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COMPARATIVE STUDY OF DOCTRINE OF PUBLIC POLICY IN ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN INDIA AND THE UNITED KINGDOM

AUTHORED BY - MAUSAM KUMAR

I. INTRODUCTION

Arbitration is a widely used mechanism for resolving cross-border disputes, providing parties with a flexible and efficient means of settling their differences outside the traditional court system.[1] The recognition and enforcement of foreign arbitral awards are fundamental to the efficacy of arbitration. However, this process is not absolute; it is subject to a significant limitation, one such is known as the public policy exception. Public Policy exception sometimes acts as a barrier to the enforcement of foreign arbitral awards.[2] There has always been a huge debate when it comes to discussing the usage of this exception across multiple jurisdictions. India is trying to establish itself as an arbitration-friendly jurisdiction, however, the public policy exception sometimes acts as a roadblock in India being an arbitration-friendly jurisdiction and challenges India's goal of becoming an International Arbitration hub.[3] On the contrary, countries like the UK adopt a strict pro-enforcement bias with respect to the actual use of the public policy exception. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) is a critical convention that gives room to the public policy exception. Both India and the UK are parties to the said convention. The public policy exception is embedded in Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). The interpretation and application of the public policy exception have differed between these two jurisdictions due to variations in their legal systems and court practices. In India, the enforcement of foreign arbitral awards is primarily governed by the Arbitration and Conciliation Act, of 1996. Section 48 of

[1] A.S.Akoto., 'Public policy: An amorphous concept in the enforcement of arbitral awards' (2020) (7) (1) Journal of Liberty and International Affairs p.56 available at https://heinonline-org.eresources.nls.ac.in/HOL/P?h=hein.journals/jlia7&i=51. accessed 16 September 2023.
[2] Y. Dubey, 'Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India' (2018) (7) (2) Christ University Law Journal available at https://heinonline.org/HOL/P?h=hein.journals/chulj7&i=195 accessed 17 September 2023.
[3] Anirudh Hariani, 'Indian arbitration and the shifting sands of public policy' (2020) (16) (2) Asian International Arbitration Journal p.171 available at https://kluwerlawonline.com/journalarticle/Asian+International+Arbitration+Journal/16.2/AIAJ2020020. accessed 16 September 2023.

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the Act sets out the grounds on which enforcement can be refused, including the public policy exception. In the United Kingdom, the enforcement of foreign arbitral awards is primarily governed by the Arbitration Act 1996. Section 103 of the Act provides for the grounds on which enforcement can be refused, including the public policy exception.[4]

RESEARCH METHODOLOGY

I will be using the doctrinal method to compare the enforcement of foreign arbitral awards in India and the UK. I will make a modest attempt to do a systematic analysis of legal texts, case law, statutes, regulations, and relevant international conventions i.e., the New York Convention of 1958. I will primarily focus on understanding and comparing the legal principles, rules, landmark case laws and interpretations within the legal systems of both countries.

OBJECTIVE

The objective of the paper is to make a comparative analysis of the doctrine of public policy exceptions in India and the UK. It will take into consideration the landmark judicial precedents in both jurisdictions. Furthermore, it will primarily try to identify the similarities in both jurisdictions while making a comparative analysis of the legislation and judicial approach in India and the UK.

STRUCTURE OF THE PAPER

In the first part, I have already dealt with the introduction to the present topic. Further, in the first part, I have mentioned about the methodology used and the objective of the present paper. The second part deals with the introduction of the topic and briefly discusses the history of the New York Convention with reference to the public policy exception in India and the United Kingdom. Further, it introduces the enabling legislation in India and the United Kingdom, i.e., Section 48 of the Arbitration and Conciliation Act 1996 and Section 103 of the Arbitration Act 1996. The third part deals with the global perspective of the public policy exception and critically analyses the incorporation of public policy doctrine across various jurisdictions. The third part further deals with the public policy doctrine in India and the UK. It also makes a comparative analysis of the existing legislation along with a few landmark cases from each jurisdiction. The fourth part includes the concluding observations by the author.

[4] Tariq Khan, 'Whether to Invest or not: Comparative Analysis of the Public Policy Doctrine in India and England' (2021) 8 (1) RGNUL Financial & Mercantile Law Review pp. 39 available at https://heinonline.org/HOL/P?h=hein.journals/rlfladme8&i=47 accessed 15 September 2023.

