Master's Thesis of Law

Public Policy as an Exception to Compliance with International Obligations:

Lessons from and for India

국제조약에서의 공공정책의 예외: 인도에서의 사례 및 적용의 시각으로

August 2020

Graduate School of Law
Seoul National University
International Law Major

Shubhi Pandey

Public Policy as an Exception to Compliance with International Obligations:

Lessons from and for India

Name of Examiner: Professor Jaemin Lee

Submitting a master's thesis of Law

July 2020

Graduate School of Law
Seoul National University
International Law Major

Shubhi Pandey

Confirming the master's thesis written by
Shubhi Pandey
July 2020

Chair	Professor Keun-Gwan Lee	(Seal)
Vice Chair	Professor Yoo Min Won	(Seal)
Examiner	Professor Jaemin Lee	(Seal)

Abstract

Public Policy as an Exception to Compliance with International Obligations: Lessons from and for India

Shubhi Pandey

Department of Law, International Law

The Graduate School

Seoul National University

International treaties are considered to be an important source of public international law as has been mentioned in Article 38 (1)(a) of the Statute of the International Court of Justice.[1] International treaties usually contain exceptions that are aimed to protect the sovereignty of the states and to ensure higher acceptance of the treaty among the states. Treaties are applicable under public international law as well as under private international law. These exceptions mentioned in international treaties are to be construed narrowly. This practice has been accepted by most of the states across the world. Public policy exception is one such which is found in international treaties. This may or may not be included expressly in the international treaty. It is believed that such exceptions are only to be invoked in extraordinary cases. This exception should not be used as an exception to not comply with international obligations. When states consent to be bound by an international treaty, it is expected of them to perform its obligations in its entirety. This is based on the principle of *pacta sunt servanda* which signifies that states will perform its obligations under the treaty in good faith.[2]

The New York Convention is a multilateral treaty which has been ratified by a number of states. The Contracting States under this Convention have the obligation to recognize and enforce foreign arbitral awards. The public policy exception has been expressly mentioned in the New York Convention under Article V(2)(b)[3] and this is also enshrined in the UNCITRAL

[1] Article 38(1)(a), Statute of the International Court of Justice, Available at: https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.

[2] Article 26, The Vienna Convention on the Law of Treaties, 1969.

[3] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959).

Model Law on International Commercial Arbitration 1985.[4] This exception is subject to varied interpretation owing to the fact that it has not been defined in the Convention itself. Public policy exceptions are being increasingly included in bilateral investment treaties and free trade agreements. Public policy exception is one of the grounds for refusal of recognition and enforcement of foreign arbitral awards. Finality of the arbitral award depends largely on its enforcement. Public policy exception, that acts as a bar to the enforcement proceeding, is subject to the interpretation of enforcing state.[5] The enforcing states in many cases invoke the public policy ground to refuse enforcement and ultimately evade its obligations under international law and treaty law. Invoking the public policy exception often creates hindrances for the enforcement of arbitral awards. The state in question in this thesis is India. Indian courts have been criticized for invoking the ground of public policy in refusing enforcement of foreign awards quite often and also for the erratic interpretation of the public policy exception itself. In my thesis, I will consider what is the relevance of treaty obligations under the New York Convention. I will then focus on scenarios in which the refusal of national courts to enforce arbitral awards can be considered as breaching treaty obligations under international law. Then the focus of this thesis will shift to how the Indian judiciary has interpreted and applied the public policy exception under the New York Convention over the years and whether it has reneged from its obligations under the Convention. In the course of my thesis, I will argue that public policy exception is not applied uniformly across borders by national courts and this exception is used by states to not enforce foreign arbitral awards in many cases, which defeats the purpose of the New York Convention as a whole. In that regard, I will analyze the Indian interpretation given to the public policy exception in the light of violent shifts in the positions taken by the Supreme Court of India. I will further analyze whether such violent shifts could bring upon India a state responsibility for breaching treaty obligations under international law. I will focus on instances where enforcement of arbitral awards-meaning to give full force and effect within the country where such enforcement is sought and in its domestic law-is unsuccessful and this lack of relief is attributable to the acts or omissions of the state and whether India has truly fulfilled its obligations under the New York Convention.

