indian law. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded. The expression "fundamental policy" connotes the basic and substratal rationale, values and principles which form the bedrock of laws in our country.'[642]
>
> …
>
> '…if the expression "fundamental policy of Indian law" is considered as a reference to a provision of the Indian statue, as is sought to be contended on behalf of Unitech, the basic purpose of the New York Convention to enforce

[642] ibid, at para 96.

> foreign awards would stand frustrated. One of the principal objective of the New York Convention is to ensure enforcement of awards notwithstanding that the awards are not rendered in conformity to the national laws. Thus, the objections to enforcement on the ground of public policy must be such that offend the core values of a member State's national policy and which it cannot be expected to compromise. The expression "fundamental policy of law" must be interpreted in that perspective and must mean only the fundamental and substratal legislative policy and not a provision of any enactment.'[643]

The court also reflected upon a significant dilemma that courts, at times, land up into due to situations that present a public policy paradox. The court noted that when the situation demands to choose between the public policy of refusing enforcement of foreign arbitral award and the public policy of permitting enforcement, it is important to strike a balance by choosing a less pernicious course. The court observed:

> 'Even where public policy considerations are to be weighed, it is not difficult to visualise a situation where both permitting as well as declining enforcement would fall foul of the public policy. Thus, even in cases where it is found that the enforcement of the award may not conform to public policy, the courts may evaluate and strike a balance whether it would be more offensive to public policy to refuse enforcement of the foreign award - considering that the parties ought to be held bound by the decision of the forum chosen by them and there is finality to the litigation - or to enforce the same; whether declining to enforce a foreign award would be more debilitating to the cause of justice, than to enforce it. In such cases, the court would be compelled to evaluate the nature, extent and other nuances of the public policy involved and adopt a course which is less

[643] ibid, at para 97.

pernicious.'[644]

The Delhi High Court in *XSTRATA*[645] adopted similar narrow interpretation of public policy, where the enforcement of the foreign award was challenged on the ground of violation of fundamental policy of Indian law as the awarded interest and award on costs was allegedly 'unreasonable' and 'perverse'. The court refused to look into the merits of the award and citing the second Explanation in the Sec. 48 (2)(b) of the IACA observed that it 'proscribes examination as to the merits of dispute'.[646]

4.7.3 *Sifandros Carrier* – Calcutta High Court

In *Sifandros Carrier Ltd.*[647], parties had entered into a charter party agreement. As dispute arose with regard to payments, the applicant initiated arbitration in London. The respondent did not participate in the arbitral proceedings, however, raised objections with regard to the jurisdiction of the arbitral tribunal via email. The tribunal proceeded with arbitration and issued an award in favor of the applicant. As the applicant filed for enforcement of the arbitral award, it was challenged by the respondent for being in violation of the public policy of India.

The respondent questioned the validity of the arbitration agreement and the manner in which the arbitral tribunal was constituted – claiming that the arbitration proceedings were 'patently illegal, misconceived, untenable, and contrary to the

[644] ibid, at para 39.

[645] *XSTRATA Coal Marketing AG v Dalmia Bharat (Cement) Ltd* [2016] (6) ARBLR 270 DHC.

[646] ibid, at para 49.

[647] *Sifandros Carrier Ltd. v Respondent: LMJ International Ltd* [2018] G.A. No. 514 of 2017, Calcutta High Court CHC.

public policy of India'.[648] It was also argued that the award suffered from misapplication of mind on part of the arbitrators as they failed to consider the objections that were raised in context of tribunal's jurisdiction, therefore, the award was against the fundamental policy of Indian law.[649]

On the issue of patent illegality, the court squarely rejected the argument by holding the under the scheme of IACA there was no such ground available to refuse enforcement of a foreign arbitral award.[650] With regard to the argument that the tribunal failed to apply its mind, the court was of the opinion that in light of the amendments brought in the IACA, the court could not review the merits of the award. The court observed:

> 'The enforcement of a foreign award can be refused only if such enforcement is contrary to the fundamental policy of Indian Law. It is submitted that while considering enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether while rendering the foreign award some errors have been committed.'[651]
>
> …
>
> 'The newly inserted Explanation (1) to Section 48 of the amended Act clarifies that 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.'[652]

The above-discussed judgments, which come from the eminent High Courts of

[648] ibid, at para 15.

[649] ibid, at para 27.

[650] ibid, at para 54.

[651] ibid, at para 62.

[652] ibid, at para 64.

India, give a clear indication that there has been a noteworthy shift in the approach of the Indian judiciary with regard to the interpretation and application of public policy ground in the context of foreign arbitral awards. The amendments in the IACA have most certainly left a significant impact on Indian courts as far as their perception about the public policy ground is concerned.

Summary

Inconsistency in the approach in interpreting the public policy exception in context of arbitral awards, in particular foreign arbitral awards, has played a major role in the chequered history of arbitration in India. Though it won't be incorrect to state that it is not just the intervention on part of Indian courts that has caused problems, but the standards of intervention and the inconsistency thereof that has been a greater cause of concern. The pendulum effect prevalent in the Indian judiciary's approach towards the interpretation and application of the public policy exception has severely dented the image of India in the world of arbitration.

The doctrine of public policy, as well acknowledged, is capable of having numerous and varying interpretations. India, like any other jurisdiction, is without any doubt free to decide the contours of its own public policy. However, striking a balance between the public policy of refusing a rather questionable arbitral award and the public policy of giving effect to finality of an arbitral award by enforcing it - is of extreme importance. Arguably, a narrow approach while defining the ground of public policy will go a long way in safeguarding India's economic and commercial interests, and promoting India as an arbitration friendly jurisdiction.

Though the legislative intervention, in form of the recent amendments brought in IACA with regard to interpretation of public policy do come across as a significant

step in the direction of curing the anomalies that the Indian judicial discourse was suffering from, it might be bit of exaggeration to state that the said amendments will work as a panacea. There are certain issues that will remain a cause of concern unless the requisite judicial attention is provided.[653]

Though the issue of application of 'patent illegality' test in context of foreign arbitral awards or the awards emanating from international commercial arbitrations seated in India has been settled for good by the amendments made in the IACA, the wider interpretation of fundamental policy of Indian law as provided in *Western Geco* and *Associate Builders* may still be a cause of concern. There is no doubt about the fact that the second Explanation under Section 34 (2)(b)(ii) and Section 48 (2)(b) restricts the interpretation of fundamental policy of Indian law by restraining courts from reviewing the merits of the award. And, noticeably, some of the High Courts in India have followed the statute in letter and spirit. However, it is yet to be seen whether the Supreme Court of India will respond in a similar fashion or will it find new ways to give effect to the reference made to 'judicial approach' and 'Wednesbury principle of reasonableness' in *Western Geco* and *Associate Builders*.

Having said that, it needs to be appreciated that in light of the recent judgments on interpretation of the public policy ground, it seems that Indian courts are keen on catching up with the international best practices on the issue at hand - hence this shift towards restrictive interpretation of public policy. Though in the same breath, it might not be incorrect to state that one need not be too euphoric about this welcome change that Indian judicial discourse is witnessing. As aptly summed up by a commentator, the Indian experience with arbitration law can be best described as 'two steps forward,

[653] Tejas Karia and others, 'Post Amendments: What Plagues Arbitration in India?' (2016) 5(1) Indian Journal of Arbitration Law 230.

one step backward'.[654] Looking back at the history of interpretation and application of the public policy ground by Indian courts, it is, perhaps, too soon to assert that India's tryst with expansive interpretation of public policy is over.

[654] Hiro N. Aragaki, 'Arbitration Reform in India: Challenges and Opportunities' in Anselmo Reyes and Weixin Gu (eds), *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in Asia-Pacific* (Hart Publishing 2018) 222.

5. PUBLIC POLICY AS AN EXCEPTION TO ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN ENGLAND, SINGAPORE, AND THE UNITED STATES: A THEMATIC ANALYSIS

Introduction

As evident from the discussions in the preceding chapters, the New York Convention or for that matter the Model Law are essentially products of the concerted efforts of the relevant stakeholders from across the jurisdictions to bring out uniformity and predictability in the practice of international commercial arbitration. On the other hand, given the fluidity of the concept of public policy, the possibility and the potential of its varying interpretation and application is the only predictable feature attributed to the concept. Though the idea here is not to create an impression that public policy necessarily serves as an impediment against the underlying goals of the New York Convention, its misuse or misapplication nevertheless remains a concern.

Not discounting the significance of the doctrine of public policy in the greater scheme of international commercial arbitration, particularly in context of enforcement of foreign arbitral awards, if not handled with caution it can very well leave a daunting impact on the arbitration regime in a jurisdiction. The erratic understanding and interpretation of public policy exception in India, as analyzed in the preceding chapter, only confirms the apprehensions.

Though the legislative efforts recently made in India might considerably help in overcoming the concerns, the unavoidable fact, however, remains that the direction in which India would head to, in matters of interpretation and application of public policy exception, ultimately rests in the hands of the national courts. In order to precisely identify the shortcomings in the approach adopted by the Indian courts,

particularly during the rough phases when the judiciary favored unbridled intervention, and to look for possible alternatives to develop as a more arbitration friendly jurisdiction, it is only logical to analyze the approach adopted by arbitration friendly courts.

A thematic analysis of the judicial discourse, on the issues concerning interpretation and application of the public policy exception, emerging from the courts of England, Singapore, and the United States – known for adopting international best practices, would be helpful in that regard.[655] This chapter essentially examines the position of England, Singapore, and the United States *vis a vis* the public policy exception in context of enforcement of foreign arbitral awards. The idea is to present a picture as to how pro-enforcement courts interact with the issues and problems attributed to public policy exception. The analysis includes the assessment of the national arbitration laws of these jurisdictions as far as their interaction with the relevant provision of the New York Convention is concerned. Special focus, largely, remains on the evaluation of the judicial discourse concerning interpretation and application of the public policy exception.

For the purpose of a thorough investigation, a thematic comparison of various manifestations and issues attributed to the public policy exception is conducted. Owing to the practical limitations of this thesis, it is not possible to pick up and analyze each and every manifestation of public policy. Therefore, discussion in this chapter is held under broader categories with an aim to cover the key issues.

[655] Queen Mary University of London and School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration* (2018) <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>. For discussion on choice of these particular jurisdictions, see the Introduction to this thesis.

While assessing the judicial discourse, the chapter begins by providing a general impression on the response of the national courts on interpretation of public policy. Thereafter, the position of the national courts on challenges raised on the ground of misapplication of laws or facts is discussed. Under this category the focus remains on the standard of review adopted by the national courts *vis a vis* the findings of the arbitral tribunals and the interpretation of relevant laws and facts.

The chapter also delves into the approach adopted by the national courts of the chosen jurisdictions with regard to the challenges on grounds of procedural public policy. Here the focus remains on how the courts have restrained the objecting parties to abuse this otherwise open-ended ground. Lastly, the chapter probes the response of the courts in matters where allegations of fraud and corruption are raised. The court decisions from the given jurisdictions are examined in order to provide a comprehensive position on the relevant issues for the purpose of understanding the established trend and to layout as to how a more pro-enforcement and consistent approach can result in infusing more certainty in the system – which is favorable for international commerce.

5.1 Legal Position on Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards

Before one delves into the study and analysis of the evaluation of the judicial discourse on the public policy exception in context of foreign arbitral awards emerging from England, Singapore, and the United States, a brief introduction on the legal structure governing the relevant issue will help to put the discussion in perspective. It will not only benefit in grasping the foundations based on which the judicial discourse on public policy exception in these jurisdictions has developed, but

will also point out the manner in which the national arbitration laws interact with the New York Convention, in particular with regard to the public policy exception. The examination will also highlight that these jurisdictions do not have any special or different legislative frameworks on the public policy exception that makes them more pro-enforcement in comparison to India. Therefore, indicating that the problem essentially lies with the approach adopted by the national courts in India.

5.1.1 England

England has undoubtedly been one of the major contributors in the development of arbitration law and practice. Owing to its importance in the international commerce, it was only natural for England to pay attention to the development of arbitration.[656] From the Arbitration Act of 1698 to the prevailing Arbitration Act of 1996, England has witnessed significant transformations in the national law on arbitration.[657] With its rich history on arbitration coupled with its significant position in global trade, England remains an important jurisdiction for both conducting arbitrations as well as enforcement of foreign arbitral awards.[658]

The United Kingdom, which includes England, Scotland, Wales, and Northern Ireland, acceded to the New York Convention in the year 1975. Owing to the growing demands from the stakeholders, to overcome the shortcomings of the U.K. Arbitration

[656] Julian Lew and Melissa Holm, 'Development of the Arbitration System in England' in Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International 2013) 1.

[657] ibid 4.

[658] Craig Tevendale and Andrew Cannon, 'Enforcement of Awards' in Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International 2013) 563

Act of 1975, a new national legislation on arbitration – the Arbitration Act of 1996 (hereinafter EAA) was introduced.[659]

Part III of the EAA, deals with the recognition and enforcement of the Geneva Convention and the New York Convention awards. Section 103 of the EAA, which almost mirrors the Article V of the New York Convention, lists down the grounds based on which recognition and enforcement of foreign arbitral awards may be refused. Section 103 (3) of the EAA provides that a foreign arbitral award may be refused if its enforcement would violate the public policy.[660]

5.1.2 Singapore

Singapore in the recent past has emerged as one of the major arbitration hubs. It has not only become the most popular destination for arbitration in Asia but is globally respected as well.[661] One of essential factors that have significantly contributed to Singapore's popularity in the area of arbitration has been the arbitration friendly

[659] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 754; A Maurer, The Public Policy Exception under the New York Convention (Juris 2012) 86.

[660] Section 103 (3) of the EAA reads:

> 'Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award'.

[661] Mangan, Reed, and Choong, *A Guide to the SIAC Arbitration Rules* (OUP 2014) 1. See Queen Mary University of London and School of International Arbitration, *2018 International Arbitration Survey: The Evolution of International Arbitration (2018)* 9. <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF>

attitude of the Singapore judiciary, especially in case of enforcement of international arbitral awards.[662]

Like most of the Asian countries, Singapore also shares a similar colonial history – particularly in context of development of modern law. And not to anyone's surprise, the law on arbitration in Singapore, for a long time even after attaining complete independence in the year 1965, was basically a replica of the then English Arbitration law. The first formal legislation that governed arbitration in the territory of Singapore was the Arbitration Ordinance of 1890, which later on got replaced by the Arbitration Ordinance of 1953.[663] Singapore became a party to the New York Convention in the year 1986. And it was in the year 1994 that Singapore adopted the Model Law for effective promotion and facilitation of international commercial arbitration, which was later on amended in 2002.[664]

The law in Singapore on commercial arbitration, unlike in case of India, is mainly governed by two legislations: the Arbitration Act of 2002 (hereinafter, Arbitration Act) and the International Arbitration Act of 2002 (hereinafter, IAA). The Arbitration Act concerns purely domestic arbitrations. The IAA on the other hand deals with the matters concerning international arbitrations seated in Singapore and the foreign arbitral awards.