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II. THE NEW YORK CONVENTION: HISTORY & APPLICATION IN INDIA AND THE UNITED KINGDOM

Before the advent of the New York Convention, nations entered into the Geneva Protocol of 1923, which aimed to facilitate the recognition and enforcement of awards within the country where they were made. Following that, the Geneva Convention of 1927 expanded on the Geneva Protocol of 1923 by broadening the reach of protocol awards, making them enforceable not only in the state where they were made but also within the territories of the contracting States.[5] Under the Geneva Convention of 1927, a party wishing to enforce an award had to establish certain necessary conditions for enforcement and often had the burden to obtain a declaration in the country where the arbitration occurred, confirming the award's enforceability in that jurisdiction, before pursuing enforcement in the local courts. This practice is commonly known as the 'double-exequatur'.[6] Article 1(e) of the Geneva Convention of 1927 further mandated that, for recognition and enforcement to be granted, it had to be definitively proven that such recognition or enforcement did not conflict with the public policy or legal principles of the country where it was being sought. Due to the Convention's broad language and the burden of proof placed on the party seeking enforcement, it created obstacles to the efficient resolution of disputes through arbitration. The New York Convention replaced the Geneva Convention of 1927. At the time of the enactment of NYC, various states were skeptical before becoming a signatory. Their prime concern was that the mandatory recognition and the terms of the convention were in violation of the domestic statutory provisions of individual states.[7] To tackle the same, Article V of the NYC was referred. Article V(2) has specifically dealt with the cases where the member states could choose to refuse the implementation of the award if it had violated the public policy, the most fundamental notions of principles of law[8] or the morality of that state. Therefore, NYC was seen as a breakthrough in the growth of international

[5]Tariq Khan, 'Whether to Invest or not: Comparative Analysis of the Public Policy Doctrine in India and England' (2021) 8 (1) RGNUL Financial & Mercantile Law Review pp. 39 available at https://heinonline.org/HOL/P?h=hein.journals/rlfladme8&i=47 accessed 15 September 2023.

[6] A J van den Berg, 'The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation', (1981) p. 360.

[7] Harpreet Kaur, 'The 1996 Arbitration and Conciliation Act: A Step Toward Improving Arbitration in India', (2010) (6) (1) Hastings Business Law Journal pp. 262-263 available at https://repository.uclawsf.edu/cgi/viewcontent.cgi?article=1146&context=hastings_business_law_journal accessed on 17 September 2023

[8] Travaux préparatoires, 'Report of the Committee on the Enforcement of International Arbitral Awards', (2016) pp. 20-21 & 23 available at https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf#page=251 accessed 17 September 2023.

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arbitration by establishing a cross-border recognition and enforcement of foreign awards.[9] It can be termed as the backbone of international dispute resolution. The NYC omitted the reference to "principles of law of the country in which it is sought to be relied upon." This removal was seen as emphasizing the New York Convention's pro-enforcement stance. Additionally, the Convention shifts the responsibility of proving non-enforceability onto the party resisting enforcement. Consequently, the New York Convention aims to establish a more simpler and efficient process for recognizing and enforcing foreign awards.[10] The New York Convention establishes an effective and consistent mechanism for enforcing arbitral awards in favour of the Award holder. However, the losing party i.e. the award debtor retains the option to challenge enforcement by presenting evidence based on specific grounds listed in Article V(1). Additionally, courts have the discretion to refuse enforcement, citing reasons like national public policy as outlined in Article V(2). However, the main issues arise in defining the ambit of 'public policy' across multiple jurisdictions. This 'public policy' exception is the most controversial exception that can cause refusal of the enforcement of the arbitral award. If we see the enabling legislation in India, then the Indian Parliament enacted the Foreign Awards (Recognition and Enforcement) Act in 1961 to enforce the New York Convention, which had become effective in 1958 and was ratified by India on July 13, 1960. Notably, the United Kingdom did not ratify this Convention until 1975.[11] Upon ratification, the Convention was incorporated into UK law through the Arbitration Act 1975 (now replaced by the Arbitration Act 1996).