[4] Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, UN Doc A/40/17.

[5] Article V(2)(b), The New York Convention, 1958, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

Keywords: International treaties, treaty obligations, *pacta sunt servanda,* New York Convention, public policy exception, India

***Student number:* 2018-25293**

Table of Contents

List of Tables

INTRODUCTION

The New York Convention was adopted on 10 June 1958 and came into force on 7 June 1959.[6] The purpose of the Convention is to ease the process of enforcement of foreign arbitral awards. The text of the Convention provides for the framework within which international commercial arbitration is to be carried out. Under Article V, the Convention provides for certain grounds based on which foreign arbitral awards can be refused recognition and enforcement.[7] Amongst all the grounds for refusal of recognition and enforcement of foreign arbitral awards, the ground of public policy is the most controversial. It can be said that the public policy exception is used by nation-states as an exception not only to refuse recognition and enforcement of foreign arbitral awards but also as an exception to compliance with international obligations. The drafters of the New York Convention left it to the Contracting States to define public policy. The public policy exception is considered to be a safety-valve, which the drafters believed would protect the sovereignty of the Contracting States. This exception was inserted in the Convention to prevent any intrusion in the domestic legal system of the Contracting States. However, this freedom bestowed upon the Contracting States by the Convention, seems to be misused by the States. The public policy exception has been interpreted differently across the world to the extent that it can be stated that some states use this exception of public policy to evade its international obligations. The Contracting States are obligated to recognize and enforce foreign arbitral awards under the provisions of the New York Convention. The states in some cases seem to be invoking the public policy exception so as not to comply with its obligation of recognizing and enforcing foreign arbitral awards. The freedom to interpret and apply public policy exception according to the national interests of the Contracting States can be troublesome since there is no uniformity in the interpretation of the same. A perfect example of this is India. Indian judiciary has been criticized worldwide for its varying interpretation of the public policy exception over the years. One of the main reasons for this is the fact that the Indian judiciary has an excessive interventionist approach in the arbitral process, especially the enforcement proceedings where it has applied the public policy exception in an erratic manner, which results in the refusal of recognition and enforcement of foreign arbitral awards in India. This actually results in the non-performance of treaty

[6] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention), 1958, Available at: http://www.newyorkconvention.org.
[7] Article V, The New York Convention, 1958.

obligations under the New York Convention. It can be said that Indian judiciary has misused the public policy exception to avoid its international obligations. A narrow approach to the public policy exception is an internationally accepted norm. The Indian judiciary, through its decisions, seems to have adopted a broader approach to the public policy exception. This is in contradiction to the international standards. The position of the Indian judiciary will be analyzed through a series of decisions delivered by the courts on the subject of invoking the public policy exception to refuse recognition and enforcement of foreign arbitral awards.

It is hypothesized that public policy exception is used as an exception to compliance with international obligations. The research will focus on India in particular and the author will analyze the decisions delivered by Indian courts on the subject matter of invoking the public policy exception to refuse recognition and enforcement of foreign arbitral awards. This research is aimed at revealing in details the violent shifts taken by the Indian judiciary when dealing with the public policy exception during enforcement proceedings. It will focus on establishing a relationship between the manner in which the Indian judiciary interprets Article V(2)(b) of the New York Convention and the non-performance of its treaty obligation of easing the process of enforcement proceedings by recognizing and enforcing foreign arbitral awards. The research will further focus on how the domestic laws of India adds more confusion in this regard. The research will then proceed to ascertain whether India can be held responsible under international law for the non-enforcement of foreign arbitral awards in its jurisdiction.

