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 ISSN: 2582-6433

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PUBLIC POLICY AS A GROUND FOR CHALLENGING ARBITRAL AWARDS: ANALYZING RECENT TRENDS

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Abstract

There are conflicts between the necessity of judicial supervision and the finality of arbitration because public policy is one of the most hotly contested topics in the developing challenge to arbitral awards. Despite the fact that arbitration is valued for its effectiveness, adaptability, and enforceability, national courts have the authority to invalidate or refuse to enforce awards that violate a jurisdiction's core moral and legal principles. The very definition of public policy varies greatly amongst jurisdictions; some courts have given it a limited interpretation, allowing it to be used only in situations involving fraud, corruption, or unfair procedures, while others embrace a broader range of factors that may include additional economic, social, and regulatory issues. This paper assesses the legal framework, judicial interpretation, and emerging trends of public policy as a ground for challenging agreements in support of arbitration. Great emphasis is on the distinction between domestic and international public policy, significant grounds for annulment, and major judicial cases that uphold the notion of public policy.

This paper depicts recent trends, indicating the greater harmonisation of public policy standards, the shifting of transnational public policy, and the growing reluctance on the part of courts to interfere in the arbitration process. In addition, the increasing implications of digital arbitration and AI-related dispute resolution challenges raise questions about data privacy and AI-persuasive enforcement, which adds more to the complexity of the public policy landscape.

This paper concludes that public policy still has a role to play in arbitration, but caution must be taken against judicial overreach that may curtail its expressive efficacy as a mechanism for dispute resolution. With time, this will lead to increasing convergence of public policy standards in the world of arbitration toward consistency and predictability in the enforcement of arbitral awards.

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Introduction

Arbitration has become one of the most effective dispute resolution mechanisms, especially in international commercial law; its allure seems to rest upon efficiency, flexibility, and enforceability, especially under acknowledging frameworks like the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards or the 1985, amended in 2006, UNCITRAL Model Law on International Commercial Arbitration. However, courts of different jurisdictions can set aside or order the non-enforcement of those arbitral awards based on specific grounds, among which the most troubling remains when invoking the public policy exception. The public policy exception affords national courts to intervene where the challenged arbitral award is allegedly in violation of fundamental legal principles of the jurisdiction where enforcement is requested.

However, given the subjectivity of the notion of public policy, its application across jurisdictions has remained inconsistent and continues to be an uncertainty for various parties engaged in arbitration. There are considerable divergences amongst different jurisdictions when it comes to the interpretation of public policy. For some, it is limited permission for judicial review, thus restricting public policy challenges only to contraventions of fundamental procedural fairness or acts of corruption so that minimal interference with the arbitral process is permitted; for others, public policy challenges cover essentially unlimited grounds, which permit judicial interference for economic regulation, competitiveness law, and sometimes even moral or socio-political reasons. The different approaches in judicial attitudes have set a field of forum shopping, whereby the parties to an arbitral award actively seek to have their awards overturned in jurisdictions more likely to view such grounds in a broader sense as justifying intervention on public policy notions.

Moreover, some of the current trends suggest increasing reliance on a form of transnational public policy where, as global standards in arbitration, principles such as human rights, anti-corruption norms, and environmental considerations are recognized. This segment will delve into the legal foundations of public policy, interpretations by the courts, and current trends related to public policy as a ground of challenge against arbitral awards. It will, thereafter, draw a comparison between domestic and international public policy before

 ISSN: 2582-6433

outlining the import of other views.

Legal Framework and Judicial Interpretation of Public Policy

Public policy when it comes to arbitration, acts as a shield against enforcing arbitral awards that go against the basic legal, moral, or social standards of a jurisdiction. Yet, its meaning and use differ a lot across legal systems. This leads to courts not being on the same page when they look at and use public policy challenges. Courts usually make a distinction between:

- **Domestic Public Policy** – Legal principles and norms that apply strictly within a country's internal legal framework.
- **International Public Policy** – broader legal standards accepted across national borders, such as those pertaining to fair trade, environmental sustainability, anti-corruption initiatives, and human rights.

This distinction is crucial because, depending on public policy considerations, an arbitral award that might be deemed enforceable in one nation's legal system might not be in another.

Narrow vs. Broad Approach to Public Policy in Arbitration

Courts around the globe handle challenges to arbitral awards based on public policy in different ways. Some legal systems stick to a narrow pro-arbitration view, allowing serious breaches to be reasons for overturning an award. Other systems give courts more room to look over awards that might clash with local laws or what's best for the public. These courts can step in more often to review such cases.