III. "PUBLIC POLICY EXCEPTION: THE GLOBAL PERSPECTIVE"

Many legal systems have supported the idea that a substantive objection cannot be raised under the umbrella of the public policy doctrine during the enforcement phase if it was known to exist during the arbitral proceedings and could have been raised before the tribunal, or if it was presented and rejected by the arbitral tribunal on its merits. The English judiciary concurs with this notion, stating that a party that failed to raise a substantive error with the tribunal, even if it had the opportunity to do so, forfeits the right to bring it up during enforcement[12]. In most members of NYC, the "pro-enforcement" approach has constantly been upheld. If we see the

[9] J. Gillis Wetter, 'Present Status of the International Court of Arbitration of the ICC: An Appraisal', (1990) (1) (1) The American Review of International Arbitration pp. 91-93.
[10] Tariq Khan, 'Whether to Invest or not: Comparative Analysis of the Public Policy Doctrine in India and England' (2021) 8 RGNUL Fin & Mercantile L Rev 35 (SCC ONLINE)
[11] Ibid.
[12] Soinco SACI & Anr. v. Novokuznetsk Aluminium Plant & Ors., [1998] 2 Lloyd's Rep. 337, Court of Appeal, England and Wales [1998] CLC 730.

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approach followed by the U.S. Courts was succinctly outlined in the Sonatrach verdict[13]. In this case, the court emphasized that the most influential rulings supporting arbitration and favoring a fair resolution of international commercial disputes are those judgments from the Supreme Court of the United States. These landmark decisions, such as *Bremen v. Zapata Offshore Co.[14]*, *Scherk v. Alberto-Culver Co.*[15], and the *Mitsubishi case*[16], countered the inclination of domestic courts to restrict their authority in international commercial disputes. The German Federal Supreme Court expressed a similar viewpoint, stating that foreign awards could only be rejected if there was a serious defect in the arbitration process that affected the core interests of the State and its economic activities.[17] Likewise, French courts draw a clear distinction between domestic and international public policy when it comes to annulling arbitral awards.[18] Overall, the trend among courts worldwide indicates that member states of the New York Convention have adopted a more stringent approach to the public policy obstacle in award enforcement.

PUBLIC POLICY EXCEPTION: INDIA AND THE UNITED KINGDOM

The landmark interpretation of this exception was established in the case of *Renusagar Power Co. Ltd. v. General Electric Co*[19]. This case set a significant precedent by emphasizing that a court should not evaluate an award on its merit and that a bigger issue than a mere violation of the law would be required, adding that the enforcement of the award can be denied in case the award is found in violation of the fundamental policy of Indian law, interests of India, and the wide notions of justice or morality. Subsequently, in the case of *Oil and Natural Gas Co. v. Saw Pipes*[20], a new criterion of patent illegality was introduced alongside those established in Renusagar. In this case, the court was adjudicating on the ambit of public policy in domestic awards as per Section 34 of the Arbitration and Conciliation Act 1996 the court held that patent illegality, to some extent, involved a review of the merits of the underlying dispute. Defining patent illegality, it held that "*Illegality must go to the root of the matter and if the illegality is of trivial nature, it cannot be held that award is against the public policy. Award*

[13] Sonatrach (Algeria) v. Distrigas Corp, (United States District Court) Massachusetts (1995) XX Y.B. Comm Arb at 795.
[14] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907 (1972).
[15] Scherk v. Alberto-Culver Co., 417 US 506 (1974).
[16] Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
[17] Dutch Seller v. German Buyer, (1987) XII Y.B. Comm. Arb.at 489.
[18] SA Laboratories Eurosilicone v. Societe Bez Medizintechnik GmbH (2004) Revue deI'Arbitrage 133.
[19] Renusagar Power Co. Ltd. v. General Electric Co., 1994 Supp (1) SCC 644.
[20] Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705.

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could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

Further, as a disturbing precedent in *Phulchand Exports Ltd. v. O.O.O Patriot*[21] (now overruled), the Supreme Court of India (SCI) expanded the concept of 'patent illegality,' initially applied to invalidate domestic awards in India as established in the Saw Pipes case, to also challenge the enforcement of foreign awards in India. This decision set a concerning precedent by broadening the scope of public policy considerations concerning foreign awards, departing from the narrower and more limited approach set in the Renusagar case. However, within three years only the Hon'ble Supreme Court realised its mistake and in the *Shri Lal Mahal Ltd. v. Progetto Grano SPA* case[22], the Supreme Court of India (SCI) reversed its earlier decision in Phulchand and clarified that a foreign award could only be denied enforcement under Section 48(2)(b) if such enforcement contradicted: (i) the fundamental principles of Indian law; (ii) the interests of India; or (iii) principles of justice or morality. This ruling effectively reinstated the criteria established in the Renusagar case and rejected the application on the ground of patent illegality during the assessment of foreign awards.