Throughout the course of this thesis, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 will be referred to as the New York Convention. The states who are a party to the Convention will be referred to as Contracting States. The United Nations Commission on International Trade Model Law of 1985 (Amended in 2006) will be referred to as the UNCITRAL Model Law. The Indian Arbitration and Conciliation Act of 1996 (Amended in 2015 and 2019) will be referred to as the Act. The Vienna Convention on the Law of Treaties of 1969 will be referred to as the VCLT. Interim International Law Association Report on Public Policy as a Bar to Enforcement of International Arbitral Awards of 2003 will be referred to as the ILA Interim Report. Resolution of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards of 2002 will be referred to as the ILA Resolution. The International Bar Association Report on the Public Policy Exception, which was released in 2015, will be referred to as the IBA Report. The ground of public policy for refusing recognition and enforcement of foreign arbitral award has been referred to as the public policy exception or the public policy defense interchangeably. It is

most commonly referred to as the public policy exception by authors of books on arbitration and even in several reports by international organizations and scholarly articles.

CHAPTER 1. THEORETICAL FRAMEWORK

1.1. Significance of Research

International treaties form an important source of international law according to Article 38(1)(a) of the Statute of International Court of Justice.[8] It is a universally recognized principle of law that treaty obligations must be fulfilled in good faith. It expected of all the subjects of international law that they will exercise their rights and duties in good faith.[9] This principle is most commonly known in public international law as *pacta sunt servanda.* This principle has been codified in Article 26 of the Vienna Convention on the Law of Treaties.[10] The principle of *pacta sunt servanda* is derived from consent of the states. Consent is the only way through which legally binding rules can be established.[11] Legally binding rules in international law can be established by means of law making treaties. Treaties are like international agreements[12] among the nation states to make rules in their domestic jurisdiction on any issue of international importance. States are the subjects of international law and as subjects of international law they have certain rights and obligations which makes the analysis of the treaty obligations of the states an important issue in public international law. Under these treaties, the states are obligated to carry out their duties, that are mentioned, in good faith. The New York Convention is the international convention which is the focus of this thesis. The New York Convention being a multilateral treaty has several contracting states. These contracting states have obligations under the Convention, the most important obligation is to ease the recognition and enforcement of foreign arbitral awards in their domestic jurisdictions.[13] The New York Convention governs the law of international commercial arbitration. If the contracting state does not perform its obligations, the state is said to have breached its treaty obligations which leads to the state being held internationally responsible for failing to fulfil its treaty obligations. In my thesis, I will analyze whether India is in breach of its treaty obligations as far as recognition and enforcement of foreign arbitral awards is concerned.

---

[8] Article 38(1)(a), The Statute of the International Court of Justice.
[9] Lukashuk, I. I., *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law,* The American Journal of International Law 83, no. 3 (1989): 513-18. Accessed May 12, 2020. doi:10.2307/2203309.
[10] Article 26, The Vienna Convention on the Law of Treaties, 1969.
[11] Lukashuk, I. I., *The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law,* 513-18.
[12] Article 2(1)(a), Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.
[13] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/english.