Narrow Approach: Favoring Arbitration Finality

Countries like England, Singapore, Switzerland, and the United States have historically adopted a narrow interpretation of public policy, limiting judicial interference in arbitration. Courts in these jurisdictions typically set aside awards only in cases involving:

- Corruption or bribery in the arbitral process.
- Fraudulent conduct or concealment of material facts.
- Serious procedural irregularities or violations of due process.

Take the case of Parsons & Whittemore Overseas Co. v. Société Générale (1974)[3]. A U.S. court decided that public policy challenges should have a narrow application. The court stressed that

[3] https://www.jstor.org/stable/2200642

 ISSN: 2582-6433

arbitral awards should lose enforcement when they violate basic legal principles. This ruling strengthened the U.S. courts' support for arbitration. It made sure parties couldn't misuse public policy exceptions to hold up or dodge enforcement. In a similar vein, look at Soleimany v. Soleimany (1999). The English Court of Appeal said no to enforcing an arbitral award linked to smuggling. They reasoned that this illegal act went against England's public policy. This case shows that even in places friendly to arbitration, courts will step in when enforcing an award would make unlawful behavior seem okay.

Broad Approach: Greater Judicial Oversight

In contrast, jurisdictions such as India, China, France, and some European countries have historically allowed a broader interpretation of public policy. Courts in these jurisdictions permit challenges based on factors such as:

- Competition law and economic regulations.
- Tax evasion and financial misreporting.
- Social justice concerns, including labor rights and environmental protection.
- Foreign policy and national security considerations.

For instance, in the case Renusagar Power Co. v. General Electric Co. (1994)[4], the Indian Supreme Court explained that an arbitral award could be annulled on public policy grounds if it did not adhere to fundamental principles of Indian law, justice, or morality. Thereafter, in ONGC v. Saw Pipes (2003), the apex court in India not only followed this but also extended this doctrine by stating that public policy can even extend to patent illegality, an umbrella term which includes violation of Indian law when it is in conflict with international public policy standards even if the international standards are not violated.

Furthermore, in Eco Swiss China Time Ltd. v. Benetton International (1999), the European Court of Justice (ECJ) decided that EU competition law was a part of European public policy and, thus, national courts were entitled to set aside arbitration awards that were in contradiction to EU antitrust principles. This case put a special emphasis on economic regulations in arbitration, particularly in the context of the European Union, which is a common market.

[4] https://blog.ipleaders.in/tracing-journey-public-policy-exception-enforcement-arbitral-awards-renusagar-nafed-v-alimenta-s/

 ISSN: 2582-6433

Grounds for Challenging Arbitral Awards on Public Policy

Public policy is a very important set of rules for regulation that aim to make the arbitration awards harmonize with the fundamental legal and moral principles of a given jurisdiction. Courts might deny the enforcement of an arbitral reward if it infringes on procedural fairness, the integrity in the contractual dealings, economic regulations, or the basic human rights. It is true that judicial intervention in arbitration is, for the most part, limited, but public policy is still a strong exception allowing the court to review and, in certain cases, set aside the arbitral decisions[5].

Procedural fairness and due process violations:

The violation of due process is one of the most widely recognised grounds for contesting an arbitral award. The principles of natural justice, which guarantee that parties receive an unbiased tribunal, equal treatment, and a fair hearing, govern arbitration as an alternative dispute resolution process. Arbitral proceedings are closely examined by courts to guarantee adherence to procedural fairness, and an award may be revoked if:

- One party was not given proper notice of the arbitration proceedings.
- The tribunal failed to consider material evidence that could have impacted the outcome.
- There was bias or conflict of interest among arbitrators.

For example, the leading case of Jivraj v. Hashwani [2011][6] highlighted the need for arbitral tribunals to be and to remain neutral; any failure to achieve neutrality goes straight to a breach of the public policy standard. Equally important is the requirement of Article V(1)(b) of the New York Convention (1958)—that is, if a party was not duly notified and has had no opportunity to defend its case, its court shall, on application made subject to the rules of procedure of that court, refuse the arbitration award. Courts in other jurisdictions have treated procedural flaws, particularly those that duly affect the ability of one of the parties to defend itself, sufficiently seriously not to enforce on the basis of public policy principles.