The IAA is divided into several parts; where Part II of the IAA is substantially based on the Model Law and deals with international arbitrations seated in Singapore.

[662] Warren B. Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9 Singapore Year Book of International Law 260; Mangan, Reed, and Choong, *A Guide to the SIAC Arbitration Rules* (OUP 2014) 2; Chan Leng Sun, 'Making Arbitration Work in Singapore'; in Anselmo Reyes and Weixia Gu (eds). *The Developing World of Arbitration: A Comparative Study of Arbitration Reform in the Asia Pacific* (Hart Publishing 2018) 147.

[663] Michael Hwang and others, 'Singapore' in Michael J. Moser (ed), *Arbitration in Asia* (Second edn, Juris 2017) 4.

[664] Mangan, Reed, and Choong, *A Guide to the SIAC Arbitration Rules* (OUP 2014) 2.

Part III serves as the enabling legislation for the New York Convention, therefore facilitating enforcement of foreign arbitral awards.

Section 31 of the IAA provides exhaustive list of grounds based on which the appropriate forum in Singapore may refuse to enforce a foreign arbitral award. The grounds listed in the IAA are basically a replica of the grounds provided in the Article V of the New York Convention. Section 31(4)(b) of the IAA provides that the enforcement of a foreign arbitral award may be refused if 'enforcement of the award would be contrary to the public policy of Singapore'.

5.1.3 United States

The United States holds the distinction of not just being one of the strongest economic powers in the world but also a major contributor in the development of jurisprudence on international commerce. And it is no secret that the development of international commercial arbitration regime has received a special attention in the U.S. The first formal national legislation on arbitration in the U.S. was enacted in the year 1925, christened as the Federal Arbitration Act (hereinafter FAA).[665] Even though the U.S. participated in the drafting of the New York Convention, it did not accede to it for over a decade after the Convention came into effect. The U.S. adopted the New York Convention in the year 1970 by incorporating it in the FAA.[666]

As a contracting party to the New York Convention and the Inter-American Convention on International Commercial Arbitration (Panama Convention), recognition and enforcement of foreign arbitral awards can be sought under the

[665] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 751.

[666] A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 183.

relevant provisions of the FAA.[667] The FAA consists of three chapters, where the first chapter generally deals with domestic arbitrations and awards, and the second and third chapters govern the enforcement mechanism for the New York Convention and the Panama Convention awards, respectively.

Chapter 2 of the FAA acts as the enabling legislation for the New York Convention in the U.S., where Section 207 of the FAA, which is the replica of the relevant provision in the New York Convention, deals with the enforcement of foreign arbitral awards.[668] The ground of public policy to refuse enforcement of a foreign arbitral awards under Section 207 is, therefore, read in light of the relevant text under the New York Convention.

5.2. Restrictive Interpretation of Public Policy Exception: A General Impression

The judicial discourse in England, Singapore, and the U.S., by and large, reflects that the national courts have a tendency towards adopting international best practices on the issue at hand. The national courts in these jurisdictions, unlike Indian courts, have more or less followed a consistent path of restrictive interpretation of public policy exception, applying it only in exceptional circumstances. The pro-enforcement bias is quite evident in all three jurisdictions. The cases selected for this section provide a general impression of the awareness in the national courts of chosen jurisdictions on the significance of restrictive interpretation of public policy exception in context of foreign arbitral awards.

[667] Chapter 2 & 3 of the Title 9 of U.S. Code.

[668] Section 207 of the FAA reads:

> 'Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention'.

The analysis of the judicial discourse on specific issues of concern, as discussed in detail in the later sections of this chapter, would make the trend that prevails in these jurisdictions clear. It will also help to discern as to how the national courts in these jurisdictions interact with the issues and problems attributed to the concept of public policy in context of enforcement of foreign arbitral awards.

5.2.1 England

Courts in England have generally favored a non-interventionist approach when it comes to interpretation and application of the public policy exception, thereby reflecting a pro-enforcement stance.[669] The judicial discourse makes it clear that the courts have adopted a restrictive approach, with significant consistency, towards interpretation of the public policy exception in context of enforcement of foreign arbitral awards.[670]

In *DST v Rakoil*[671], the House of Lords while highlighting the need of narrow interpretation of public policy in context of foreign arbitral awards noted:

[669] Stavros Brekoulakis, 'Public policy Rules in England and International Arbitration Law' (2018) 84(3) Arbitration 216; May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 764; *Tongyuan (USA) International Trading Group v Uni-Clad Ltd* [2001] XXVI YBCA, at 892.

[670] Craig Tevendale and Andrew Cannon, 'Enforcement of Awards' in, Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International 2013) 580; Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 21.

[671] *DST v Rakoil* [1990] 1 A.C. 295 House of Lords.

> 'Considerations of public policy can never be exhaustively defined, but they should be approached with extreme caution… It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised'.[672]

Similar opinion was voiced in *IPCO (Nigeria) Ltd*[673], where the court while supporting restrictive interpretation and application of public policy observed:

> 'The reference to public policy in s. 103(2) was not intended to furnish an open-ended escape route for refusing enforcement of New York Convention awards. Instead, the public policy exception in s. 103(3) is confined to the public policy of England (as the country in which enforcement is sought) in maintaining the fair and orderly administration of justice'.[674]

The threshold for triggering refusal to enforce of a foreign arbitral award on the ground of violation of public policy in England is high since the doctrine of public policy is construed restrictively.[675] As a matter of fact, facilitating enforcement of

[672] ibid, at 314.

[673] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp* [2005] 1 C.L.C. 613, QBD (Comm. Court) 27

[674] ibid, at 617-618.

[675] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 776 & 784; Craig Tevendale and Andrew Cannon, 'Enforcement of Awards' in Julian Lew and others (eds.), *Arbitration in England* (Kluwer Law International 2013) 579; Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 4,

foreign arbitral awards in itself has been considered a matter of public policy by the courts in England.[676]

It is extremely rare for the courts in England to refuse a foreign arbitral award on the ground of violation of public policy, as is evident from the fact that number of such cases remains in single digits.[677] The mantra that the courts in England have been following for long is to balance the competing public policies, i.e. the public policy consideration of not enforcing such awards that have the potential of violating the fundamentals of the legal system with the public policy of supporting finality of arbitral awards.[678]

5.2.2 Singapore

As far as the ground of violation of public policy of Singapore in context of enforcement of arbitral awards is concerned, there is a general perception that the public policy argument will be accepted only when the courts are fully satisfied that it is not the narrow interest of the party to the dispute but the larger interest of the State

[676] Stavros Brekoulakis, 'Public policy Rules in England and International Arbitration Law' (2018) 84(3) Arbitration 214; A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 87; *Soinco SACI & Anr. v Novokuznetsk Aluminium Plant & Ors* [1998] C.L.C. 730 Court of Appeal (Civil Division); *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, at para. 101.

[677] Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 3; Craig Tevendale and Andrew Cannon, '*Enforcement of Awards'* in Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International 2013) 575; A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 95.

[678] Craig Tevendale and Andrew Cannon, 'Enforcement of Awards' in Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International 2013) 581; Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 14.

importance that is being affected.[679] Overall, the courts in Singapore have shown a consistent trend towards adopting a narrow approach when it comes to interpretation of the ground of public policy.[680]

To a substantial extent, the courts of Singapore have played a major role in encouraging and promoting the culture of arbitration.[681] The arbitration friendly attitude of the Singapore judiciary is well reflected by the decision of the Singapore Court of Appeal in *Tjong Sumito*[682], where it noted:

> 'There was a time when arbitration was viewed disdainfully as an inferior process of justice. Those days are now well behind. An unequivocal judicial policy of facilitating and promoting arbitration has firmly taken root in Singapore. It is now openly acknowledged that arbitration, and other forms of alternative dispute resolution such as mediation, help to effectively unclog the arteries of judicial administration as well as offer parties realistic choices on how they want to resolve their disputes at a pace they are comfortable with'.[683]

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[679] Nish Shetty, 'Public Policy and Singapore Law of International Arbitration' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (25 March, 2015) 1.

[680] Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing 2011) 185.

[681] A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 157; Locknie Hsu, 'Public Policy Considerations in International Arbitration: Costs and Other Issues' (2009) 25(1) Journal of International Arbitration 102; Comments at the Second Reading of the International Arbitration Bill on October 31 1994, Singapore Parliamentary Debates, 63 Official Report 625-627 <www.lawncom.sg>

[682] *Tjong Very Sumito and others v Antig Investments Pte Ltd* [2009] SGCA 41.

[683] ibid, at para 28; [2007] XXXII YBCA, para 45, at 505, where the Singapore High Court noted: '[P]rinciple of international comity enshrined in the Convention…strongly inclines the courts to give effect to foreign arbitration awards'.

The Singapore High Court has on several occasions made clear its intentions of supporting and facilitating the ambitions of Singapore to evolve as an international arbitration destination. Highlighting the importance of enforcement of foreign arbitral awards to reach that goal, the court has made it amply clear that grounds like public policy exception must not be entertained unless exceptional circumstances exist – otherwise the entire purpose of international commercial arbitration can get scuttled.[684] For example, in *Re An Arbitration*[685] the objecting party challenged the enforcement of the arbitral award on the ground of public policy for being issued *ex parte.* Noting that the objecting party was provided the opportunity to participate in the arbitral proceedings, the court refused to accept the challenge of public policy violation and observed:

> '[W]oven into the concept of public policy as it applies to the enforcement of foreign arbitral awards "is the principle that courts should recognize the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice'.[686]

Interestingly, in Singapore arbitral awards emanating from international arbitrations seated in Singapore are taken at par with foreign arbitral awards. Therefore, reliance on the judicial discourse on public policy exception in case of setting aside of international arbitral awards under IAA would be helpful for the purposes of analyzing the relevant issues in this chapter. Courts in Singapore have on

[684] See, for example, *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

[685] *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte. Ltd.* [1995] SGHC 232.

[686] ibid, at para 70.

several occasions relied on its own judgments, delivered in context of international arbitration awards seated in Singapore, for the purpose of deciding over the interpretation of the public policy exception - when raised in case of enforcement of foreign arbitral awards.

When it comes to foreign arbitral awards or the international arbitration awards seated in Singapore, the standards of interpretation of public policy exception do not vary. This was clarified by the Singapore Court of Appeal in the landmark decision of *AJT v. AJU*.[687] While looking into the question of whether the standards of interpreting the public policy exception under the setting aside proceedings should be different from those under the enforcement of foreign arbitral awards, the court decided to hold in negative.[688]

5.2.3 United States

The overall impression about the U.S. as a jurisdiction, in context of enforcement of foreign arbitral awards, is that it is a pro-enforcement and an arbitration-friendly.[689] The U.S. holds a strong policy of respecting party autonomy and favoring finality and binding nature of foreign arbitral awards.[690] The foundation of the pro-enforcement

[687] [2011] SGCA 41.

[688] ibid, at 37.

[689] Mélida Hodgson and Anna Toubiana, 'IBA Public Policy Project – Country Report, USA' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (31 March, 2015) 1; S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges* (Federal Judicial Center, 2012) 4; Jennifer Permosly and Yasmine Lahlaou, 'Recognition and Vacator of Foreign Arbitral Awards in the U.S.; in Laurence Shor, Tai-Hang Cheng and others (eds), *International Arbitration in the United States* (Kluwer Law International 2017) 472

[690] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 751; S.I. Strong, *International Commercial Arbitration: A*

policy favored by the U.S. courts in context of the New York Convention awards was laid down by the U.S. Supreme Court in *Scherk v. Alberto*[691] where it opined:

> 'The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries'.[692]

As a result the courts in the U.S. have more often than not reflected a pro-enforcement bias, in line with the aims and objectives of the New York Convention.[693] It is very rare to see a foreign arbitral award being refused enforcement on the ground of public policy, despite it being a popular ground for challenging enforcement.[694] The repeated emphasis of the U.S. federal courts on narrow interpretation of the public policy exception, by recognizing that it can be

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Guide for U.S. Judges (Federal Judicial Center, 2012) 4; Yasmine Lahlou and Andrew Poplinger, 'Basic Principles Governing Recognition and Enforcement of Foreign Arbitral Awards in the U.S. and New York' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 111. For example, *Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F. Supp. 907 [1996], at 913

> 'The U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law'.

[691] *Scherk v Alberto- Culver Co.*, [1974] 417 U.S. 560.

[692] ibid, at 520.

[693] S.I. Strong, *International Commercial Arbitration: A Guide for U.S. Judges* (Federal Judicial Center, 2012) 72

[694] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23() Arizona Journal of Int'l & Comp. Law 777; Yasmine Lahlou and Andrew Poplinger, 'Barriers to Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York and Panama Convention' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 130.

invoked only when the most basic notions of morality and justice are violated, indicates the willingness to follow the approach advocated by the framers of the New York Convention.[695]

Public policy argument is accepted by courts only in cases where the courts conclude that a 'well defined and dominant public policy is at stake'.[696] The most popular and well-accepted definition of public policy, across the jurisdictions, in context of the New York Convention, as laid down in the *Parsons & Whittemore* case, broadly reflects the understanding of the public policy exception adhered to by the U.S. courts.[697]

> 'We conclude, therefore, that the Convention's public policy defense should be construed narrowly. 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'.[698]

There is a catena of decisions that corroborates the argument that the U.S.

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[695] Reisman, Craig and others, *International Commercial Arbitration: Cases, Materials and Notes on the Resolution of International Business Disputes* (Westbury, New York, The Foundation Press 1997) 1285; Mélida Hodgson and Anna Toubiana, 'IBA Public Policy Project – Country Report, USA' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (31 March, 2015) 3.

[696] Yasmine Lahlou and Andrew Poplinger, 'Barriers to Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York and Panama Convention' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 165.