Arbitration, in the present day, is a popular means of dispute resolution which is widely used. International commercial transactions have increased owing to globalization and such transactions tend to involve disputes which are being resolved through arbitration rather than approaching the courts. With the constant increase in cross border business relations, disputes regarding the same arise. Even today there has been an increase in international commercial transactions between entities which gives rise to cross border commercial disputes. When they enter into any transaction, they sign an agreement which has an arbitration clause or sometimes they sign an arbitration agreement separately. These companies usually like to keep their dispute and information regarding the dispute private. Solving such disputes through arbitration is considered the best option that may include cross-border transactions. Resolving cross-border disputes via national courts has proven to be expensive, inefficient, and lengthy. The important thing to note here is that an arbitral award has higher chances of getting enforced in a foreign country rather than a court judgment. Consequently, it may be beneficial for disputing parties to settle their disputes before an international arbitral panel rather than by resorting to litigation. Arbitration is considered to be a quick and cost effective method for private parties to solve cross border disputes confidentially. Moreover, international arbitral awards are enforceable in the five-selected countries and in most other countries of the worlds under bilateral or multilateral conventions such as the New York Convention. It can be said that international commercial arbitration is more favored by business entities carrying out international commercial transactions to resolve their disputes. One of the main factors behind the diffusion of international commercial arbitration is the near universal acceptance of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958. The New York Convention and the UNCITRAL Model Law on Arbitration are two important sources of arbitration laws worldwide. This research is significant also because of the fact that the New York Convention is still relevant today because it is the only international multilateral treaty on the subject matter of recognition and enforcement of foreign arbitral awards. Since there is no other international treaty dealing with this subject matter, it is important to discuss this when we discuss any matter related to recognition and enforcement of foreign arbitral awards. It is the only source of relevant international treaty along the lines of which the member states have modeled their arbitration laws.

It is important to bear in mind that recognition and enforcement of foreign arbitral awards is the most important aspect of the process of international commercial arbitration. The reason is that the success and failure of international commercial arbitration are eventually measured by its final enforcement. International commercial arbitration could not be said to be successful if

the award rendered could not be recognized and enforced. The possible advantages of arbitration become meaningless if the decision rendered in arbitration is unenforceable. Furthermore, parties who have incurred money and time for arbitration feel frustrated if the awards made in their favor could not be realized. The New York Convention is considered to be the founding stone on which the international legal framework of international commercial arbitration is based on. The Convention has been ratified by most of the nation-states which is why this Convention has been so successful. The Convention mentions several grounds based on which the domestic courts can refuse the recognition and enforcement of an international arbitration award. One of the most significant and contentious grounds for refusing the enforcement of arbitral awards is public policy. It is treated differently both from country to country, and also among courts in the same country. The public policy exception is considered to be the most controversial ground for the refusal of recognition and enforcement of foreign arbitral awards. There is no uniformity in its application. Different states interpret it differently keeping in mind their own national interests. But the drafters had reasons to allow for such exceptions. The public policy defense serves as a safety valve allowing the contracting states to prevent intrusion into their legal system of awards they consider irreconcilable with it. The contracting states' far reaching freedom to define their national policy standard inevitably impedes foreseeability and consistency of enforcement decisions involving public policy. A best practice standard can be established requiring the contracting states to restrictively define and apply their public policy acknowledging the foreign origin of the awards to be enforced. Nevertheless, Article V(2)(b) does not allow one to neglect making the effort to explore the respective public policy standard of the contracting state where the award's recognition and enforcement is sought. Most major arbitral jurisdictions define public policy narrowly and apply it exceptionally when an award contravened fundamental legal norms. Indeed, in most, the public policy violation must reach a certain threshold to warrant refusing enforcement/ the exception can legitimately apply to awards concerning contracts that would be illegal under national laws. Most of the states across the world have adopted a narrow approach towards the interpretation of the public policy exception. This trend is being followed by other states as well.

India offers a good example to discuss this issue because, as stated in the introduction abovementioned, the Indian judiciary has delivered quite contrasting judgments on the subject matter of invoking the public policy exception for refusing recognition and enforcement of foreign arbitral awards. From the analysis that will be made in course of this research, it will become evident that the Indian judiciary keeps oscillating from one approach to another. In

one of the very first decisions delivered in the case of *Renusagar Power Co. Ltd. v. General Electric Co.,*[14] the Supreme Court of India was praised for its decision where it had construed the public policy exception narrowly. This early decision of the Supreme Court of India was considered to be in line with the international standards. However, the Supreme Court of India deviated from this position in its subsequent decisions and adopted a wider interpretation of the public policy exception. The court added an additional criterion of 'patent illegality' to prove public policy violation.[15] The narrow construction of the public policy exception was reinstated in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa.*[16] This is exactly how the Indian judiciary keeps oscillating from one position to another. This will be analyzed in details in the further sections.

