ENFORCEMENT OF ARBITRAL AWARDS CONTRARY TO PUBLIC POLICY- A COMPARATIVE STUDY OF INDIA, US & FRANCE

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Abstract

Judicial enforcement of arbitral awards is essential where there is no willful consistence by the pertinent parties. Courts worldwide might decline to implement arbitral awards if such implementation would be in opposition to the public policy of their nations.

This is known as *'the public policy exception to the enforcement of arbitral awards'*. It is enshrined in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention) and the UNCITRAL Model Law on International Commercial Arbitration 1985 (Model Law), which are two of the most conspicuous global instruments in advancing and managing international commercial arbitration.

Public policy in general approach special case is a standout amongst the most disputable exemptions to the requirement of arbitral awards, bringing on legal irregularity and subsequently unpredictability in its application. It is frequently compared to a 'unruly horse'. The International Law Association's Resolution on Public Policy as a Bar to Enforcement of International Arbitral Awards 2002 (ILA Resolution) embraces a thin way to deal with the public policy exception – to be specific, refusal of implementation under the public policy exemption in exceptional circumstances only. The ILA Resolution seeks to encourage the conclusion of arbitral awards as per the New York Convention's essential objective of encouraging the requirement of arbitral awards. The courts of numerous nations allude to this as the New York Convention's 'pro-enforcement policy', which requests a slender way to deal with the exception.

This paper endeavours to investigates the primary contentions and complexities in the legal use of the exception of public policy by drawing a comparative study between India and US , France.

Keywords: New York Convention, Foreign Arbitral Awards, International Law Association, New York Convention, Public Policy.

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INTRODUCTION

Increment in worldwide exchange, speculation and the globalization of business has prompted the advancement of international commercial arbitration as a preferred method of resolving disputes. International commercial arbitration (ICA) gives an option to choose a impartial, simply, classified, sorted out and savvy method of resolving commercial disputes. In guideline, an award that has been effectively rendered in the inquirer's favor by an international arbitral tribunal does not require authorization by a national court on the off chance that it is done by the respondent. However, the reality is that often the respondent will evade carrying out the terms of the award or use the award as a bartering device with the inquirer.

Any deterrent in implementing international arbitral awards represents a principal danger to business ventures over the world. Along these lines, it is generally recognized that, a jurisdiction's credibility as a good destination for ICA essentially lays on its award enforcement regime. Under the NYC an effective petitioner can look for enforcement of award either in the national court of the seat of arbitration or the court of the nation in which the respondent has its asset.[1] The New York Convention[2] (NYC) provides for certain exceptions on the premise of which enforcement of a foreign award might be denied. By temperance of the NYC an Award may not be upheld if there's inadequacy, invalidity of the arbitration agreement, absence of legitimate notification and procedural due procedure, its past extent of arbitration agreement, there is non-recognition of arbitration principles agreed by the parties, it's not yet binding, it's not arbitral and it's as opposed to public policy[3]. Unlike the other grounds, arbitration and public policy can be conjured by the enforcement court on its own motion.

The contention encompassing the public policy exception is that it is unequipped for being unequivocally decided and it fluctuates starting with one state then onto the next. This circumstance can prompt an award not being in spite of the public policy of the seat yet might be in opposition to people in public policy of the authorization state. In the nineteenth century public policy was contrasted 'unruly horse that may lead one away from sound law'[4].

Public policy is a standout amongst the most well-known grounds regularly utilized by parties to worldwide discretion to oppose implementation of arbitral awards[5]. Till today, it remains an exceedingly wrangled about, disputable and complex subject. This is a result of the differing approach taken by national courts in connection to the idea of public policy in international arbitration. Albeit after some time, arbitration laws and practice have attempted

[1] The New York Convention improves upon the Geneva Convention of 1927 in that it removes the need to establish judicial confirmation of an award where it was made and it shifts the burden of proving the invalidity of the award from the party enforcing to the party resisting.