[697] See, *Parsons & Whittemore Overseas Co.* v *Societe Generale de L'Industrie duPapier* [1974] 508 F.2d., U.S.C.A 2nd Cir.

'We conclude, therefore, that the Convention's public policy defense should be construed narrowly. 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'.

[698] ibid, at 969.

courts more often than not favor narrow interpretation of public policy with a pro-enforcement bias in mind, which in turn aids in realizing the underlying objective of the New York Convention, i.e. the finality of arbitral awards. For example, in *NTT Docomo Inc.*[699] where the enforcement of the award was challenged on the ground of public policy as the award called for specific performance and not just monetary damages, the court emphasizing on the restricted interpretation of the public policy exception observed:

> 'The defense attaches "only when the award violates some explicit public policy that is well-defined and dominant as is ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests."… Respondent fails to identify an "explicit," "well-defined," or "dominant" public policy…against the Tribunal's order of specific performance…'.[700]

In *Karaha Bodas*[701] where it was alleged that failure to disclose relevant information during the arbitration proceedings amounted to fraud, therefore violation of public policy, the court denied to refuse enforcement and highlighted the purpose behind restricted interpretation of public policy. It noted:

[699] *NTT Docomo Inc. v. Ultra D.O.O.* [2010] 10 civ 3823 (RMB)(JCF), SDNY.

[700] ibid, at 5.

[701] *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, [2004] 364 F.3d 274, U.S.C.A 5th Cir.

> 'Defenses to enforcement under the New York Convention are construed narrowly, "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts"'.[702]

Even though the general trend in the U.S. has been in favor of restricted interpretation of public policy, thereby facilitating a pro-enforcement policy, it does not rule out the possibility of a foreign arbitral award being refused enforcement where the U.S. public policy is at stake. For example, in *Laminoirs-Trefileries-Cableries*[703] a French seller and a U.S. buyer entered into a purchase agreement. As dispute arose, the seller initiated arbitration proceedings before an ICC tribunal in accordance with the agreement. Seller got a favorable award and moved a motion to enforce the award in the U.S. The buyer challenged on the ground of violation of public policy arguing that the arbitral tribunal wrongly applied the French legal rate of interest instead of relying on the relevant Georgian law.

Though the court did not accept the argument that the tribunal wrongly applied the French law on the issue, it did hold that part of the foreign arbitral award was against public policy as it awarded an additional post-award interest in case of delay in payments on part of the award-debtor – therefore was penal rather than compensatory.[704]

In a recent decision in *Hardy Exploration*[705], a U.S. court declined to enforce a foreign arbitral award on public policy ground. The arbitral award included direction in form of payment of interest and specific performance. As Hardy moved a motion

[702] ibid, at 18.

[703] *Laminoirs-Trefileries-Cableries de Lens, S.A., v. Southwire Co.* [1980] 484 F. Supp. NDG 1063.

[704] ibid, at 1069.

[705] *Hardy Exploration & Production (India), Inc. v. Government of India, Ministry of Petroleum & Natural Gas*, [2018] Case 1:16-cv-00140-RC, DDC.

for enforcement before the District Court of Columbia, Govt. of India challenged the motion. In addition to seeking a stay on enforcement motion - owing to the pending setting aside proceedings, it argued that enforcement of the part of award dealing with 'specific performance' would be in violation of the U.S. public policy – as it would infringe upon India's sovereign right to control its own lands and natural resources.

Accepting the arguments put forth by GoI, the court refused to enforce the award and held:

> 'This case presents the Court with a unique opportunity to balance two important U.S. public policy values: respect for the sovereignty of other nations and respect for foreign arbitral agreements… the Court finds that India does not overstate the United States' public policy interest in respecting the right of other nations to control the extraction and processing of natural resources within their own sovereign territories. The Court therefore finds that India has met its burden of demonstrating that confirmation of the specific performance portion of the award would be contrary to U.S. public policy, and therefore the Court declines to confirm this portion of the award'.[706]

Refusing to enforce the portion of the award dealing with payment of interests, the court noted:

> 'This portion of the award is so inseparable from the specific performance portion of the award, the confirmation of which would violate U.S. public policy, that the

[706] ibid, 20-21.

confirmation of the interest portion of the award must also be found, necessarily, to violate U.S. public policy'.[707]

It would also be relevant to point out here that the U.S. courts have witnessed some inconsistency in the approach adopted in enforcement of arbitral awards annulled in foreign jurisdictions. The application of the doctrine of public policy in some of these cases has been subjected to criticism. However, interpretation and application of the public policy exception as provided under Article V (2)(b) of the New York Convention in context of arbitral awards has not been directly the issue of concern before the courts in those cases.[708] Though courts have extending indirect application of the concept of public policy, also referred to as 'public policy gloss', in order to decide the matters primarily dealing with application of Article V 1(e) of the New York Convention.[709] Since the decisions are essentially concerned with interpretation and application of Article V 1(e) and the issue of public policy concerns in context of the judgments of foreign courts annulling arbitral awards, analysis of those decisions is excluded from the scope of this chapter.

5.3 Limited Scope of Judicial Intervention vis-à-vis Error of Law or Facts

Confusing enforcement proceedings as an opportunity to rectify or revisit the findings of arbitral tribunals on matters of law or facts not only is outside the scope of the New

[707] ibid, at 31.

[708] Louis Duca and Nancy Welsh, 'Interpretation and Application of the New York Convention in the United States' in, G. Bermann (eds), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 1051.

[709] See *Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion*, [2016] No. 13-4022, 2nd Cir.; *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, [2017] No. 14-597, 2nd Cir.; *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd*., [1999] 191 F.3d 194, 2nd Cir.

York Convention but also goes squarely against the spirit of international arbitration. Deference to the findings of arbitral tribunals is quintessential for upholding the finality of arbitral awards and to ensure that national courts do not sit as appellate authorities in the enforcement proceedings.

Nevertheless, misapplication of law or facts on part of the arbitral tribunals, where challenges may be raised with regard to both on substantive or procedural issues, remains one of the popular grounds to challenge enforcement of arbitral awards within the rubric of public policy exception. Even though there is no statutory restriction on bringing error of law or facts on part of arbitral tribunals within the ambit of public policy exception, the consequences of favoring such a policy can be alarming, to say the least – particularly if it is exercised as a norm rather than exception. The relevant examples emerging from Indian courts, as discussed in the preceding chapter, demonstrate the potential of unbridled judicial intervention in obstructing the enforcement of arbitral awards thereby failing the entire arbitration process.[710]

Therefore, it is only a plausible expectation from national courts to uphold the finality of arbitral awards by giving substantial deference to the findings of the arbitrators and to refrain from considering mere misapplication of law or facts on part of arbitral tribunals akin to violation of public policy. The scope of review favored by national courts can significantly impact not only the fate of the arbitral award in question but also the underlying objectives of international arbitration.

As ensuring finality of foreign arbitral awards remains one of the primary objectives of the New York Convention, diluting it by allowing national courts to conduct a full-scale review of arbitral awards under the guise of protecting public

[710] See discussion under Section 4.3.2, Chapter 4.

policy would only facilitate annihilation of international commercial arbitration. Therefore, a consistently restrictive and measured approach is arguably the most pragmatic way to ensure an arbitration-friendly environment.

5.3.1 England

Given the generally followed restrained standard of judicial review in case of foreign arbitral awards during the enforcement proceedings, courts in England follow a policy of giving substantial deference to the findings of arbitral tribunals. As a result, misapplication or error of law or facts on part of arbitral tribunals does not normally rise to the level of violation of public policy.

In general, the courts in England have refrained from conducting review of the arbitral awards while deciding on the allegations of violation of public policy.[711] The approach is in line with the underlying vision of the New York Convention with gives significant importance to finality of the foreign arbitral awards and discourages enforcing courts from behaving as appellate authorities. However, there have been occasions where the English courts have suggested that if situations warrant, courts may get behind the arbitral award in order to decide on the issue of public policy.

One such decision, which has been subjected to some criticism for its outcome and the reasoning, is the celebrated case of *Soleimany v Soleimany*[712]. In the case at hand, parties entered into an agreement whereby the plaintiff would export carpets from Iran and the defendant would sell them in England and elsewhere. However, the

[711] Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 5; Craig Tevendale and Andrew Cannon, Enforcement of Awards; in, Julian Lew and others (eds), *Arbitration in England* (Kluwer Law International, 2013) 572.

[712] *Soleimany v Soleimany*, [1998] C.L.C. 779, Court of Appeal (Civil Division).

problem with the contract was that the export of carpets as agreed by the parties was in violation of the Iranian law.

As dispute arose, parties agreed to refer the dispute to Beth Den, in accordance with the Jewish laws. Beth Den held that despite the exports being illegal in this case, such illegality did not affect the rights of the parties under Jewish law, and accordingly issued an award. One of the issues before the court during the enforcement proceedings was whether the enforcing court should go behind the award in order to ascertain that the arbitrator has correctly decided on the issue of illegality involved. The court observed:

> 'The difficulty arises when arbitrators have entered upon the topic of illegality, and have held that there was none. Or perhaps they have made a non-speaking award, and have not been asked to give reasons. In such a case there is a tension between the public interest that the awards of arbitrators should be respected, so that there be an end to lawsuits, and the public interest that illegal contracts should not be enforced. We do not propound a definitive solution to this problem… It may, however, also be in the public interest that this court should express some view on a point which has been fully argued and which is likely to arise again. In our view, an enforcement judge, if there is prima facie evidence from one side that the award is based on an illegal contract, should enquire further to some extent… We do not for one moment suggest that the judge should conduct a full scale trial of those matters in the first instance…The judge has to decide whether it is proper to give full faith and credit to the arbitrator's award. Only if he decides at the preliminary stage that he should not take that course does he need to embark on a more elaborate enquiry into the issue of illegality'.[713]

[713] ibid, at 790.

Even though the court cautioned from conducting a 'full-scale' review of the arbitral award, it nevertheless hinted towards some sort of reluctance in giving deference to the findings of arbitral tribunals in matters that touched upon issues of public policy. This opinion, however, did not have a major influence on the approach of restraint that the English courts follow *vis a vis* standard of review in matters of foreign arbitral awards during the enforcement proceedings. The dominant opinion remains that the courts should preferably refrain from conducting review of the arbitral awards when violation of public policy is raised to challenge enforcement of foreign arbitral awards.

For example, in a recent decision in *Sinocore International Co. Ltd.*[714], the enforcement of a Chinese arbitral award was challenged on ground of public policy because of the alleged forgery involved and the misapplication of relevant law. The court while reiterating the position of English courts on giving substantial deference to arbitral tribunals and the limited scope of review *vis a vis* foreign arbitral awards in context of public policy exception, held:

> 'When considering public policy defences to enforcement, it was not appropriate or permissible for the English court to review the tribunal's analysis of the issues with a view to deciding that it was wrong, as a matter of applicable Chinese law, in its determination of what was the operative breach and the real causation of loss. It would plainly be appropriate to uphold and enforce the decision of a

714 *Sinocore International Co Ltd. v. RBRG Trading (UK) Ltd.* [2017] 1 C.L.C. 601 QBD (Comm. Court).

tribunal which had considered the matter fully and properly as a matter of Chinese law'.[715]

The courts in England, on the issue of reviewing of foreign arbitral awards in context of the public policy exception during the enforcement proceedings, more often than not rely on the sturdily worded opinion laid down in the landmark *Westacre Investments*[716], where the court held:

'As regards arbitrations, there is the strongest conceivable public policy against re-opening issues of fact already determined by the arbitrators. That is the policy which underlies the 1979 and 1996 Arbitration Acts and, as it is now accepted, prohibits investigation by the courts by means of the appeal procedure under the pretence of a question of law, of the weight of the evidence before the arbitrator in order to disturb findings of fact'.[717]

The court further observed:

'The opportunity for erroneous and uncorrectable findings of fact arises in all international arbitration. If much weight were to be attached to that consideration it is difficult to see that arbitrators would ever be accorded jurisdiction to determine issues of illegality… Accordingly, in determining the question of public policy as to enforcement, I proceed on the basis that, like the Swiss courts, the English courts also would have held that the arbitrators had jurisdiction to

[715] ibid, at 602.

[716] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.*, [1998] C.L.C. 409, QBD (Comm. Court)

[717] ibid, at 443.

determine the question whether the consultancy agreement was illegal and void on the grounds alleged'.[718]

Likewise, in *IPCO (Nigeria) Ltd.*[719], an application was moved to sets aside the order enforcing the arbitral award issued in Nigeria. Among other grounds, it was argued that the enforcement of the arbitral award would violate public policy due to several reasons, including the error in arbitral tribunal's findings. The court while deciding on whether an error on part of the arbitral tribunal would render the enforcement of the arbitral award contrary to the public policy, observed:

'I can take this point summarily. The NNPC argument was that the tribunal's errors (amounting to misconduct) led to an award so exaggerated in size that its enforcement, against a state company, would be contrary to public policy. With respect, this complaint appears to lack substance. Were it soundly based, a mere error of fact, if sufficiently large, could result in the setting aside of an award. That cannot be right and I say no more of this topic.'[720]

Similar position of giving substantial deference to the findings of arbitral tribunals on the matters of law or facts adopted by the English courts is reflected in *OTV v. Hilmarton*[721] and *Soinco SACI & Anr*[722], as well. The practice followed by the English courts is evidently reflective of the pro-enforcement and arbitration friendly

[718] ibid, at 432-433.

[719] *IPCO (Nigeria) Ltd v Nigerian National Petroleum Corp.* [2005] 1 C.L.C. 613, QBD (Comm. Court) 27.

[720] ibid, at 628.

[721] *Ominum De Traitement Et De Valorisation S.A. (OTV) v Hilmarton Ltd.*, [1999], 1998 Folio No. 1003, High Court of Justice, QBD (Comm. Division).

[722] *Soinco SACI & Anr. v. Novokuznetsk Aluminium Plant & Ors.* [1998] C.L.C. 730 Court of Appeal (Civil Division).

policy that mirrors with the idea of finality of arbitral awards envisaged in the New York Convention.