My research will examine the practical significance of the judicial application of the public policy exception to the practices of the Supreme Court of India. India being a member state of the New York Convention, its jurisdiction does involve a debate on the appropriate scope and application of the public policy exception. Furthermore, there is divergence on nature and significance of public policy and due process applied by courts of law which will be analyzed in the subsequent sections through a series of court decisions. It will be evident from the analysis that the domestic courts take judicial intervention to a higher level with respect to invoking the public policy exception. This is all because of the fact that there is no universally accepted standard of public policy, as has been stated earlier. Additionally, there is a question about the manner and extent to which the domestic courts of the Contracting Sates respect the New York Convention. It is my belief that this research will help in making a substantive contribution to legal and practical issues arising, critical to the successful operation of the New York Convention and also to the issue of how India can reduce its breach of treaty obligations.

1.2. Scope of Research

This thesis will focus only on the decisions delivered by the Indian judiciary on the subject of invoking the public policy exception to deny recognition and enforcement of foreign arbitral awards. There will be some references to foreign cases on the same subject matter but only with the aim to establish the international standards with respect to the interpretation of the public policy exception. The thesis will focus only on international commercial arbitration and not on international investment arbitration. International commercial arbitration and

[14] AIR 1994 SC 860.
[15] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 705; *Phulchand Exports Limited v. OOO Patriot* (2011) 10 SCC 300.
[16] (2014) 2 SCC 433.

international investment arbitration have certain dissimilarities.[17] Hence, reference will only be made to the provisions of the New York Convention. There will be no reference made to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States or the ICSID Convention, as it is known more popularly. It is pertinent to note that India is a party to the New York Convention, however, it is not a party to the ICSID Convention. Since the analysis in this research is based on the judicial decisions of the Indian courts on the subject matter of enforcement of foreign arbitral awards, the reference will only be made to the New York Convention and the UNCITRAL Model Law along with the domestic laws of India on arbitration. However, India has entered into several bilateral investments treaties with other countries which has given rise to arbitration proceedings. A brief reference will be made to the enforcement proceedings in such cases in order to analyze whether India was in breach of its obligations under the such BITs.

1.3. Methodology

The methodology incorporated in the preparation of this research is purely doctrinal in nature involving primary and secondary sources of information. The entire research will be based on the analysis of various provisions of international conventions and domestic laws. The research will also be based on expert opinion in various commentaries and journal articles. These will be constantly referred to during the course of the research. Empirical data for the same is not required, hence the approach adopted for this research will be doctrinal.

1.4. Objectives of the Research

In the course of the research, the author will be answering the following questions:

1. What is the relevance of treaty obligations under the New York Convention?
2. What are the scenarios in which the refusal of national courts to enforce arbitral awards can be seen as breaching treaty obligations under international law?
3. How is public policy exception to recognition and enforcement of foreign arbitral awards interpreted by the Supreme Court of India?
4. Should states apply transnational public policy in the absence of an obligation under the New York Convention to avoid any state responsibility under international law?

[17] Parmentier, Pieter, *International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules* (March 1, 2018). Available at SSRN: https://ssrn.com/abstract=3200648 or http://dx.doi.org/10.2139/ssrn.3200648; See also Stephan Wilske, Martin Raible & Lars Market, *International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing*, 1 Contemp. Asia Arb. J. 213 (2008); See also Karl-Heinz Bockstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012,* Arbitration International, The Journal of the London Court of International Arbitration, Volume 28 Number 4, 2012.

5. How is there a need for a more uniform interpretation of public policy exception across the world so that the recognition and enforcement of foreign arbitral awards become easier?

1.5. Terminology

In this section, few important terms will be defined for reference.