At this point, substantial amendments were made through the Arbitration and Conciliation (Amendment) Act, 2015. These changes were influenced by the recommendations in the 246th Law Commission Report, which aimed to restrict the courts from intervening in arbitral awards based on "public policy" reasons. It acknowledged that *Saw Pipes* had unintended consequences on international commercial arbitrations and the enforcement of foreign arbitral awards, which was corrected by the SCI in *Lal Mahal.* It also proposed to statutorily include a definition to public policy based on the SCI's ratio in Renusagar.[23]

Further, in the *Associate Builders v. Delhi Development Authority*[24], the Supreme Court of India ruled that an arbitral award can be set aside on the grounds of justice if it is found to be so unfair that it shocks the conscience of the court. In the *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[25], the court emphasized that the

[21] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.
[22] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[23] Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act, 1996* (Aug. 2014)
[24] Associate Builders v. Delhi Development Authority, 2014 SCC OnLine SC 937.
[25] Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, 2019 SCC OnLine SC 677.

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most fundamental principles of justice are violated when someone is coerced into modifying a contract against their intentions, which goes against basic principles of justice.

In the recent time, the cases of *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors*.[26] and *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.*[27] (NAFED) have exposed conflicting judicial decisions, highlighting the divergence in the approach to enforcing foreign awards under the public policy exception in India. In Karia, the Supreme Court emphasized the importance of minimizing judicial interference in arbitral proceedings and imposed significant costs for rejecting an appeal against the Bombay High Court's decision to allow the enforcement of foreign awards. Conversely, in NAFED, a different bench of the Court dismissed the Delhi High Court's order permitting the enforcement of a foreign award. In the NAFED case, the court determined that the contract between the parties fell under the category of a contingent contract as defined by Section 32 of the Indian Contract Act, of 1872. Such a contract would be considered unenforceable due to the absence of government permission or authorization. Therefore, as a rare exception, the Hon'ble supreme court invoked the public policy exception in declining to enforcing the award. The Karia ruling clarified that to establish a violation of the fundamental policy of the Indian legal system, there must be a breach of a legal principle or statute that is considered fundamental and non-negotiable. This case reinforced the long-standing principles of fundamental policy and minimal judicial interference, consistent with previous judgments.

The judiciary's approach to the public policy exception has been focused on narrowing its scope, particularly after the 2015 Amendment. However, there is also an opposing perspective that views the public policy exception as a valuable means of safeguarding fundamental legal principles. While cases like Karia have emphasized limiting judicial intervention, NAFED appears to be a setback in the direction of minimal interference by the judiciary. Consequently, there is a clear need for a consistent approach in the enforcement of foreign arbitral awards to address these conflicting viewpoints.

UNITED KINGDOM

The enabling legislation in the United Kingdom regarding refusal to enforce an award on the grounds of public policy is to be found in Section 103(3) of the Arbitration Act 1996. It is

[26] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors., 2020 SCC Online SC 177.
[27] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., 2020 SCC OnLine SC 381.

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pertinent to note that in the UK, a series of recent decisions have revolved around applications to invalidate awards on public policy as a result of the illegality. These cases have not followed a systematic approach by English judges; instead, they have been addressed individually on a case-by-case basis.

Firstly, the landmark case of *Soleimany v.Soleimany*[28], where the father and son entered into an illegal scheme to export persian rugs out of Iran. A dispute arose between father and son in relation to the proceeds of sale as a result the same was reffered to Beth Din. The applicable law was stated to be Jewish Law. At Beth Din, the award was made in favour of the son. The son sought enforcement of award and father resisted on the ground of public policy. The court of appeal held that an English Court would not enforce an award on the ground of public policy which sought to enforce a contract which was illegal under English law as well as the law of country of performance. Further, the landmark case of Westacre Investment Inc. v. Jugoimport SDPR Holding Company Ltd and Ors.[29] issue of whether enforcement of a Swiss arbitration award would be contrary to English public policy. The primary contention was whether the underlying contract was to procure influence over, or to pay bribes to, Kuwaiti government officials. The Court of Appeal held that even if this was so, and even if the award had been obtained by fraud, it would still be enforced where the Defendants had had an opportunity to put these matters before the Swiss arbitral tribunal. A Petition for leave to appeal to the House of Lords was rejected.