5.3.2 Singapore

The Singapore courts have maintained a consistent opinion when it comes to error in application of law or facts on part of the arbitral tribunal *vis a vis* the public policy exception. As a matter of rule, arbitral awards are not open to appeal; therefore an error of law or facts on part of the tribunal is generally not open to judicial scrutiny - hence not considered in violation of the public policy of Singapore, save in exceptional circumstances.[723]

PT Asurani Jasa [724] is a significant case that is considered as a landmark in this regard. One of the issues before the Singapore Court of Appeal was that whether misapplication of one of the provisions of the Singapore International Arbitration Act would amount to violation of public policy. The court of first instance in its judgment had rejected the argument that violation of a law necessarily tantamount to violation of public policy. The court had observed:

> 'Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, i.e., the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the

[723] Warren B. Chik, 'Recent Developments in Singapore on International Commercial Arbitration' (2005) 9, Singapore Year Book of International Law 266; Chan Leng Sun SC, *Singapore Law on Arbitral Awards* (Academy Publishing 2011) 119 & 185; *Northern Elevator Manufacturing Sdn Bhd v United Engineers (Singapore) Pte Ltd* [2004] 2 SLR (R) 494, at 19.

[724] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] SGCA 41.

ground of public policy. If I were to make such a holding, it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal. Further, in the context of this case, whilst it is obviously not desirable to have conflicting arbitral decisions existing on the very same dispute between the same parties, I do not see any public policy implication in such a state of affairs existing between private parties, nor has the applicant identified any such implication'.[725]

The appellant, while arguing that the trial court had erred in its finding, relied on the decision of the Supreme Court of India in *ONGC v. Saw Pipes*[726], where it was held that an award in violation of a provision of Indian law would be 'patently illegal' and liable to be set aside for being in conflict with the public policy of India. The Singapore Court of Appeal, rejecting the argument and disagreeing with the position held by the Supreme Court of India, made the following observation:

'While we have the greatest respect for the Supreme Court of India, we do not think that the reasoning in that decision is applicable to the legal framework under the Act. In our view, the legislative intent of the Indian Act reflected in the Indian decision is not reflected in the Act, which, in contrast, gives primacy to the autonomy of arbitral proceedings, and limits court intervention to only the prescribed situations. The legislative policy under the Act is to *minimize curial intervention* in international arbitrations. Errors of law or fact made in an arbitral decision, per se, are final and binding on the parties and may not be appealed

[725] *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2005] SGHC 197, at para 29.

[726] *Oil & Natural gas Corporation Ltd. V Saw Pipes Ltd* [2003] AIR SC 2629.

against…'[727] [Emphasis added]

The court, therefore, unambiguously refused to subscribe to the broad interpretation of the public policy exception as provided by the Indian Supreme Court in *ONGC v. Saw Pipes*, which according to the court of appeal was inconsistent with the cardinal principles of finality of arbitral awards and minimum court intervention.

In *AJU v AJT*[728], where the arbitral tribunal's findings on the validity of the underlying agreement were challenged, the Singapore Court of Appeal while reversing the decision of the Singapore High Court and upholding the findings of the arbitral tribunal held:

> '…the court cannot abrogate its judicial power to the Tribunal to decide what the public policy of Singapore is and, in turn, whether or not the Concluding Agreement is illegal… however eminent the Tribunal's members may be. Accordingly, we agree with the Judge that the court is entitled to decide for itself whether the Concluding Agreement is illegal and to set aside the Interim Award if it is tainted with illegality…this conclusion does not mean that in every case where illegality in the underlying contract is invoked, the court is entitled to reopen the arbitral tribunal's finding that the underlying contract is not illegal… With respect, we do not think the Judge's criticism of the Tribunal's approach is justified because, as the record shows, the Tribunal did consider the relevant surrounding circumstances'.[729]

[727] [2006] SGCA 41, at para 57.

[728] *AJU v AJT* [2011] SGCA 41.

[729] *ibid*, at para 63.

The court of appeal further went on to observe:

> 'In our view, the Judge was not entitled to reject the Tribunal's findings and substitute his own findings for them… Arbitration under the IAA is international arbitration, and not domestic arbitration. That is why Sec. 19B (1) provides that an IAA award is final and binding on the parties, subject only to narrow grounds for curial intervention. This means that findings of fact made in an IAA award are binding on the parties and cannot be reopened except where there is fraud, breach of natural justice or some other recognized vitiating factor'.[730]

The court of appeal, although acknowledged that court may intervene where necessary, relying on the decision in *PT Asurani Jasa* it opined that errors made by the tribunal, on their own, according to the court were not sufficient to conclude violation of public policy.[731] Looking into the underlying policy of the IAA, the court clearly suggested that findings of the tribunal must be given primacy and even in case of public policy objections the courts should intervene in exceptional circumstances only.

Interestingly, the court while arriving at its conclusion rejected the observations of the English Court made in *Soleimany*, on whether the court should reopen an examination of fact and law to look into the illegality of the contract where the tribunal has already ruled on it. The court instead relied upon the test laid down in *Westcare*, which basically advocated that tribunal's findings must not be re-opened, except under exceptional circumstances.[732]

[730] *ibid*, at para 65.

[731] *ibid*, at para 66.

[732] *ibid*, at para 41-60

Similar approach has been consistently followed by the Singapore courts in catena of decisions, including, *Dongwoo Mann+Hummel Co. Ltd.*[733], *Rockeby Biomed Ltd*.[734], *Prometheus Marine Pte. Ltd*.[735], *Aloe Vera of America, Inc*.[736], *AKN v. ALC*[737] and *Fisher, Stephen J*[738].

A significant opinion, which deserves a mention here, was laid down in *Sui Southern Gas Co Ltd.*[739]. The decision is of relevance because it held a contrary opinion on the application of 'Wednesbury Priniciples' in comparison to that held by the Supreme Court of India. The award, in the case at hand, was challenged on the basis of Wednesbury principles for being perverse, manifestly unreasonable, and irrational.

Plaintiff and defendant, both were companies incorporated under the laws of Pakistan. They entered into a gas supply agreement, and as the dispute arose the matter was referred to arbitration in accordance with the agreement. An award was made in favor of Habibullah Coastal Power. The plaintiff argued that the award was 'perverse, manifestly unreasonable and irrational', therefore in violation of public policy. Acknowledging that mere error of law was not sufficient to declaring an award contrary to public policy, the plaintiff stressed that in the case at hand the tribunal's approach was manifestly unreasonable, therefore attracting the application of Wednesbury principles.

[733] *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] SGHC 67.

[734] *Rockeby Biomed Ltd v Alpha Advisory Pte Ltd* [2011] SGHC 155.

[735] *Prometheus Marine Pte Ltd v King, Ann Rita and another appeal* [2017] SGCA 61.

[736] *Aloe Vera of America, Inc. v Asianic Food (S) Pte Ltd and Another* [2006] SGHC 78.

[737] *AKN & Anr. v ALC & Ors. and Other Appeals* [2015] SGCA 18.

[738] *Fisher, Stephen J v Sunho Construction Pte Ltd*. [2018] SGHC 76.

[739] *Sui Southern Gas Co Ltd. v Habibullah Coastal power Co (Pte) Ltd.* [2010] SGHC 62.

The court, after carefully considering the plaintiff's arguments, made the following observations with regard to application of Wednesbury principles:

> 'Although the court undoubtedly has, on judicial review, a power to quash an administrative decision when its substantive merits are so absurd that no sensible person could have made that decision, I was of the view that no such power is available where the decision in question is made by an arbitral tribunal. This is because there is no appropriate analogy between administrative and arbitral decisions. Review for Wednesbury unreasonableness or irrationality exists because it is presumed that, when Parliament gives an administrative decision-maker a discretion, that discretion is not unfettered; rather, Parliament intends that that discretion be exercised reasonably... This presumption of rationality, however, finds no purchase in the context of private arbitrations, where parties have contractually agreed to abide by the decision of the arbitral tribunal…The ability to challenge an award for unreasonableness or irrationality is not a ground set out in the Act'.[740]

The court while emphasizing on the restrictive interpretation of public policy noted:

> '…in order for SSGC to have succeeded on the public policy argument, it had to cross a very high threshold and demonstrate egregious circumstances such as corruption, bribery or fraud, which would violate the most basic notions of morality and justice. Nothing of the sort had been pleaded or proved by SSGC, and its ambiguous contention that the Award was "perverse" or "irrational" could

[740] *ibid*, at para 18.

not, of itself, amount to a breach of public policy'.[741]

Interestingly, the opinion taken by the Singapore court on the argument to extend the Wednesbury principles, which finds its roots in court's power to review the discretionary decision made by an administrator under the authority of the Parliament, to private arbitrations was diametrically opposite position to that of the Indian Supreme Court. The Indian Supreme Court has been of the view that tribunal's failure to meet the standard of Wednesbury principles of reasonableness goes against the fundamental policy of India, therefore against the public policy of India.[742] As discussed in the previous chapter, inclusion of Wednesbury principles as a ground for claiming violation of public policy of India has been sternly criticized – as it facilitates enough scope for an expanded judicial intervention.[743]

5.3.3 United States

In U.S., mere policy, be it substantive or procedural, reflected in a statutory law does not necessarily reflect the public policy in context of enforcement of foreign arbitral awards.[744] The U.S. courts hold a policy that misapplication of law or facts on part of the tribunal would not be considered as violation of public policy. It is for this very reason that 'manifest disregard of law, which is a ground to refuse enforcement under

[741] *ibid*, at para 48.

[742] *Oil and Natural Gas Corporation Ltd v Western Geco International Ltd* (2014) 9 SCC 263, at para 35.

[743] See discussion under Sections 4.5.1, 4.5.2, and 4.6.1, Chapter 4.

[744] Yasmine Lahlou and Andrew Poplinger, 'Barriers to Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York and Panama Convention' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 165.

the Chapter 1 of the FAA, does not justify refusal of enforcement of foreign arbitral awards on public policy ground.[745]

The U.S. courts, generally, do not recognize reviewing of foreign arbitral awards where mistake in application of law or facts is alleged.[746] Substantial deference is given to the findingss of the arbitral tribunals, except for in exceptional circumstances.

However, the decision in *Northrop Corp*.[747] is one example where the court had a different opinion on the issue. In the case at hand, the underlying agreement involved payment of commissions to an agent for facilitating arms sales to Saudi Arabia. The arbitral tribunal held that the commissions were payable. The question before the court was whether the award emanating from an allegedly illegal agreement would be violative of public policy, and whether or not the court should defer to the findings of the arbitral tribunal in order to determine the illegality of the underlying agreement.

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[745] Richard Speidel, 'International Commercial Arbitration: Implementing the New York Convention' in Edward Brunet and others (eds), *Arbitration Law in America – A Critical Assessment* (CUP 2006) 300; Yasmine Lahlou and Andrew Poplinger, 'Barriers to Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York and Panama Convention' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 170; *Brandeis Intsel Ltd. v Calabrian Chemicals Corp*. [1987] 656 F. Supp., SDNY, at 165.

> 'That is because "manifest disregard" of law, whatever the phrase may mean, does not rise to the level of contravening "public policy," as *that* phrase is used in Article V of the Convention'.

[746] Richard Speidel, 'International Commercial Arbitration: Implementing the New York Convention' in Edward Brunet and others (eds), *Arbitration Law in America – A Critical Assessment* (CUP 2006) 299; *NTT Docomo Inc. v Ultra D.O.O.* [2010] 10 civ 3823 (RMB)(JCF), SDNY.

[747] *Northrop Corp. v. Triad Financial Establishment*, [1984] 593 F. Supp. 928, C.D. Cal.

The court opined that it had the authority to review the arbitral award in order to determine whether enforcing the award would violate public policy. Also in such circumstances where legality of the underlying contract was challenged, there is no need to defer to the findings of the arbitral tribunal. The court noted:

> 'In determining whether an arbitrator's award is contrary to law and public policy, the court is not constrained by the traditional deferential standard… Judicial deference is… unwarranted where, as here, the public policy in question involves DOD regulations, a foreign government's decree, and a federal statute (the FCPA). Thus, I examine de novo the arbitrator's decision with respect to the alleged unenforceability of the Agreement on public policy grounds'.[748]

This decision, however, does not reflect the general trend followed by the U.S. courts. For example, in *Karaha Bodas*[749], the award imposed liability and damages against Perusahaan (Pertamina) owned by the government of Indonesia. Karaha, a Cayman Islands company, moved a motion for enforcement in the U.S. Pertamina argued that the arbitral award issued in Switzerland was tainted with procedural violations and other errors on part of the arbitral tribunal. In this appeal at hand, Pertamina and the Republic of Indonesia (which was participating as amicus) argued that the arbitral tribunal and the district court had erred in finding that Swiss procedural law, rather than Indonesian procedural law, applied. It was brought to the notice of the court that in the arbitration agreements, the parties chose Indonesian procedural as well as substantive law to govern the arbitration.

[748] ibid, at 936.

[749] *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2004] 364 F.3d 274, U.S.C.A 5th Cir.

The court declining to entertain the arguments opined that under the New York Convention the enforcing courts are not expected to evaluate the findings of the arbitral tribunals on application of law or facts. The court held:

> 'The New York Convention and the implementing legislation, Chapter 2 of the Federal Arbitration Act ("FAA"), provide that a secondary jurisdiction court must enforce an arbitration award unless it finds one of the grounds for refusal or deferral of recognition or enforcement specified in the Convention. The court may not refuse to enforce an arbitral award solely on the ground that the arbitrator may have made a mistake of law or fact. "Absent extraordinary circumstances, a confirming court is not to reconsider an arbitrator's findings"'.[750]

The court further noted:

> 'Under Article V (2)(b) of the New York Convention, a court may refuse to recognize or enforce an arbitral award if it "would be contrary to the public policy of that country." The public policy defense is to be "construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice." "The general pro-enforcement bias informing the convention points to a narrow reading of the public policy defense." … Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of the New York Convention'.[751]

[750] ibid, at 18.

[751] ibid, at 55.

The position was reiterated in *Republic of Argentina v. BG Group*[752], where the enforcement of arbitral award was challenged for violation of public policy as the arbitral tribunal had allegedly erred in assessing the damages. The Court of Appeal held:

> '"The public policy defense" under the New York Convention "is to be construed narrowly [and] applied only where enforcement would violate the forum state's most basic notions of morality and justice."… More specifically, the Court's authority to deny recognition of an arbitral award under the New York Convention "is limited to situations where the contract as interpreted [by the arbitrators] would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."… This does not mean, however, that an arbitral award may be denied confirmation simply because it violates some statute in existence in the United States'.[753]

The court, emphasizing over the limited scope for judicial review and declining from taking a second guess at the tribunal's findings on law and facts, held:

> 'The Court also must remain mindful of the principle that "judicial review of arbitral awards is extremely limited," and that this Court "do[es] not sit to hear claims of factual or legal error by an arbitrator" in the same manner that an appeals court would review the decision of a lower court… In fact, careful scrutiny of an arbitrator's decision would frustrate the FAA's "emphatic federal policy in favor of arbitral dispute resolution"… Instead, "a court must confirm an

[752] *Republic of Argentina v BG Group PLC*, [2011] 08-485 (RBW), DDC.