[5] https://arbitrationblog.kluwerarbitration.com/2022/06/18/public-policy-is-this-catch-all-provision-relevant-to-the-legitimacy-of-international-commercial-arbitration/
[6] https://www.blackstonechambers.com/news/case-jivraj_v_hashwani/

 ISSN: 2582-6433

Corruption, Fraud, and Illegality

Public policy includes basic principles of integrity, legality, and good faith in the making and performance of contracts and commercial transactions. Given that it violates both domestic and international public policy norms, an arbitral award of contractual funds tainted with corruption, fraud, or any other illegality can and should be set aside.

In the 2006 case of World Duty Free Co. Ltd. v. Kenya, an ICSID tribunal ruled that corruption is against international public policy and refused to enforce a contract that was obtained through bribery. The tribunal decided that arbitral tribunals and courts shouldn't help parties enforce contracts that were obtained dishonestly.

The notion that illegality renders contractual obligations void has been reinforced by the refusal of French and American courts to recognise arbitral awards that seem to validate corrupt or fraudulent transactions.

The majority of jurisdictions follow the rule that arbitration cannot be used as a cover for illegal activity. As a result, courts carefully examine arbitral awards to make sure they don't unintentionally support dishonest contracts or encourage immoral behaviour.

Violation of Competition Law and Economic Regulations

In the majority of jurisdictions, economic policies—such as trade regulations, consumer protection laws, and competition laws—are an essential component of public policy. If an arbitral award conflicts with antitrust laws or promotes anti-competitive practices, courts may refuse enforcement on public policy grounds.[7]

- The European Court of Justice (ECJ) held in Eco Swiss China Time Ltd. v. Benetton International (1999) that EU competition law is a component of European public policy. The court affirmed the superiority of economic regulations over private arbitration agreements by holding that national courts could revoke arbitral awards that violated the principles of competition law.
- Since anti-competitive behaviour undercuts the goals of economic policy, U.S. courts have also declined to enforce awards that violate the Sherman Act or other antitrust

[7] https://www.commerce.gov.in/international-trade/india-and-world-trade-organization-wto/indian-submissions-in-wto/competition-policy/working-group-on-the-interaction-between-trade-and-competition-policy-communication-from-india-3/

 ISSN: 2582-6433

laws.

Courts make sure that arbitration doesn't turn into a way to get around mandatory competition laws by incorporating economic regulations into public policy. This strategy emphasises how crucial regulatory supervision is to international commercial arbitration.

Fundamental Rights and Social Policy Considerations

Public policy now encompasses labour rights, environmental sustainability, and human rights protections. Nowadays, a lot of courts understand that arbitral awards need to be in line with basic moral and social norms, particularly when they concern discrimination, forced labour, or environmental abuses.

Human rights and labour protections: Courts have declined to uphold arbitral awards that contravene essential labour rights, including anti-discrimination laws, workplace safety rules, and minimum wage statutes. Awards that support discriminatory employment practices have been contested on the grounds of public policy in certain jurisdictions.

- Environmental laws: Public policy scrutiny of arbitration cases involving pollution, resource extraction, and climate-related disputes has grown. Arbitral awards that violate national environmental laws have been overturned to protect public interest concerns in a number of European and Latin American jurisdictions.

A growing focus on sustainability and human rights in arbitration is demonstrated by the fact that courts in Germany and France have invalidated awards connected to corporate practices that violate labour and environmental protections. This pattern is indicative of a larger movement in arbitration jurisprudence to incorporate corporate social responsibility (CSR) considerations.

Recent Trends and Emerging Challenges in Public Policy and Arbitration

The idea of public policy in arbitration is always changing to reflect shifts in judicial perspectives, international legal norms, and technological developments. In the past, courts have refused to enforce arbitral awards that go against the core moral and ethical standards of a particular jurisdiction by citing public policy. Recent patterns, however, point to a move towards increased harmonisation, judicial restraint, and the creation of fresh difficulties in the digital era.