[2] Convention on the Recognition and Enforcement of Foreign Arbitral Awards opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1989).

[3] Ibid, Article V (1) (a), (b), (c), (d), (e), V (2) (a) and V (2) (b)

[4] Per Burough J in *Richardson* v. *Mellish* (1824) ALL ER 258 at p266

[5] http://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf

to adjust the idea of public policy with the goal that parties might profit by an all-around acknowledged idea of public policy, the distinction in state of mind of national courts has made this errand practically inconceivable. As of late, the distinction in state of mind has been most unmistakable in India, where a progression of court choices have hampered the advancement of a universally acknowledged idea of public policy.

THE INDIAN APPROACH

As per the ethos of the UNCITRAL Model Law, the Indian Arbitration Act was given the trust that there will be immaterial lawful legal intercession in the arbitral procedure. Despite this, the Indian courts have exhibited an unimaginable inclination towards interfering with global mediation. In this affiliation, lawful intervention at the recompense authorization stage on grounds of public policy is the most questionable.

There is a little uncertainty that the Indian Supreme Court choice in *Renusagar* v. *General Electric*[6] has dependably been the beginning stage at whatever point one considers the theme of Indian court intercession on grounds of public policy. Taking all things into account, the Supreme Court made it clear that:

'Applying these criteria it must be held that the implementation of an foreign award would be denied on the ground that it is as opposed to public policy if such necessity would be in opposition to (i) principal arrangement of Indian law; or (ii) the hobbies of India; or (iii) equity or ethical quality.'

This decision relied on upon private general law and was as per worldwide practice normally recognized in most made arbitral awards, for instance, the US and France. This decision confirmed the position that, just in unprecedented circumstances, should the national courts interfere with arbitral respects on grounds of public policy. Furthermore, the Supreme Court evidently held that the courts should not use public policy guard to survey the benefits of an arbitral award.

In any case, instead of its former decision in the *Renusagar case* and dismissing the for the most part recognized measures of public policy, the Indian Supreme Court took a substitute methodology in *Oil and Natural Gas Corp* v. *Saw Pipes*[7] and frustrated the all-inclusive community strategy safeguard. The instance of Saw Pipes emerged out of a local debate concerning the payment of liquidated damages under a supply contract. The matter was suggested mediation and a grant was rendered by the tribunal which held that ONGC was not qualified for any traded hurts since it had neglected to build up any misfortune as a consequence of the late supply by Saw Pipes. ONGC associated to put aside the arbitral honor under the attentive gaze of the Indian court on grounds of public policy.

Taking all things into account, the Indian Supreme Court held that the ground of public policy was obliged to be given a more broad significance than in the *Renusagar case* in light

[6] (1994) AIR SC 860
[7] (2003) 5 SCC 705

of the way that the thought of public policy proposed matters which concerned public good. The Supreme Court saw that, as an issue of law, ONGC was not needed to demonstrate its misfortune and, thus, was qualified to seek liquidated damages. In this manner, the Supreme Court set aside the award on grounds of public policy on the reason that the arbitral tribunal had failed when it assumed that ONGC expected to exhibit its hardship in the event that it is patently illicit.

The Supreme Court felt that a honor which manhandled the law couldn't be said to be in the overall public benefit, in light of the fact that it was inclined to unfairly impact the association of value. The Indian Supreme Court held that, despite the three heads set forward in the *Renusagar case*, an arbitral honor might be set aside on grounds of public policy in case it is patently illegal. It held that an award was patently unlawful if the honor was notwithstanding the substantive law, the Indian Arbitration Act and/or the agreement's terms. The effect of this was these incorporated any slip of law submitted by the authorities.