[753] ibid, at 14.

arbitration award where some colorable support for the award can be gleaned from the record"'.[754]

The court further noted:

'In other words, where the parties have conferred upon the arbitrator the authority to determine… then judicial review of that decision "is extremely limited," and this Court is without authority "to hear claims of factual or legal error by an arbitrator"'.[755]

Another noteworthy decision on the issue, where a U.S. court gave deference to the findings of the tribunal on law, was laid down in *Telenor Mobile*[756]. As dispute arose between the parties, Telenor initiated proceedings against Storm. The tribunal in its final award held in favor of Telenor, granting various reliefs including divestiture of Storm's share in their joint venture. As Telenor sought enforcement in the U.S., Storm challenged the enforcement. Among other grounds, it was argued that the award was issued in disregard of the Ukrainian laws, as enforcement of the award would compel Storm to violate judgments of Ukrainian courts, therefore making the enforcement contrary to public policy. The court rejecting the arguments, observed:

'[S]torm argues that the Tribunal's decision directly conflicts with Ukrainian law, and therefore, that it cannot comply with the Final Award – which is based on Storm's non-compliance with the Agreement – without violating that law… In

[754] ibid, at 10-11.

[755] ibid, at 17.

[756] *Telenor Mobile Commc'ns AS v. Storm LLC*, [2007] 07 Civ. 6929 (GEL), DDC.

> any event, even if there is a direct conflict between Ukrainian law and the Final Award, New York's public policy does not call for vacatur here. First, it is unclear whether an established public policy against enforcement of arbitral awards that compel a violation of foreign law even exists in New York… Moreover, even if such a policy exists, it is outweighed in this case by the public policy in favor of encouraging arbitration and enforcing arbitration awards. New York courts have explicitly cautioned against allowing a party to "escape from [its contract] obligation on the pretext of public policy"'.[757]

Similar line of argument was adopted by the U.S. Court of Appeal of fourth circuit in *AO Techsnabexport*[758]. AO, a Russia based corporation, and Globe, a U.S. based company entered a sale purchase agreement. Upon breach of the agreement arbitration was initiated in Sweden. Tribunal issued a partial award for Globe, followed by a final award in favor of AO after the Russian court in a separate proceeding decided against the validity of the agreement.

AO moved for enforcement of the arbitral award in the U.S., which was challenged by Globe. In the appeal at hand, Globe argued that the tribunal had violated public policy by applying Russian criminal law in international commercial arbitral proceedings. The United States Court of Appeals affirmed the District Court's judgment confirming the final award and denying Globe's arguments noted:

> 'The scope of judicial review of an arbitration award is "among the narrowest known at law." … We have explained that expansive judicial scrutiny of such awards would undermine important benefits of arbitration, such as avoiding the delay and expense associated with litigation…Therefore, a court considering a

[757] ibid, at 40-42.

[758] *AO Techsnabexport v Globe Nuclear Services and Supply GNSS Lmt.* [2010] 09-2064, 4th Cir.

> complaint seeking confirmation of an arbitration award may determine only whether the arbitrators acted within the scope of their authority, and may not consider whether the arbitrators acted correctly or reasonably.[759]

For long, the U.S. courts have maintained a policy of giving substantial deference to the findings of the arbitral tribunals, thereby emphasizing on the limited scope for judicial intervention.[760] Analysis of the judicial discourse in the U.S. reflects that the courts have, by and large, refrained from reviewing arbitral awards. Though in *Mitsubishi Motors*[761] the court did give an indication that the foreign arbitral awards were open to judicial review during the enforcement proceedings, the prevailing trend reflects that the U.S. courts have not subscribed to this opinion, as it is the limited scope for review of arbitral awards that is favored.[762]

5.4 Breach of Natural Justice and Due Process vis-à-vis Procedural Public Policy

There is no denying in the fact that it is not just the contents of the arbitral awards that can be held against public policy by a national court, but the manner in which the arbitral award was arrived at could also be tested on the yardstick of public policy. Denial of procedural fairness, natural justice, or equality of treatment can cause a national court to refuse enforcement of a foreign arbitral award on public policy

[759] ibid, at 9.

[760] Yasmine Lahlou and Andrew Poplinger, 'Basic Principles Governing Recognition and Enforcement of Foreign Arbitral Awards in the U.S. and New York' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 95.

[761] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc*. [1985] 473 U.S. 614.

[762] Richard Speidel, 'International Commercial Arbitration: Implementing the New York Convention' in Edward Brunet and others (eds), *Arbitration Law in America – A Critical Assessment* (CUP 2006) 299.

grounds. However, it is also important to appreciate that the challenges that are raised under the heading of breach of natural justice and due process are essentially covered under Article V (1) of the New York Convention.

Given the wide scope of possibilities under which a party can raise breach of natural justice or lack of due process during the arbitral process as a violation of public policy, it becomes extremely important for national courts to ensure that such attempts are not made to sabotage the enforcement proceedings. Also, owing to the possible overlap between Article V (2)(b) and the grounds listed under Article V (1)(b) and Article V (1)(d), courts should not widen the scope of procedural public policy, instead apply public policy exception only in exceptional circumstances.[763] A restrictive interpretation and application of public policy exception in matters where allegations of breach of natural justice or lack of due process are raised would go a long way in ensuring that the procedural efficiency of arbitration is not discredited and the ground of procedural public policy is not misused.

5.4.1 England

Even though the courts in England have acknowledged that they do have the authority to review arbitral tribunal's decisions on procedural matters; owing to the general pro-enforcement policy the courts give substantial deference to the findings of the arbitrators.[764] English courts, by and large, channelize efforts towards maintaining a

[763] See discussion on the overlap between Article V(1) and V2(b) under Section 3.3.3, Chapter 3.

[764] May Lu, The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England (2006) 23(3) Arizona Journal of Int'l & Comp. Law 755; A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 92.

balance between the procedural fairness guaranteed to the parties and the underlying goal of the New York Convention that promotes finality of arbitral awards.[765]

In this regard the opinion laid down in *Minmetals Germany GmbH*[766] sheds sufficient light on the issue as far as the approach followed by the English courts is concerned. The matter involved two arbitral awards issued under the auspices of CIETAC in favor of Minmetals. Ferco challenged the enforcement of the awards in England. It was argued that Ferco was denied the opportunity to present its case, as a result causing substantive injustice – therefore enforcement of the ensuing award would be in violation of public policy.

The court, clarifying as to under what circumstances a foreign arbitral award would be refused enforcement when breach of natural justice is raised as violation of public policy, noted:

> 'In my judgment, the inability to present a case to arbitrators… contemplates at least that the enforcee has been prevented from presenting his case by matters outside his control. This will normally cover the case where the procedure adopted has been operated in a manner contrary to the rules of natural justice. Where, however, the enforcee has, due to matters within his control, not provided himself with the means of taking advantage of an opportunity given to him to present his case, he does not in my judgment, bring himself within that exception to enforcement under the convention. In the present case that is what has happened'.[767]

[765] May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defenses to Oppose Enforcement in the US and England' (2006) 23(3) Arizona Journal of Int'l & Comp. Law 763.

[766] *Minmetals Germany GmbH v Ferco Steel Ltd*. [1999] C.L.C. 647 QBD (Comm. Court).

[767] ibid, at 658.

It further noted, and as has been acknowledged by English courts in general, the court would normally enforce a foreign arbitral award in situations where the objecting party has raised the defense during the setting aside proceedings and failed, or has failed to raise the issue during the annulment proceedings without any cogent reasons.[768] The court observed:

> 'Just as great weight must be attached to the policy of sustaining the finality of international awards so also must great weight be attached to the policy of sustaining the finality of the determination of properly referred procedural issues by the courts of the supervisory jurisdiction. I use the word 'normally' because there may be exceptional cases where the powers of the supervisory court are so limited that they cannot intervene even where there has been an obvious and serious disregard for basic principles of justice by the arbitrators or where for unjust reasons, such as corruption, they decline to do so. However, outside such exceptional cases, any suggestion that under the guise of allegations of substantial injustice procedural defects in the conduct of an arbitration which have already been considered by the supervisory court should be re-investigated by the English courts on an enforcement application is to be most strongly deprecated'.[769] [Emphasis added]

The court went on lay down recommendations as to how courts could determine whether or not enforcement of an arbitral award, which was allegedly arrived at by

[768] Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 7

[769] *Minmetals Germany GmbH v. Ferco Steel Ltd*., [1999] C.L.C. 647 Queen's Bench Division (Commercial Court), at 661

breaching principles of natural justice, would violate the public policy. The court held:

> '[I]n a case where an enforcee alleges that a New York Convention award should not be enforced on the grounds that such enforcement would lead to substantial injustice and therefore be contrary to English public policy the following must normally be included amongst the relevant considerations: (1) the nature of the procedural injustice; (2) whether the enforcee has invoked the supervisory jurisdiction of the seat of the arbitration; (3) whether a remedy was available under that jurisdiction; (4) whether the courts of that jurisdiction have conclusively determined the enforcee's complaint in favour of upholding the award; (5) if the enforcee has failed to invoke that remedial jurisdiction, for what reason and in particular whether he was acting unreasonably in failing to do so'.[770]

Recognizing the aforementioned opinion as the correct approach in determining whether the award was arrived at by compromising natural justice or due process - so as to refuse enforcement of the emanating arbitral award; the court in *Gater Assets Ltd*[771] declined to set aside the enforcement order. The applicant had alleged that award was procured by dishonest means, where the applicant and the arbitral tribunal were misled. The court, in the instant case, emphasizing on the high threshold establishing violation of public policy, held:

> 'For present purposes however I am satisfied that nothing short of reprehensible or unconscionable conduct will suffice to invest the court with a discretion to

[770] ibid, at 661.

[771] *Gater Assets Ltd v Nak Naftogaz Ukrainiy*, [2008] 1 C.L.C. 141, QBD (Comm. Court).

consider denying to the award recognition or enforcement. That means conduct which we would be comfortable in describing as fraud, conduct dishonestly intended to mislead'.[772]

Similar opinion on restrictive interpretation and application of public policy exception in order to uphold the pro-enforcement policy, in matters where breach of natural justice or due process during arbitral proceedings is alleged, is reflected in several analogous decisions delivered by English courts.[773]

5.4.2 Singapore

In cases where parties challenge enforcement of arbitral awards for being in breach of natural justice or due process, thereby arguing that enforcement of arbitral awards would violate public policy of Singapore, the courts have maintained a restrictive approach in interpreting and applying the public policy exception.

In *Strandore Invest*[774], enforcement of a Danish arbitral award was challenged on the ground of violation of public policy, in Singapore. The applicants, Danish companies, and the defendant had entered into a share sales agreement. As dispute arose between the parties, the applicants initiated arbitration proceedings, in accordance with the agreement, before the Danish Institute of Arbitrators (DIA). Objecting to the arbitration due to the alleged invalidity of the agreement, the defendant refused to nominate an arbitrator or to participate in the arbitral

[772] ibid, at 169.

[773] For example, *Tongyuan (USA) International Trading Group v Uni-Clan Ltd.,* [2001] No. Folio No.1143 of 2000, High Court of Justice QBD (Comm Court); *Honeywell International Middle East Limited v Meydan Group LLC* (Formerly Known as Meydan LLC) [2014] Case No: HT-12-372, High Court of Justice, QBD (Technology and Construction Court).

[774] *Strandore Invest A/S and Others v Soh Kim Wat*[774] [2010] SGHC 151.

proceedings. Eventually, the final award was issued in favor of the applicants. The defendant applied before the courts in Denmark to get the award set aside, but the application was denied.

As the applicants moved the application for enforcement of the award before the court in Singapore, the defendant challenged enforcement on several grounds, including violation of public policy. It was argued that DIA had not adhered to due process requirements as the request to arbitration was sent improperly. As a result the defendant could not participate in the arbitral proceedings.

Relying on the ratio provided by the Singapore Court of Appeal in *PT Asuransi Jasa* that advocated for narrow interpretation of public policy, the court rejected defendant's arguments and observed:

> 'In the final analysis, all these matters are contentions that should have been brought up in the Danish arbitration proceedings. Soh had been given every opportunity to do so by the DIA. There was no substance in Soh's complaints that he was treated unfairly by the DIA. He was given a number of opportunities to appoint his arbitrator but he failed to do so. Here therefore cannot complain about the composition of the Arbitral Tribunal. All the issues Soh wanted to ventilate in… were matters that he should have raised in the arbitration'.[775]

In *Dongwoo Mann+Hummel Co. Ltd.*[776], parties entered into a share-purchase agreement, a shareholders agreement, and a technical assistance and trademark licensing agreement. As the dispute arose between the parties, it was submitted to arbitral tribunal. The tribunal found against Dongwoo.

[775] ibid, at para 29.

[776] *Dongwoo Mann+Hummel Co Ltd v Mann+Hummel GmbH* [2008] SGHC 67.

Dongwoo challenged the award by arguing that the tribunal erred because it 'had made an award which was in conflict with public policy by allowing M+H to "flagrantly flout" the tribunal's directions in relation to discovery', which in turn deprived Dongwoo of fair opportunity to present its case.[777]

While delving into the argument that non-observance of the directions of the arbitral tribunal with regard to discovery of certain documents would amount to violation of the public policy, the court provided a detailed analysis as to under what circumstances public policy exception can be applied when breach of natural justice is alleged. The court held:

> 'When parties resort to arbitration, it goes with saying that they expect the tribunal to resolve their dispute properly, fairly and justly in accordance with the law and the institutional or agreed rules governing that arbitration. Parties embark on the arbitral process with a common fundamental understanding and with trust that (a) no party will use any underhanded tactics to fool the tribunal into coming to a result in its favour; (b) no party will bribe the tribunal into giving a decision in its favour or do anything to corrupt or subvert or compromise the professional integrity, impartiality and independence of the tribunal; (c) no party will fabricate evidence in support of its case; and (d) no party will do anything that will "violate and undermine the forum's most basic notion of morality and justice". If so, then I will be minded to set aside the award on the grounds of public policy as upholding such an award will certainly "shock the conscience" and will be "clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public"'.[778]

[777] ibid, at para 51.