 ISSN: 2582-6433

Growing Recognition of Transnational Public Policy

The growing acceptance of transnational public policy—a body of universal rules derived from international treaties, conventions, and international legal standards—represents a substantial change in arbitration jurisprudence. Public policy was previously limited to national legal frameworks, with standards being established by each jurisdiction. However, public policy interpretations have become more convergent as a result of globalisation and the growth of international commercial arbitration. International norms are now regularly taken into account by courts and arbitral tribunals, including:

- Anti-corruption measures: Because of the widespread acceptance of instruments like the OECD Anti-Bribery Convention and the United Nations Convention Against Corruption (UNCAC) as part of transnational public policy, arbitral awards pertaining to corruption are more vulnerable to challenge[8].
- Protections for human rights: The UN Guiding Principles on Business and Human Rights have impacted arbitration rulings, particularly in investor-state conflicts involving issues such as discrimination, forced labour, or human rights abuses.
- Environmental issues: Treaties like the Paris Agreement and the UN Sustainable Development Goals (SDGs) are being mentioned more and more in arbitration as climate change gains legal significance. As part of public policy considerations, tribunals are expected to evaluate environmental compliance, especially in disputes involving energy and natural resources.

These changes show that international legal obligations are influencing public policy in arbitration and that it is growing beyond national laws. Although this change encourages more uniformity, it also calls into question how much arbitral tribunals should follow international standards in cases where parties have not expressly consented to them.

Judicial Pro-Arbitration Attitudes

The growing judicial hesitancy to invalidate or deny enforcement of arbitral awards on the grounds of public policy is another significant trend. Courts in jurisdictions that support arbitration have always adopted a limited strategy, limiting their involvement to cases involving flagrant transgressions of basic legal principles. This approach is evident in various judicial decisions:

- The **Swiss Federal Tribunal** has repeatedly ruled that public policy challenges should

[8] https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf

 ISSN: 2582-6433

be interpreted **restrictively**, preventing unnecessary disruption of arbitration. Swiss courts stress that a decision cannot be overturned on the grounds of public policy based only on factual or legal errors.

- The French courts' pro-arbitration stance has been strengthened by the Court of Cassation's upholding of the rule that only flagrant and grave transgressions of international public policy call for judicial intervention.
- In a similar vein, courts in Singapore and Hong Kong have prioritised finality over intervention, holding that the definition of public policy should not be arbitrarily expanded to include economic and regulatory policy considerations[9].

This pro-arbitration stance demonstrates a global dedication to reducing judicial intervention, which will improve international arbitration's predictability and stability. Under the guise of arbitration-friendly laws, parties may try to circumvent significant regulatory frameworks, which raises possible risks.

Challenges Posed by Digital Arbitration and AI

The swift development of digital dispute resolution is posing new public policy challenges for courts and arbitral institutions. Complex legal and ethical issues are raised by emerging technologies like smart contracts, blockchain-based arbitration, and AI-driven decision-making:

- **Legality of AI-generated arbitral awards:** AI is being used more and more to predict case outcomes, examine legal precedents, and even create arbitral rulings. It is still unclear, though, if these AI-generated awards can be contested on the grounds of public policy because they lack human reasoning, procedural fairness, or ethical considerations.
- **Conflicts over cross-border data protection:** Arbitration proceedings involving digital evidence and online hearings may result in disputes over privacy rights and cybersecurity obligations due to the stringent standards imposed by GDPR and other data protection regulations. Courts may have to determine whether illegal data collection during arbitration or data breaches amount to public policy infractions.
- **Automated arbitration and smart contracts:** Due process and enforceability issues are brought up by the use of self-executing contracts that don't require human intervention. Courts may be forced to deny enforcement on the grounds of public

[9] https://globalarbitrationreview.com/insight/know-how/challenging-and-enforcing-arbitration-awards/report/india

 ISSN: 2582-6433

policy violations if an automated arbitration process disregards public interest considerations.

These difficulties show how technology is changing arbitration, necessitating a reevaluation of public policy concepts in the digital age. In order to maintain the fairness, transparency, and enforceability of digital arbitration, courts will probably need to create new frameworks that strike a balance between technological efficiency and legal protections.

Conclusion

One of the most intricate and dynamic grounds for contesting arbitral awards is still public policy. There is a growing trend towards harmonisation and reliance on transnational public policy principles, even though courts around the world are still having difficulty defining its scope. In order to maintain arbitration's status as a reliable, effective, and legally binding dispute resolution process, the future of arbitration is probably going to require striking a careful balance between party autonomy and changing public policy concerns.

This balance must also account for evolving societal values, international human rights standards, and global commercial expectations. Ultimately, achieving greater clarity and consistency in the application of public policy will enhance trust in the arbitral process and support its continued global relevance.

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 ISSN: 2582-6433

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