The instance of *Saw Pipes* has been broadly denounced for its wide elucidation of public policy defence. The Indian Arbitration Act exclude blunder of law as a ground for putting aside arbitral award and it has been broadly acknowledged in India that a judge's choice can't be audited on such grounds.[8] By plainly expressing that the public policy ground incorporates lapses of law by the arbitral tribunal, the Saw Pipes case went past the extent of the Indian Arbitration Act and made another ground for putting aside arbitral award. By bringing slips of law within the ambit of public policy, the Indian courts have made an auxiliary section to overview the advantages of a judge's decision, which is in clear inconsistency of arbitration law and practice.[9]

Furthermore, as an outcome of *Saw's Pipes case*, more parties will now have the ability to challenge arbitral awards on grounds of public policy before the Indian courts. Therefore, this will surge the Indian courts with cases by the losing party messed with the arbitral tribunal's decision.

The occasion of *Saw Pipes* is particularly pushing for the international community subsequent to the Indian Supreme Court did not expressly banish foreign award from its reasoning. In addition, in *Bhatia International* v. *Bulk Trading*[10],the Supreme Court held that acquisitions of Part 1 of the Indian Arbitration Act (which applies to family intercessions just) would similarly apply to remote respects under Part 2 of the Indian Arbitration Act, unless especially precluded by the parties. The example of *Bhatia* created much considerate contention since it pivoted the recognized position that Part 1 of the Indian Arbitration Act would not have any kind of effect to international arbitration. This suggested party, contingent upon *Bhatia*, could use the 'patently unlawful' ground of public policy added by *Saw Pipes* to contradict approval of remote arbitral awards.

[8] *Lakshmi Mathur* v. *Chief General Manager, MTNL* (2000) Arb. L.R (Bom) 684

[9] In the Mitsubishi case (473 US at 638), the US Supreme Court made it clear that 'the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal.'

[10] (2002) AIR SC 1432

In 2008, the Indian Supreme Court, extending its former decision in the *Bhatia case*, held that a foreign arbitral award could be set aside on grounds of public policy as detailed in the Saw Pipes case. The *Satyam case*[11] has to a great degree hampered India's progression towards developing itself as an intercession agreeable area. The case of Satyam concerned a joint endeavor debate about which twisted up in a universal discretion arranged in London. An arbitral award was rendered for Satyam which he attempted to implement in the US. In the interim, Venture international recorded an application to set aside the remote award before the Indian courts on grounds of public policy. The matter took care of business in the witness of the Indian Supreme Court which held that regardless of the way that there were no acquisitions in Part 2 of the Indian Arbitration Act pleasing test to a remote arbitral award; a solicitation to set aside the same could lie under Part 1 of the Indian Arbitration Act. The Indian Supreme Court held that the losing gathering could get a self-sufficient action India to set aside a remote arbitral award on the developed grounds of public policy as set out by virtue of *Saw Pipes*. The *Satyam case* has been delineated by Nariman, one of India's most eminent judges, as basically "strange" and one which 'can't be defended'.

Cases like *Saw Pipes* and *Satyam* demonstrate the Indian court's system on the issue of public policy and arbitral award. It creates the impression that the Indian courts have dependably misconstrued the acquirements of the Indian Arbitration Act in a path notwithstanding the spirit of the New York Convention. These decisions have brought on a great deal of uneasiness for the international group incorporated into business with an Indian affiliation, who generally incline toward the quick exchange of their level headed discussion through discretion as opposed to taking an interest in extended suit before the Indian courts.

In 2010, the *Bombay High Court in Western Maharashtra Development Corporation Ltd.* v. *Bajaj Auto Ltd*[12], relying upon the *ONGC case*, set aside an arbitral award on the ground that it was instead of the substantive acquisitions of law and, subsequently, patently illegal. In picking whether the court should interfere with the award, the Bombay High Court analyzed the Supreme Court decision in the *Saw Pipes case* and held that the award could be set aside on grounds of public policy.

The Bombay High Court felt that, inter alia, the mediator between did not have any kind of effect the procurement's of the Indian association law successfully and, in this way, the award renounced the substantive acquisitions of law and was patently unlawful. This decision highlighted yet another specimen of undue court intervention under the presence of public policy. Yet rendered in the household association, because of the fact that cases like *Bhatia* stay set up, the procedure taken by the Indian court in Western Maharashtra Development Corporation Ltd. speak to a bona fide danger to overall mediation with an Indian affiliation.