[778] *ibid*, at para 139.

The court finally concluded that in case of allegations of 'fraudulent, unconscionable or similar reprehensible conduct against another party', the standard of proof required is very high, and in the case at hand the required standard of proof was not met.[779] Therefore, the award could not have been held as against the public policy of Singapore.

Similarly, in *Coal & Oil Co.*[780], the plaintiff, a Dubai based company, argued that there had been breach of natural justice – therefore enforcement would be contrary to the public policy of Singapore because; a) the tribunal 'failed to declare the arbitral proceedings closed' before releasing the award – as required under the relevant rules of SIAC, and, b) there was an 'inordinate delay' on part of the tribunal to release the award after the final closing submissions.

Rejecting the argument that delay in release of arbitral award amounts to violation of public policy, the court noted:

> 'The plaintiff also argues that "Singapore's public policy demands that any arbitration and its award are presented in a fair and expeditious manner" and that the delay of 19 months in this case constitutes a violation of public policy. With respect, the plaintiff's argument is misconceived… Violations of "public policy" only encompass those acts which are so egregious that elementary notions of morality have been transgressed. While delay in the release of an arbitral award might not necessarily be in the public interest, it cannot, in itself without more, constitute a violation of public policy'.[781]

[779] *ibid*, at para 147.

[780] *Coal & Oil Co. LLC v GHCL Ltd* [2015] SGHC 65.

[781] ibid, at para 63.

As is reflected from the judicial discourse, Singapore courts have been reluctant to invoke the ground of public policy for refusal of enforcement of arbitral awards on pretext of violations of rules of natural justice or due process, in absence of any concrete evidence of prejudice to the relevant rights. In *John Holland Pty. Ltd*.[782] the Singapore High Court explained the circumstances which would warrant refusal of enforcement of an arbitral award for being contrary to public policy – in case of allegations of breach of natural justice are raised. The court observed that:

> '[O]ne has to consider whether "a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced". It is incumbent upon the applicant to first, establish which rule of natural justice was breached; secondly, how it was breached; thirdly, in what way was the breach connected with the making of the award; and fourthly, how the breach had prejudiced the rights of the party concerned'.[783]

The court further noted that for engaging the ground of public policy, even if there is some irregularity in the procedure followed by the tribunal, it is essential for the applicant to identify the specific public policy that has been violated.[784] By and large, courts in Singapore have maintained a strict position of not allowing the

[782] *John Holland Pty. Ltd. (formerly known as John Holland Construction & Engineering Pty Ltd) v Toyo Engineering Corp. (Japan)* [2001] SGHC 48.

[783] ibid, at para 18.

[784] ibid, at para 25. The court observed, 'No particular policy has been identified, however, as having been embarrassed by the award. The contention that public policy covers situations in which there has been a "fundamental irregularity in respect of the law" is, with respect, not very helpful. A fundamental irregularity in itself cannot render an award bad. A public policy must first be identified, and then it must be shown which part of the award conflicts with it'.

objecting parties to derail enforcement proceedings by raising procedural irregularities as violation of procedural public policy.

5.4.3 United States

The U.S. courts have construed the concept of procedural public policy narrowly in context of enforcement of foreign arbitral awards.[785] One of the tests that the U.S. courts follow is to determine whether or not the objecting party had an opportunity to raise the issues before the tribunal, and if the objecting party failed to avail the opportunity without any cogent reasons - courts normally do not entertain the challenge on the ground of public policy exception.[786] Basically, the courts have maintained a yardstick of high threshold in order to engage the public policy exception when breach of natural justice or due process is raised.

For example, in *Consorcio Rive S.A*[787], the defendants challenged enforcement of an arbitral award issued in Mexico, *inter alia*, for violation of public policy. The case of defendants was that Rive had initiated criminal proceedings and used it as a tool of 'intimidation and extortion' against Briggs and its parent company. Because of the threat of being arrested, the defendants were prevented from participating in the arbitration proceedings; therefore enforcement of the arbitral award would validate an unfair decision that was arrived at by violating the principles of natural justice. The court resorting to restrictive interpretation of public policy and rejecting the challenge, observed:

[785] Louis Duca and Nancy Welsh, 'Interpretation and Application of the New York Convention in the United States' in G. Bermann (ed) *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 1033.

[786] ibid 1035.

[787] *Consorcio Rive S.A. de C.V. (Mexico) v Briggs of Cancun, Inc.* (US), [2003] 01- 30553, 5th Cir.

> '[C]ourts construe this public policy defense narrowly and only apply it when enforcement of the foreign arbitration award would violate the forum state's most basic notions of morality and justice… it is not uncommon in the United States for criminal and civil proceedings involving the same matter to run concurrently… even considering that Mexican criminal proceedings were instituted, does not violate our most basic notions of morality and justice and does not preclude the courts from enforcing the award'.[788]

The court also pointed out that the defendants had enough opportunities to participate in the arbitration proceedings, further holding that they could have participated without physically being present during the proceedings, by sending attorney or representatives.[789]

In *China Nat'l Building Material Investment*[790] the court refused to accept that the *ex parte* award issued by the arbitral tribunal would amount to violation of due process and public policy, given that the objecting party was given the opportunity to present its case. The plaintiff, a Chinese entity, entered into a sales and purchase agreement with the defendant, a Texas based corporation. As dispute arose between the parties, arbitration was initiated in Hong Kong in accordance with the agreement. Defendant did not respond to the notice. The Hong Kong International Arbitration Center went ahead with proceedings and appointed an arbitrator for defendant. The two arbitrators then jointly appointed a third arbitrator, and accordingly the arbitral

[788] Ibid, at 7-8.

[789] ibid, at 10.

[790] *China Nat'l Building Material Investment Co. Ltd. v. BNK Int'l LLC* [2009] A-09-CA-488-§, WD Texas.

tribunal was constituted. Despite providing multiple opportunities, defendant did not participate in arbitral proceedings. The arbitral tribunal finally issued an award ex parte.

In the enforcement proceedings the defendant challenged the enforcement arguing that since the award was issued *ex parte* it lacked due process and therefore violates the public policy of the United States. The court rejecting the argument, observed:

> '[I]t is well-known "[t]he public policy limitation in the Convention is construed very narrowly and applied only where enforcement would violate the forum state's most basic notions of morality and justice."… Such is not the case here, for the same reasons the Court rejects Defendant's due process defense. Defendant presents no convincing argument enforcement of the Awards violates basic notions of morality and justice, and thus this ground for summary judgment is also DENIED'.[791]

Similarly, in *Anatolie Stati*[792] the court refused to entertain the challenge that enforcement of the arbitral award would violate public policy as the arbitral institution had allegedly failed to follow due process. Petitioner, in the case at hand, had initiated arbitration under the aegis of SCC in Sweden, The arbitral tribunal awarded for the petitioner, and the petitioner accordingly moved to enforce the award in the U.S.

Respondent challenged the enforcement on several grounds, including, violation of public policy. The argument put forth was that SCC violated due process

[791] ibid, at 15.

[792] *Anatolie Stati et al. v. Republic of Kazakhstan* [2018] Case 1:14-cv-01638-ABJ, DDC.

requirement while appointing the arbitrator on behalf of the respondent – as it was not given notice to appoint its arbitrator, therefore enforcement of ensuing award would be in violation of public policy. The court pointing out that the respondent was served with two successive notices to appoint arbitrator, which gave 'reasonable time' to the respondent to appoint its arbitrator. The court noted:

> 'Thus, the Court finds that respondent was "reasonably" informed of the proceeding and its obligation to appoint an arbitrator and given an "opportunity to be heard."… Respondent's inability to appoint its arbitrator was not due to a lack of notice but rather a lack of timely participation on its part…"[D]ue process is not violated if the hearing proceeds in the absence of one of the parties when the party's absence is the result of his decision not to attend"'.[793]

Since the ground of violation of due process itself could not be established, the court there held that the allegations did not meet the high threshold required to refuse enforcement on the ground of public policy.[794]

5.5 Fraud and Corruption

Fraud and bribery are invariably considered as contrary to public policy across the jurisdictions. Therefore, enforcement of foreign arbitral awards that may facilitate such illegal practices would most likely be considered as contrary to public policy, even if the narrower version of international public policy were taken as the yardstick.

Similarly, courts may decline to enforce an arbitral award that emerges out of an underlying illegal contract where fraud or corruption is involved. National courts may

[793] ibid, at 28.

[794] ibid, at 31.

also refuse from enforcing an arbitral award that has been obtained through fraud, corrupt, or other illegal means. So basically, in case of fraud or corruption, objecting party may raise a challenge on substantive or procedural grounds depending upon the facts and circumstances.

Interestingly, the Indian national arbitration law under its provision on public policy exception, specifically makes a mention of awards induced or affected by fraud or corruption as contrary to public policy.[795] Though, that does not suggest that courts have not had varying opinions when challenges were raised on this ground.[796] Also, the courts in India have been ambiguous with regard to position on arbitrability of matters involving fraud or corruption, the prevailing view being that matters involving 'serious fraud' cannot be arbitrated – therefore leaving room for ambiguity with regard to enforcement of awards where the legality of the underlying contracts is challenged on grounds of fraud or corruption.[797]

There are a number of considerations that national courts may take into account when dealing with the aforementioned allegations during the enforcement

[795] See discussion under Section 4.1.2.1 and 4.6.2, Chapter 4.

[796] *Venture Global Engineeing LLC v Tech Mahindra Ltd & Anr* [2017] SCC SC 1271. The Supreme Court of India came with a diverging opinion on what would constitute an award induced by fraud, thereby against public policy. In the case at hand enforcement of award was challenged for being induced by fraud as the award-creditor had allegedly suppressed material facts throughout the arbitration proceedings. The court had a divided opinion; one opinion held that suppression of material facts is to be considered as a valid argument for refusing enforcement on ground of public policy, the other opinion adopted a restrictive approach and held that unless the intention to commit fraud is established and unless there is causative link between the material suppressed and the resultant award, public policy will not be violated. The matter has now been referred by the Supreme Court to a larger bench for decision. See Wasiq Dar, 'Has Public Policy Exception Returned to Haunt Indian Courts' (Kluwer Arbitration Blog, 20 December 2017).
<http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/>

[797] *A. Ayyasamy v A. Paramasivam and Ors.* [2016] SCC 386; Parul Kumar, Is Fraud Arbitrable? Examining the Problematic Indian Discourse (2017) 33(2) Arbitration International 249.

proceedings. Varying positions and approaches adopted by national courts in this regard only adds to the confusion and complications. However, it is relevant to mention here that there is a greater consensus on maintaining a higher threshold when such allegations are raised - as is reflected from the fact that, by and large, courts do not refuse enforcement of arbitral awards merely on the basis of allegations.

5.5.1 England

In matters where allegations of fraud or corruption are raised, English courts may not necessarily give deference to the arbitral tribunal's findings.[798] However, the courts in England do prefer to refrain from revisiting the facts, except in exceptional circumstances, if the arbitral tribunal or the seat court has already dealt with the issue and found against the contentions made by the opposing party.[799]

The decision in *Westacre Investments*[800] is considered as a landmark in matters where enforcement of foreign arbitral awards is challenged, on ground of violation of public policy, for being tainted with alleged fraud or corruption. In the case at hand the issue before the court was whether enforcement of a Swiss arbitral award would violate public policy.

It was argued that the underlying consultancy agreement, concerning sale of arms, allegedly involved payment of bribes to the Kuwaiti officials in order to secure

[798] Stavros Brekoulakis, Public policy Rules in England and International Arbitration Law (2018) 84(3) Arbitration 217.

[799] A Maurer, *The Public Policy Exception under the New York Convention* (Juris 2012) 90; Maxi Scherer, 'IBA Country Report England' in *Report on the Public Policy Exception in the New York Convention – IBA Subcommittee on Recognition and Enforcement of Arbitral Awards* (20 October 2014) 25.

[800] *Westacre Investments Inc v Jugoimport-SDPR Holding Co Ltd & Ors.*, [1998] C.L.C. 409, QBD (Comm. Court).

sales. Therefore, the question was whether an arbitral award emanating from such an allegedly illegal contract could be enforced in England.

The court, through its decision, addressed various connected concerns in this case. On the issue of whether an illegal underlying contract would render the arbitration agreement as *void ab initio*, the court noted:

> '[I]t does not follow that where the underlying contract is illegal and void ab initio and agreement to arbitrate disputes arising under it will necessarily also be void ab initio, it does not establish any general principle, that wherever the underlying contract is illegal and void under a statute or at common law, an arbitration agreement in respect of disputes arising under it will necessarily be valid or that awards made under such agreement will be enforceable. It is thus necessary to determine in each case whether the nature of the illegality is such as to invalidate the agreement to arbitrate as well as the underlying contract…if the underlying contract were illegal and void at common law the question whether an arbitration agreement ancillary to it was also impeached by the illegality would have to be answered by reference to the policy of the court in relation to the particular nature of the illegality involved'.[801]

On the issue whether the illegality of the underlying contract would make enforcement of the emanating arbitral award violative of public policy, the court was of the opinion that the enforcing court will have to evaluate the competing public policy concerns while taking a decision on enforcement. The court, explaining the principle and applying it in the instant case, observed:

[801] ibid, at 423.

> 'However, in deciding whether to permit enforcement of the award the court has to consider whether the public interest in preventing the enforcement of corrupt transactions outweighs the public interest in sustaining the principle of nemo debit bis vexari which underlies the issue estoppel. This involves essentially… public policy balancing exercise…On the one hand there is the public policy of sustaining the finality of awards in international arbitration and on the other hand the public policy of discouraging corrupt trading…The relevant question is whether the public policy of discouraging corrupt trading represents a social policy to which effect ought to be given in the interests of the international comity generally or some section of it, in preference to the public policy of sustaining the finality of international arbitration awards…In my judgment, it is relevant to this balancing exercise to take into account the fact that there is mounting international concern about the prevalence of corrupt trading practices... Against these considerations it is necessary to take into account the importance of sustaining the finality of international arbitration awards in a jurisdiction which is the venue of more international arbitrations than anywhere else in the world… On balance, I have come to the conclusion that the public policy of sustaining international arbitration awards on the facts of this case outweighs the public policy in discouraging international commercial corruption'.[802]

On the issue whether enforcing courts could allow the objecting party to offer new evidence to prove that the award-debtor managed to obtain the award through fraudulent means by presenting perjured evidence, the court held that such permission could be granted only in exceptional circumstances. The court noted:

[802] ibid, at 434-435.