In the landmark case of *Tinsley v. Milligan*[30], the House of Lords introduced a rule-based approach known as the "reliance test" to assess the illegality exception. According to this test, if a defendant invoked illegality as a defense, the court would examine whether the claim relied on the claimant's own illegal action. However, this test has faced criticism for being arbitrary, ambiguous, and potentially unjust. Critics argue that it focuses on procedural details rather than the underlying policy considerations behind illegality, leading to confusion about what constitutes "reliance" in this context. Further, In the landmark case of Patel v. Mirza[31], the reliance test established in Tinsley was overturned by the Supreme Court. Instead, the court adopted a flexible, policy-based approach to assess the illegality exception. This approach involves considering three key factors: (i) the fundamental purpose of the breached restriction

[28] Soleimany v Soleimany [1999] QB 785 at 800
[29] Westacre Investment Inc. v. Jugoimport SDPR Holding Company Ltd and ors. [2000] QB 288
[30] Tinsley v. Milligan [1994] 1 AC 340.
[31] Patel v. Mirza [2016] UKSC 42.

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and whether it would be better served by rejecting the claim; (ii) any other relevant public policy considerations that might be affected by denying the claim; (iii) whether denying the claim is a proportionate response to the illegality. When determining if it would be disproportionate to reject a claim on public policy grounds, various factors come into play, including the seriousness of the misconduct, foreseeability, the parties' equal responsibility, and the contract's core elements.

It's worth noting that in many countries, including England, the pro-enforcement bias of the New York Convention is regarded as a public policy issue. Therefore, English courts have generally taken a restrictive stance when considering the public policy exception. The English judiciary is generally reluctant to refuse the enforcement of an arbitral award on these grounds. The English Court of Appeal, in *RBRG Trading (UK) v. Sinocore International*[32], acknowledged that a high threshold exists for rejecting the enforcement of an arbitral award on public policy grounds. In the RBRG case enforcing an international arbitration award under the New York Convention would contradict English public policy, the Court of Appeal outlined several key principles to consider when evaluating a public policy challenge.

Firstly, the grounds for refusing enforcement on public policy must be interpreted narrowly, recognizing a strong public policy in favour of enforcement. Even if there are grounds for refusal, the court still has the discretion to allow enforcement.

Secondly, if the arbitral tribunal has determined that illegality was not an issue, further inquiry into the facts is discouraged unless there are exceptional circumstances.

Thirdly, in cases involving illegality under English law, the public policy exception should only be applied when the illegality touches upon principles of universal, rather than strictly domestic, foreign policy.

Lastly, there must be a close connection between the claim being pursued and the alleged illegality in the dispute. Therefore, the court concluded that the connection between the defendant's fraud and the enforcement of the award was not a valid and sufficient basis for invoking the public policy exception. It is therefore evident that the English judiciary maintains

[32] RBRG Trading (UK) Limited v. Sinocore International Co. Ltd. [2018] EWCA Civ 838.

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a strong pro-enforcement stance regarding public policy, as indicated by the stringent standards and conditions required to invoke this exception. The numerous principles and criteria established for denying the enforcement of an award on public policy grounds reinforce the notion that the English judiciary intentionally interprets the scope of this exception in a very restrictive manner.

IV. CONCLUSION

The public policy doctrine in both India and England is subject to numerous standards and tests. Both countries have displayed a tendency towards interpreting the public policy exception restrictively and favouring a pro-enforcement approach. In India, courts have made efforts to limit the application of the public policy exception and align it with the objectives of the New York Convention. However, recent decision like NAFED has reignited discussions on this issue and challenges which continue to hinder India's goal of becoming a more arbitration-friendly jurisdiction for foreign investors. On the other hand, English courts have consistently applied a high standard before refusing enforcement of an arbitral award, demonstrating a strong pro-enforcement bias. This suggests that India should consider adopting a more consistent approach, drawing inspiration from England, to determine the acceptable level of judicial interference and enforcement decisions in arbitration matters.

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