These decisions have begun a considerable measure of verbal confrontation and uneasiness both inland and toward the ocean with legitimate specialists overall noticing that such choices, if left unaddressed, would vivaciously stain India's picture all inclusive. These

[11] (3) 2011 (1) SCC 694

[12] [2010] 154 ComCas 593 (Bom)

decisions, fundamentally, took India back to England's pre-1979 period when the English courts could review the official's advantages decision through the case communicated technique in this manner speaking to a bona fide limit to the use and advancement of international arbitration.

These stresses were instantly perceived by the Government of India which comprehended that its debate determination framework expected to keep pace with its quickly developing economy. The Government of India took certain exercises to acknowledge authoritative changes to address the issues settled on by these decisions.

Starting late, the Government of India pushed a 2010 meeting paper endorsing changes to the Indian Arbitration Act keeping in mind the deciding objective to oversee, inter alia, the issues postured by exorbitant legal intervention.[13] The paper perceives that the Indian courts have misconceived the acquisitions of the Indian Arbitration Act in such a way with a specific end goal to pound its article and purpose.[14] The paper proposes to change the issues acted by choices such like *Saw Pipes, Bhatia and Satyam*.

The essential key change proposed by the discourse paper is to refute the effects of the *Bhatia case*. With a particular finished objective to fulfill this, the paper proposes to present clear dialect in the Indian Arbitration Act such that Part I of the Indian Arbitration Act would apply "only" to assertions situated in India. This would apply completely isolated from two procurements which have been especially precluded in order to help the arbitral procedure. The two procurements are portions 9 and 27 of the Indian Arbitration Act, which manage the Indian courts' forces to give between time measures in support of arbitration.

As showed by the suggestion, the position ought to be aligned back with the *Renusagar case*, which reflects the typical perception of public policy in present day made arbitral jurisdictions. As showed by the interview paper, a award would be rather than public policy just on the off chance that it disregards, the interests of India or value and moral quality. The modification would not allow Indian courts to find a break of public policy on the Saw Pipes ground of 'patent illegality' going forward.[15]

In any case, it gives the idea that, with begin of this new first light, the Indian courts have started showing up due respect to arbitral awards. The most recent case on this issue hails an abundantly required advancement in the perspective of the Indian courts overseeing policy policy and approval of arbitral award.

[13] For a thorough discussion of the changes contemplated by the consultation paper, please see P Nair, 'India at a gateway?', GAR Vol. 6(1) available at http://www.globalarbitrationreview.com/journal/article/28916/india-gateway/. The author's discussion of the consultation paper is based on Nair's article in the GAR.

[14] P Gandhi and A Kashyap, 'India: Round up 2010/2011', Practical Law Company available at http://arbitration.practicallaw.com/9-504-6908.

[15] The proposal excludes the ground of 'patent illegality' from the ambit of public policy, but retains it only for challenges to domestic arbitral awards in a more restrictive manner.

In *Penn Racquet Sports* v. *Mayor International Ltd.*,[16] the Delhi High Court dismisses a test to the implementation of an ICC award, holding that the award was not as opposed to public policy of India. In going to its decision, the Indian court held that the ground of public policy for the reasons of prerequisite authorization of foreign award ought to be deciphered barely. The Delhi High Court held that to adequately invoke this ground, the candidate must exhibit some reason which is more than a minor encroachment of Indian law. The arbitral award must manhandle the fundamental policy of Indian law or be in contrast to the interests of India, justice or morality.

In association with public policy, this decision is considered to the latest commitment by the Indian courts to help India regain the confidence of the international arbitration community. This decision highlights the enthusiasm of the Indian courts to handle the past's issues and adjust the Indian circumspection law back with the philosophy taken in the *Renusagar case*, which is similar to the prevalent viewpoint in the most made arbitral purview's, for instance, the US and France.