> 'Where a party to a foreign New York Convention arbitration award alleges at the enforcement stage that it has been obtained by perjured evidence that party will not normally be permitted to adduce in the English courts additional evidence to make good that allegation unless it is established that: (1) the evidence sought to be adduced is of sufficient cogency and weight to be likely to have materially influenced the arbitrators' conclusion had it been advanced at the hearing; and (2) the evidence was not available or reasonably obtainable either: (a) at the time of the hearing of the arbitration; or (b) at such time as would have enabled the party concerned to have adduced it in the court of supervisory jurisdiction to support an application to reverse the arbitrators' award if such procedure were available. Where the additional evidence has already been deployed before the court of supervisory jurisdiction for the purpose of an application for the setting aside or remission of the award but the application has failed, the public policy of finality would normally require that the English courts should not permit that further evidence to be adduced at the stage of enforcement'.[803]

The decision reflects not only a restricted interpretation of the public policy exception vis-a-vis enforcement of foreign arbitral awards, it presents a balanced view whereby courts can with clarity decide as to when enforcement of a foreign arbitral award could be refused in matters engaging serious public policy considerations like fraud or corruption affecting the underlying contracts.

It may be of relevance to mention here that in *Soleimany*[804] the court to some extent drifted from the above mentioned opinion, as the court observed:

[803] ibid, at 444.

[804] *Soleimany v Soleimany*, [1998] C.L.C. 779, Court of Appeal (Civil Division), at 790.

> 'However, it would seem to us that if what the foreign court did was to recognise by its judgment that a contract had been entered into with the object of committing an illegal act in a state which England recognised as a foreign and friendly state, and to enforce the rights of the parties under it, then there would be no room for recognising the more relaxed approach of a different jurisdiction. That, as it would seem to us, is the very type of judgment which the English court would not recognise on the grounds of public policy… Thus our conclusion would be that if the award were a judgment of a foreign court, the English court would not enforce it'.[805]

Nevertheless, *Soleimany* remains an exception as *Westacre Investments* continues to be the leading authority on the issue. For example, in *Honeywell International*[806] enforcement of Dubai based arbitral award was challenged based on the ground that the underlying contract was obtained by paying bribes to the officials – therefore enforcement of the award emanating from such contract would violate public policy. The court noted that since bribery was not established, it could not refuse enforcement. Also, the fact that the objecting party refused to participate in the arbitral proceedings, thereby giving up the opportunity to raise the allegation without any cogent reasons, would go against the objecting party.[807]

The court, however, went on to further restrict the application of the public policy exception by pointing out that while a contract to commit fraud or bribery would be unenforceable in England, a contract 'induced' by bribery cannot be held to be in violation of English public policy. The court held:

[805] ibid, at 787.

[806] *Honeywell International Middle East Limited v Meydan Group LLC (Formerly Known as Meydan LLC)* [2014] Case No: HT-12-372, High Court of Justice, QBD (Technology and Construction Court)

[807] ibid, at para 89.

> 'English public policy will refuse to enforce a contract which is tainted by illegality, in the sense that it is illegal in performance, such as a contract to commit fraud or bribery… where a contract has been induced by bribery it is not contrary to English public policy for the contract to be enforced but it gives the innocent party the opportunity to avoid the contract, at its election, provided counter-restitution can be made… It follows that whilst bribery is clearly contrary to English public policy and contracts to bribe are unenforceable, as a matter of English public policy, contracts which have been procured by bribes are not unenforceable'.[808]

Likewise, in *National Iranian Oil*[809] the court mirroring the opinion laid down in *Honeywell International*, held:

> 'There is certainly no English public policy to refuse to enforce a contract which has been preceded, and is unaffected, by a failed attempt to bribe, on the basis that such contract, or one or more of the parties to it, have allegedly been tainted by the precedent conduct… to introduce a concept of tainting of an otherwise legal contract would create uncertainty, and in any event wholly undermines party autonomy'.[810]

[808] ibid, at para 182-185.

[809] *National Iranian Oil Co. v. Crescent Petroleum Co International Ltd & Anr*. [2016] 1 C.L.C. 508, QBD (Comm. Court).

[810] ibid, at 562-567.

Similar approach was reflected in a recent decision in *Sinocore International*.[811] The court reiterated that even though public policy will be applied in case of an arbitral award, which cannot be isolated from an underlying contract that has been entered into for the purpose of committing illegality like fraud or bribery; enforcement would not be refused on the mere ground of the award being 'tainted'.[812] The decisions clearly reflect the restrictive interpretation of public policy exception and the pro-enforcement bias resorted to by the English courts while deciding on the fate of the arbitral awards when allegations of fraud, corruption, or illegality are raised.

5.5.2 Singapore

Consistency in the approach and the trend towards adopting a narrow interpretation of public policy exception remains the highlight of Singapore judicial discourse in the given context. Analysis of the decisions where the public policy exception invoked on grounds of allegations of fraud or corruption is further indicative of the pro-enforcement approach favored by the Singapore courts.

In *Swiss Singapore Overseas Enterprises*[813] a sale-purchase agreement was entered into by a Singapore company with an Indian company. It was argued by the plaintiff that the tribunal issued the award against the plaintiff based on a falsified testimony by the defendant, therefore the award was obtained by fraud – hence its enforcement would violate public policy of Singapore. It was further argued that only after the publication of the award, facts had emerged suggesting the false

[811] *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd.* [2017] 1 C.L.C. 601, QBD (Commercial Court).

[812] ibid, at 610-613.

[813] *Swiss Singapore Overseas Enterprises Pte Ltd. v. Exim Rajathi India Pvt Ltd* [2009] SGHC 231.

testimony.[814]

The court while taking into account the allegation that the award was 'obtained by fraud', laid down guidelines to test as to when can it be concluded that an award has been obtained by fraud, therefore upon enforcement would violate public policy. The court held that an award would be considered as 'obtained by fraud' if:

> '(a) the fraud alleged is in the shape of perjury, the applicant must prove that its new evidence could not have been discovered or produced, despite reasonable diligence, during the arbitration proceedings; (b) the newly discovered evidence must be decisive in that it would have prompted the arbitrator to have ruled in favor of the applicant instead of the other party; (c) if the fraud was in the shape of nondisclosure of a material document, the document must be so material that earlier discovery would have prompted the arbitrator to rule in favor of the applicant; and (d) negligence or error in judgment in failing to discover a crucial document would not be sufficient to justify a setting aside of the award and for that purpose, the nondisclosure must have been deliberate and aimed at deceiving the arbitrator'.[815]

In the instant case the court did not find any condition being satisfied, therefore held that the award was not against the public policy of Singapore.

Similarly, in *Beijing Sinozonto Mining Investment*[816] a CIETAC award was issued in favor of the applicant, Beijing Sinozonto Mining (BSM), for which the applicant filed for a leave to enforce in Singapore. The respondent challenged the

[814] *ibid*, at para 13.

[815] *ibid*, at para 30.

[816] *Beijing Sinozonto Mining Investment Co Ltd v Goldenray Consortium (Singapore) Pte Ltd.* [2013] SGHC 248.

award on the ground of public policy. The respondent alleged that the applicant had influenced the arbitral tribunal and the award was tainted by fraud and corruption.

Rejecting the respondent's challenge that the award violated the public policy, the court observed:

> 'Public policy is capable of covering a wide variety of matters. Erroneous legal reasoning or misapplication of law is generally not a violation of public policy within the meaning of s 31(4)(b). However, in the present case, the argument advanced is that the forum state's most basic notions of morality and justice would be violated if an arbitral award procured through fraud was enforced there; and "fraud" in this context encompasses a showing of bad faith during the arbitration proceedings, such as bribery, undisclosed bias of the arbitrator, or willful destruction or withholding of evidence. I agree entirely… that if a party bribes the tribunal into giving a decision in its favour, or does anything to corrupt, subvert or compromise the professional integrity, impartiality and independence of the tribunal, that would certainly shock the conscience and be clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public… What is the standard of proof against which the court makes such a finding? Is a "finding", in this context, based on the civil standard of a balance of probabilities (that is, more likely than not) or on something less than that, and if the latter, what exactly is the standard?... it would be proper to hold that the preliminary facts making out the grounds relied upon must be proved to the satisfaction of the court on a balance of probabilities'.[817]

Applying the threshold test of balance of probabilities in case at hand, the court held that in order to succeed in its claim, owing to the gravity and seriousness of the

[817] ibid, at para 41, 42, 48.

allegations leveled, it was required from the respondent to provide 'cogent evidence' of fraud or corruption in order to convince the court.[818] However, as the court held, the respondent failed in doing so.

The afore-mentioned decisions makes it amply clear that the Singapore courts have established a high threshold when it comes to proving that an award is against the public policy for being tainted with fraud and/or corruption. This judicial trend continues to exist as is clearly evident from the recent decision of the Singapore High Court laid down in *China Machine New Energy Corp*.[819]

An application was moved challenging the award for being in breach of natural justice and tainted by corruption – therefore contrary of public policy. It was argued that the applicant was deprived of reasonable hearing and the tribunal had failed to consider its arguments. Also, the tribunal had failed to investigate the allegations of corruption and fraud. The applicant also made a claim that the award was induced or affected by corruption. The court called these grounds as 'due process ground and the public policy and corruption ground'.[820]

On the issue of public policy and corruption, the court noted that the tribunal had found that that there was no evidence presented before it with regard to the allegations of corruption. The court observed that in appropriate cases the arbitrators 'may be required to investigate allegations of corruption', however, the court also cautioned that arbitrators are under a duty to investigate corruption only when the 'allegations of corruption affect the issues under consideration on the Arbitration'.[821] The court noted:

[818] ibid, at para 59, 68.

[819] *China Machine New Energy Corp v. Jaguar Energy Guatemala LLC and Anr.* [2018] SGHC 101.

[820] ibid, at para 111.

[821] ibid, at para 224 & 226.

> 'Critically, the Tribunal held that the Corruption Allegations, which had not been proven in any court, did not have any bearing on the issues in the Arbitration... Thus, the Tribunal was not "aware of circumstances creating a suspicion of corruption which, if proven, would affect the claims in dispute". Accordingly, on the basis of the opinion of CMNC's own expert, the Tribunal would not have come under a duty to investigate the Corruption Allegations'.[822]

The court was of the opinion that a mere failure on part of tribunal to investigate the allegation of corruption would not, on its own, invite application of the public policy exception. It emphasized that the 'breach of the duty to investigate must carry the risk that upholding the award that is subsequently issued may legitimize the corrupt activities'.[823] Since the tribunal in the instant case, according to the court, concluded that the corruption allegations didn't have any bearing on the claims in arbitration, there was no breach of duty on part of the tribunal.

5.5.3 United States

The U.S. Courts may deny recognition and enforcement of a foreign arbitral award if the award is tainted by fraud, even as there is no specific mention of fraud as ground under the Chapter 2 of the FAA. It is argued that the understanding of fraud as provided under the Chapter 1 of the FAA may be extended to the foreign arbitral

[822] ibid, at para 227.

[823] ibid, at para 228.

awards in order to determine whether enforcement of the award tainted with fraud would violate the U.S. public policy.[824]

Awards issued under the influence of corruption, demonstrated by bias and partiality on the part of the arbitral tribunal may be held in violation of the U.S. public policy.[825] Courts may also deny enforcement of foreign arbitral awards if the underlying agreement is illegal. In matters where allegations of fraud or corruption are brought before the courts to apply the ground of public policy, the U.S. courts have set a high threshold. The allegations are required to be proven by presenting clear and convincing evidence.[826]

In *Waterside Ocean*[827], enforcement of arbitral awards, issued in London, was challenged, inter alia, on ground of violation of public policy. It was alleged that the award were procured by committing a fraud as Waterside's owner had presented inconsistent testimonies – one before the arbitrators and the other before the prior judicial proceedings. The court rejecting to consider inconsistency in testimony as violative of public policy and upholding the restricted interpretation and pro-enforcement policy of the New York Convention, held:

> 'We find little merit in INL's position… This defense must be construed in light of the overriding purpose of the Convention, which is "to encourage the

[824] Richard Speidel, 'International Commercial Arbitration: Implementing the New York Convention' in Edward Brunet and others (eds), *Arbitration Law in America – A Critical Assessment* (CUP 2006) 292.

[825] Yasmine Lahlou and Andrew Poplinger, 'Barriers to Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York and Panama Convention' in Andrew, Yasmine and others (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York* (Kluwer Law International 2018) 167.

[826] ibid, at 166.

[827] *Waterside Ocean Nav. Co. v. Int'l Nav. Ltd.,* [1984] 737 F.2d 150, U.S.C.A. 2nd Cir.

> recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries"… We note that appellant has made clear in this court that it does not claim that Waterside knowingly presented perjured testimony to the arbitrators in London, or even that the testimony was perjurious. Appellant claims only that directly inconsistent testimony was given in different proceedings. We believe that the assertion that the policy against inconsistent testimony is one of our nation's "most basic notions of morality and justice" goes much too far'.[828]

There is a three-pronged test that courts may apply while determining whether enforcement of an arbitral award should be denied when allegations of fraud are raised. Fraud must be "established by clear and convincing evidence"; it "must not have been discoverable upon exercise of due diligence before or during arbitration"; and it "must be materially connected to an issue of arbitration".[829]

In *Karaha Bodas*[830], it was argued that the award is contrary to public policy because the respondent committed a fraud by not disclosing the political risk insurance policy during the arbitration proceedings. The court rejecting the argument held:

> 'KBC's failure to disclose the political risk insurance policy does not provide a basis for refusing to enforce the Award. Enforcement of an arbitration award may

[828] ibid, at 151-152.

[829] Louis Duca and Nancy Welsh, 'Interpretation and Application of the New York Convention in the United States' in G. Bermann (eds), *Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 1035.

[830] *Karaha Bodas Co. LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2004] 364 F.3d 274, U.S.C.A 5th Cir.

be refused if the prevailing party furnished perjured evidence to the tribunal or if the award was procured by fraud. Courts apply a three-prong test to determine whether an arbitration award is so affected by fraud: (1) the movant must establish the fraud by clear and convincing evidence; (2) the fraud must not have been discoverable upon the exercise of due diligence before or during the arbitration; and (3) the person challenging the award must show that the fraud materially related to an issue in the arbitration. It is not necessary to establish that the result of the arbitration would have been different if the fraud had not occurred. Courts, however, have held that an arbitration award is not fraudulently obtained when the protesting party had an opportunity to rebut his opponent's claims at the hearing'.[831] [Emphasis added]

In *Europcar Italia*[832] the court was of the opinion that matters where the underlying contract, and not the award itself, was tainted by fraud or was allegedly illegal, the courts may deny deferring to arbitral tribunal's findings only in exceptional circumstances. In the case at hand, it was argued that the underlying contract was allegedly forged; therefore enforcement of the award would violate public policy. The court, refusing to entertain the argument, held:

'Maiellano has apparently confused the issue of a fraudulently obtained arbitration agreement or award, which might violate public policy and therefore preclude enforcement with the issue of whether the underlying contract that is the subject of the arbitrated dispute was forged or fraudulently induced — a matter to be determined exclusively by the arbitrators… Furthermore, even if the arbitrators erroneously determined that the agreement was valid, an arbitration

[831] ibid, at 57.

[832] *Europcar Italia, S.p.A. v Maiellano Tours, Inc*. [1998] 156 F.3d 310, U.S.C.A. 2nd Cir.

award cannot be avoided solely on the ground that the arbitrator may have made an error of law or fact'.[833]

A rare opinion, with regard to fraud and corruption in context of public policy exception, was presented by a U.S. court in *Tamimi Global*[834]. The matter involved enforcement of an arbitral award made in London, emanating out of a service agreement between the parties. The issues before the court was whether the alleged fraud committed by virtue of paying kickbacks to obtain the underlying contract would make the enforcement of the award contrary to public policy.

The court declined to refuse the enforcement as it held that the objecting party had failed to meet the burden of proving the alleged fraud. However, the court did not stop there. It went on to hold that even if the allegation were proven, public policy would not have been violated in the instant case. The court noted:

'The Court concludes, however, that a stay is not warranted and confirmation is appropriate because the allegations made… *even if proven,* would not lead this Court to refuse confirmation on public policy grounds. In this case, the allegations by the United States are that KBR was a participant in the alleged fraud. To the extent Tamimi was paying kickbacks to obtain dining services subcontracts, KBR – through its managerial employees – was accepting those kickbacks…Enforcement of an arbitration award or other judgment in favor of one party alleged to have committed fraud against the other party allegedly engaged in the same fraudulent misconduct does not violate the most basic notions of morality and justice'.[835] [Emphasis added]

[833] ibid, at 316.

[834] *Tamimi Global Co. Ltd. v. Kellogg Brown & Root LLC, et al.* [2011] Case 4:11-cv-00585, TXSD.

[835] ibid, at 5-6.

Though the judicial discourse in the U.S. generally reflects that courts interpret and apply the public policy exception very restrictively in cases where allegations of fraud, corruption or illegality are raised, the courts may refuse to enforce a foreign arbitral award where the fundamental notions of morality and justice are at stake. For example, in *Changzhou Amec Eastern Tools*[836] the question before the court was whether enforcement of a foreign arbitral award emanating from an underlying arbitration agreement, which was been signed by the award-debtor under duress, would violate the U.S. public policy. The court refusing to enforce the award, held:

> 'While it may be unusual for a court to deny confirmation under Article V(2)(b), it is equally unusual for a court to enforce contracts created without one party's consent… The Court will not wield its power to enforce contracts which would be wholly unenforceable under domestic laws… The Convention does not mandate categorical confirmation of awards; rather, the Article V(2) defenses contemplate courts will consider domestic laws in confirming an award. Article V(2)(b) would lack any meaning if a court could not rule against confirmation when the "defendant had been subject to coercion or any part of the agreement had been the result of duress"'.[837]

[836] *Changzhou Amec Eastern Tools and Equipment CP. Ltd. v Eastern Tools & Equipment* [2012] Case No. EDCV 11-00354 VAP, CDC.

[837] ibid, at 59-60.

Summary

Diverging interpretation and application of public policy exception is there to stay, as it is nearly impossible to attain absolute uniformity across the jurisdictions in this regard. However, a more harmonized approach, in line with understanding of public policy as envisaged under the New York Convention, can definitely provide succor in terms of predictability and certainty. Given the significantly pro-enforcement track record of the courts in England, Singapore, and the U.S, it should not be difficult to list these jurisdictions as representatives of international best practices *vis a vis* interpretation of New York Convention in, general, and the public policy exception, in particular. As the judicial discourse reflects, in terms of interpretation of public policy exception, the given jurisdictions have consistently adopted restrictive interpretation of public policy - paving the way for a smooth and reliable mechanism of enforcement of foreign arbitral awards.

As a matter of policy, the threshold to satisfy the national courts in these three jurisdictions, on the possibility of enforcement of a foreign arbitral award violating public policy, has been set very high. This in turn has prevented the courts from causing unnecessary hindrances on parochial grounds or otherwise when it comes to enforcement of foreign arbitral awards – therefore fulfilling the objectives envisaged in the New York Convention.

The judicial clarity and consistency on the issues concerning public policy exception in England, Singapore, and the U.S., reflected by the analysis of the judicial discourse, presents a clear road map for the jurisdiction like India which have been marred by irregularity in approach as far as interpretation and application of public policy exception is concerned. The lessons drawn, which are discussed in the conclusion of this thesis, can definitely augment the recent legislative efforts made in

India in order to overcome the challenges faced in context of interpretation and application of the public policy exception – with an aim of making India a more arbitration friendly jurisdiction.

CONCLUSION

The doctrine of public policy, owing to its inherent characteristics, has a long history of being a matter of interest as well as concern, particularly in the context of cross-border dispute resolution mechanism. It is trite to state that the possibility of having a straightjacket approach or for that matter a one-size-fits-all interpretation of public policy is quite bleak. What needs to be appreciated is that there will always be certain borderline areas where the understanding of public policy among nations will vary. To that extent, if one may argue, the problems attributed to public policy are incurable.

However, that does not discount the fact that national courts, by giving due consideration to the underlying objectives and principles of international commercial arbitration - which holds party autonomy and finality of arbitral awards as *raison d'être*, can most certainly make application of public policy more predictable and less controversial. The idea being that the notion of public policy should be perceived by national courts as a safeguard mechanism and not as bludgeon to launch an attack against everything that looks alien. Therefore a clear policy and a consistent approach towards interpretation and application of the public policy cannot be overemphasized.

Party autonomy, as pointed out in the thesis, is not just the mainstay but also one of the most striking and appealing features of international commercial arbitration. With the tremendous scope that international commercial arbitration offers with regard to customizing the dispute settlement process, one can only imagine the impact that unbridled application of public policy by national courts can leave on the underpinnings of the regime of international commercial arbitration. This is not to create an impression that arbitration should be completely alienated or

isolated from the control of national courts. As a matter of fact, it is the national courts that play a significant role in legitimizing the arbitration process by facilitating legal sanctity to arbitral awards. The point that needs to be taken into account is that national courts should accommodate and appreciate the choice of parties' to resort to arbitration for settlement of disputes, and in that regard the approach of national courts should be to apply maximum restraint by not using public policy as a tool to legitimize unnecessary judicial interventions.

Public policy, as discussed in the thesis, makes a visible impression in the process of arbitration right from the very inception to the end, making it almost omnipresent. It begins to mark its presence in arbitral proceedings when matters of arbitrability are under consideration. Though, as clarified in the thesis, arbitrability in itself stands as a distinct principle and a separate ground to either set aside or/and refuse enforcement of arbitral awards, its genesis is closely affiliated to public policy considerations.

Another significant juncture where public policy considerations play a role in the arbitral process is with regard to parties' choice of laws that would govern the arbitral process. Public policy consideration may not only come into picture to restrict the afore-mentioned choice by disallowing application of certain laws chosen by the parties, it may also mandate the parties or the arbitral tribunal to apply specific mandatory laws or rules that otherwise were excluded. Though the rationale being that parties or arbitral tribunals must not get to exploit the autonomy by deviating from certain mandatory laws of the relevant legal system, it is also important to point out that national courts are not expected to use compliance with mandatory rules as a tool of thwarting the arbitration process. It is for this reason that national courts are expected to maintain restraint and not put all mandatory rules in the bracket of public

policy. Deviation from the most fundamental mandatory rules only should qualify as violation of public policy.

Once the arbitral award is issued, the aggrieved party, generally, has the option of approach the relevant national court with an application to set aside the arbitral award. And as discussed in the thesis, violation of public policy, invariably, remains one of the grounds based on which the arbitral award can be set aside by the seat court. Here again, the interpretation of public policy by national courts can leave a significant impact on the overall process of arbitration, as the decision of the court can influence the prospects of enforcement of the arbitral award.

The lack of consensus over the interpretation and application of public policy, during annulment proceedings, has for long been a reason of controversy. Mostly, because of the absence of any statutory guidance in context of interpretation and application of public policy - coupled with varying understanding as far the scope of review of arbitral awards is concerned. An expansive interpretation of public policy exception, as argued in the thesis, can give unbridled authority to national courts to intervene and to virtually sit as appellate authority, thereby desecrating the notable features of arbitration, i.e. finality of arbitral awards. Keeping that in mind, and at the same time not undermining the significance of public policy exception during annulment proceedings, the scope of application of public policy exception must be limited by restricting it only to the most fundamental mandatory norms of the legal system.

The effectiveness of international commercial arbitration, as a cross-border dispute settlement mechanism, as highlighted in the thesis, rests on the efficiency with which arbitral awards can be enforced. Owing to the successful implementation of the New York Convention across the jurisdictions, the efficacy of international

commercial arbitration has only strengthened in the last sixty odd years. Nevertheless, the varying approaches and the possibility of expansive interpretation of the ground of public policy to refuse enforcement of foreign arbitral awards has been an area of concern for the stakeholders.

Even though the New York Convention essentially focuses on providing a resolute mechanism to substantially assure the enforcement of foreign arbitral awards, it also permits the national courts of enforcing States to refuse enforcement of foreign arbitral awards where it is required to safeguard the fundamental interests of the legal system. And the provision on public policy exception serves as manifestation of such safeguard mechanism.

Notwithstanding the indispensability of the public policy exception during the enforcement stage, owing to the enormous scope it can offer to national courts to intervene and refuse enforcement of foreign arbitral awards, the possibility of national courts using public policy exception, as a potent tool to satisfy hostile or parochial interests, cannot be ruled out.

There is no denying that there are no written rules dictating the possible ways of interpreting the ground of public policy, however, the inference one can draw from the interpretation of relevant international instruments like the New York Convention and the Model Law, coupled with scholarly opinions and judicial discourse on the issue, clearly favors a restrictive approach in application of the exception. In absence of which, the likelihood of depriving the bonafide party of the fruits of arbitration only increases.

The judicial trend, as examined in the thesis, in context of interpretation and application of public policy, by and large, clearly reflects that national courts have been more accommodative when it comes to enforcement of foreign arbitral awards.

However, the trend does not necessarily represent that there is uniformity in approach adopted by various jurisdictions. India is one such example where inconsistency in the approach vis-à-vis interpretation and application of public policy exception has played a major role in discrediting its position in the world of arbitration, to say the least. The pendulum effect resulting in oscillating position on interpretation and application of public policy, as displayed in the thesis by the analysis of Indian judicial discourse, which the Indian judiciary has been obsessed with has left a daunting effect on India as a jurisdiction.

It would, however, be unfair to not to point out that in the recent past there have been significant efforts made on part of the Indian legislature as well as the judiciary to rectify the position on understanding of the public policy exception. Most notably, the radical legislative intervention, in form of the recent amendments brought in the Indian national law on arbitration with regard to interpretation of public policy, does come across as a significant step in the direction of curing the anomalies. However, it would be premature, if not incorrect, to argue that the said legislative intervention will serve as a panacea and solve the otherwise recurring problem for good.

The recent examples of relatively wider interpretation of public policy, by expanding the understanding on 'fundamental policy of Indian law', as provided in *Western Geco* and *Associate Builders*, forewarns that unless the national courts in India open up to a more pro-enforcement approach, it might not be possible for India to get rid of the baggage of being an intrusive jurisdiction in context of enforcement of foreign arbitral awards.

As pointed out earlier, there is no denying that it is nearly impossible to attain absolute uniformity across the jurisdictions as far as interpretation and application of

public policy exception is concerned. Nevertheless, a more harmonized approach, based on the understanding of public policy as envisaged under the New York Convention, can to great extent help in overcoming the issues in concern. For jurisdictions like India, that are representatives of erratic approach on interpretation of public policy yet aspiring to become arbitration friendly jurisdictions; precisely identifying the relevant shortcomings followed by finding possible alternatives from the international best practices can be of immense help.

For that purpose, the thesis looked into the approach followed by courts in England, Singapore, and the U.S. in matters concerning interpretation and application of public policy exception. As these jurisdictions hold a significantly pro-enforcement track record, they were taken as the representatives of international best practices *vis a vis* interpretation of New York Convention in, general, and the public policy exception, in particular. The analysis of the judicial discourse emerging from these jurisdictions not only presented a picture on as to how contrary views to the opinions, on similar issues, favored by Indian courts are prevalent in these jurisdictions in most, if not all, cases; it also reflected the consistency in approach with which restrictive interpretation of public policy is adopted in these jurisdictions. Thereby, ensuring a smooth and reliable environment for enforcement of foreign arbitral awards.

Overall, in these three jurisdictions, the threshold to engage public policy ground for refusal of enforcement of foreign arbitral awards has been set very high. The clarity and consistency espoused by the courts in England, Singapore, and the U.S. has significantly thwarted the unnecessary hindrances to enforcement of foreign arbitral awards, therefore fulfilling the objectives envisaged in the New York Convention.

Since there is no magic bullet that can overnight cure the anomalies that the Indian approach on interpretation and application of public policy suffers from, the best bet would be for the Indian courts to appreciate that public policy of favoring enforcement of a foreign arbitral award should not as a matter of policy remain subservient to the public policy of refusing the same award. Striking a balance between the public policy of refusing a rather questionable arbitral award and the public policy of giving effect to finality of an arbitral award - is where one can find the most pragmatic solution.

For controlling the 'unruly horse' of public policy, no doubt it is important to have a 'good judge in the saddle'; with narrowing down and restricting the track on which the horse can run, one can further ensure that it gallops for justice.

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