PUBLIC POLICY AND THE INTERNATIONAL APPROACH

Public policy is one of the grounds specified in the New York Convention taking into account which a party can challenge the requirement of a foreign arbitral award. The infamous way of public policy is not a development of the current age.

Public policy is a standout amongst the most imperative weapons in the hands of the international court which permits it to decline authorization of an arbitral award which is generally legitimate. It is especially infamous since this barrier is unequipped for being accurately decided and is completely indigent upon the laws of individual states for its application. Accordingly, it changes starting with one state then onto the next. Adding to this is the way that the New York Convention not gives any direction to the courts in respect to how the general population arrangement barrier ought to be deciphered.

Therefore, courts may decipher public policy completely at their own particular prudence and much will rely on upon the national's disposition court and the specific judge at the time. Keeping in mind the end goal to manage this issue, the International Law Association (ILA) endeavored to characterize an inside and out recognized thought of all inclusive public policy however fail to do since it was not ready to accomplish an understanding in respect to what-ought to constitute international public policy.[17]

Notwithstanding the pending vulnerability of this subject, it has been seen that, in most made arbitral domains, public policy has been deciphered scarcely by the courts. This is in light of the fact that the courts of made districts all things considered bear a genius execution perspective towards arbitral award which they consider to be a stand-alone part of public policy itself. It has been illuminated as takes after:

[16] 2011 (122) DRJ 117

[17] O Ozumba, 'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?', available at www.dundee.ac.uk.

'Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is termed in international arbitration parlance as the pro-enforcement bias. Pro-enforcement is it a public policy.'[18]

This expert declaration attitude of courts is most apparent in the made arbitral domains, for instance, the US and France.

US APPROACH

US courts take a thin approach when deciphering the idea on public policy as a ground of opposing enforcement.

In *Parsons* v. *Whittemore*[19], the dispute of the respondent was that if the award is authorized, it will repudiate US public policy because of the strained relationship between the US and Egypt as a consequence of the 1967 Arab-Israeli war. The U.S court of Appeal rejected this dispute and it noticed that deciphering public policy to ensure national hobby will firmly undermine the viability of the NYC. This case infers that a state's national hobbies as financial approvals or conciliatory approaches are excluded in people in public policy's exception[20].

In a *Second Circuit decision*[21], there was an endeavor to oppose the authorization of an arbitral award under the ICC rules that was supportive of the Egyptian party. In its judgment, the court highlighted the general pro-enforcement attitude set by the New York Convention and obviously expressed that acknowledgment of an arbitral award might be denied under the public policy defense "where authorization would damage the forum state's most fundamental ideas of equity and ethical quality".

Specifically, the judge focused on the way that a broad understanding of the idea of public policy would negate the very extent of the New York Convention, which is the evacuation of hindrances to foreign arbitral award acknowledgment. "To peruse general society strategy guard as a parochial gadget defensive of national political hobbies would truly undermine the Convention's utility".

Having personality a top priority these US court choices, it is sheltered to say that American courts have taken a prohibitive methodology while breaking down the thought of public policy. They have made it clear that any obstruction by the national courts in a international arbitration on this ground ought to be negligible. This position from 1974 has continued as before, as can be found in later cases as *Telenor Mobile Communications* v. *Storm LLC*[22].

[18] O Ozumba, note 12 above, at 9

[19] Federal Arbitrazh Court of the East Siberian Circuit, case no A58-2103/05, October 16th 2006

[20] Harris T.L, "The Public Policy Exception to the Enforcement of International Arbitration Awards Under the New York Convention" Journal of International Arbitration 24(1) (2007) at p10

[21] Parsons and Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 975 (1974)

[22] *Telenor Mobile Communications* v. *Storm LLC* case, 524 F. Supp. 2d 332 (2007)

For this situation, the public policy defense in light of the way that the award had been toppled by a national court in plot with one gathering was rejected. The courts acknowledged the implementation of the arbitral award, expressing that declining such requirement would negate foreign law in such a way to make compliance with one the violation of the other.

The courts extraordinarily accentuated the significance of arbitral procedures and the supportive role the courts of law must play in this process. Consequently, it is clear that the American approach on this issue is unmistakably a great one to assertion, the issue of refusing enforcement only occurring in rare cases.

FRENCH APPROACH

A landmark decision of the European Court of Justice, the *Eco Swiss China Time Ltd.* v. *Benetton International NV*[23] case. In this case, the ECJ was confronted with an inquiry postured by the Supreme Court of Holland in regards to a putting aside method. It held that "it is in light of a legitimate concern for productive discretion procedures that survey of arbitration awards ought to be restricted in extension and that dissolution of or refusal to perceive a award ought to be conceivable just in exceptional circumstances". In that specific case, the ECJ considered that opposition regulations are to be viewed as crucial standards inside the European Union and, therefore, an arbitral award can be invalidated taking into account public policy ground in this circumstance.

In line with this way of considering this issue, French courts have by and large kept up an exceptionally moderate methodology when judging public policy matters.

In the *Gallay* v. *Fabricated Metals*[24] case the Paris Court of Appeal refused to set aside an arbitral award on the claim that it violated competition law. The court stated that, contrary to the Eco Swiss case, the arbitrators had addressed the issue and found no infringement.

However, in some cases the French courts have drastically limited the very scope of public policy.

In *Thales* v. *Euromissile*[25] case, Thales was ordered to pay damages to Euromissile in a debate concerning a permit assention. None of the parties made any reference to an encroachment of competition law amid the procedures. Later Thales, in view of the Eco Swiss case, requested the award to be put aside contending that it was in opposition to public policy since it offered impact to an agreement that encroached fundamental principles of law rules. The French court, notwithstanding, took a prohibitive way to deal with the matter, contending that public policy could be summoned just when the actual award is as opposed to French lawful request or damages fundamental principles of law. That is to say, that what really the losing party is obliged to do by righteousness of the award must be as opposed to public policy and not the contractual connection the award depends on.

[23] ECJ, Eco Swiss China Time Ltd. v. Benetton International NV, 1999
[24] Paris Court of Appeal, Gallay v. Fabricated Metals case, 1999
[25] Paris Court of Appeal, Thalès v. Euromissile case, 2005

Moreover, the French court contended that, with the exception of when we are in the vicinity of misrepresentation, it can't pass judgment on the case on the benefits, this being impedance unpermitted by law. Without an egregious rupture of public policy, there is no motivation to deny authorization of an arbitral award or put it aside.

CONCLUSION

Surely, even today, public policy remains a basic weapon in the hands of a national court wishing to interfere with the arbitral methodology. The reason being that public policy stands out beginning from one state then onto the following and, along these lines, there is no broad comprehension in the matter of what its substance ought to involve. Whilst the reality of the matter is that public policy is an unruly horse which can lead you astray, it is not impossible to tame this unruly horse.

This should be possible in various ways. In the first place, more international activities like that of the ILA ought to be started so that more nations can meet up to achieve an assertion as to people in general's parameters approach guard. Free finished rules will never be adequate to accomplish the assurance that this equivocal territory of law requests. Second, fitting guideline and planning should be made open to judges overseeing carefulness cases. Simply through fitting get ready will one get the chance to be aware of this thought, its substance and the circumstances in which this reason-ability should be worked out? Judges should be made careful that the law of mediation is self-contained and that the motivation behind why interventions exist is on the grounds that they are perceived by law and is vital for the brisk determination of question. Last, yet not least, judges should be made aware of the unfavorable results that undue hindrances in all inclusive statement have on the country's economy and general improvement.

With the right approach, India, similar to the US and France, will soon get to be one of the main arbitral wards of South-East Asia. This is evident from the genuine attempts taken by the Government of India and the alteration in philosophy of the national courts overseeing prudence matters. The new period for international intervention in India is as of now in sight.