1. Arbitration, International Arbitration, International Commercial Arbitration

'Arbitration' is a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute. In choosing arbitration, the parties opt for a private dispute resolution procedure instead of going to court.[18] This is the definition provided by the World Intellectual Property Organization (WIPO). The American Bar Association defines arbitration as a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments.[19] The UNCITRAL Model Law and the Indian Act define arbitration as any arbitration whether or not administered by a permanent arbitral institution.[20]

'International commercial arbitration' is defined in the Act as follows:

International commercial arbitration means an arbitration relating to disputes arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India and where at least one of the parties is-

(i) An individual who is a national of, or habitually resident in, any country other than India; or

(ii) A body corporate which is incorporated in any country other than India; or

(iii) An association or a body of individuals whose central management and control is exercised in any country other than India; or

(iv) The government of a foreign country.[21]

2. Arbitral awards

There is no clear definition of the term 'arbitral awards' provided in the New York Convention or even the Act. According to the Convention, the term arbitral awards shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral

[18] *What is Arbitration?,* Available at: https://www.wipo.int/amc/en/arbitration/what-is-arb.html.

[19] *Arbitration, Available at: https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/.*

[20] Article 2(a), UNCITRAL Model Law, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf; Section 1(a), The Arbitration and Conciliation Act, 1996, Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf.

[21] Section 2(f), The Arbitration and Conciliation Act, 1996.

bodies to which the parties have submitted.[22] According to the Act, arbitral award includes an interim award.[23] Part II of the Act deals with foreign awards. This chapter deals with the New York Convention Awards. The definition of foreign awards is mentioned in Section 44. According to Section 44, foreign award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960-

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the First Schedule applies, and

(b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies.[24]

3. Treaty

A definition of the term 'treaty' has been mentioned in the VCLT. Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[25]

4. Contracting State

A definition of the term 'contracting state' has been mentioned in the VCLT. Contracting state means a state which has consented to be bound by the treaty, whether or not the treaty has entered into force.[26]

5. Party

[22] Article I (2), The New York Convention, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[23] Section 2(c), The Arbitration and Conciliation Act, 1996, Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf.

[24] Section 44, The Arbitration and Conciliation Act, 1996, Available at: https://www.wipo.int/edocs/lexdocs/laws/en/in/in063en.pdf.

[25] Article 2(a), The Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[26] Article 2(f), The Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

A definition of the term 'party' has been mentioned in the VCLT. Party means a state which has consented to be bound by the treaty and for which the treaty is in force.[27] The term party and contracting state may be used interchangeably in this thesis.

6. Recognition and Enforcement

The terms recognition and enforcement have not been defined in the New York Convention. The definitions of these terms can be found in case laws decided by the domestic courts of Contracting States.[28] Legal scholars are in broad agreement that 'recognition' refers to the process of considering an arbitral award as binding but not necessarily enforceable, while 'enforcement' refers to the process of giving effect to an award.[29]

7. Public Policy (Domestic public policy and international public policy)

Public policy, with reference to the theme of this thesis, is one of the grounds for the refusal of recognition and enforcement of arbitral awards. The term 'public policy' has not been defined in the New York Convention. According to the text of the Convention, the Contracting States are to define what public policy would mean in their jurisdiction. Hence, it is quite difficult to have a uniform and exhaustive definition of this term. The International Law Association defines international public policy as a body of principles and rules recognized by the Contracting States and if a foreign arbitral award violates these set of rules, it can be refused recognition or enforcement.[30]

In India, a foreign arbitral award can be refused recognition or enforcement if the award is contrary to the fundamental policy of Indian law or the interests of India or if it is against justice or morality. This was held in the case of *Renusagar.*[31] The evolution of the notion of public policy in India will be discussed in details subsequently.

---

[27] Article 2(g), The Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[28] Article I, The New York Convention, New York Convention Guide, Shearman & Sterling, Columbia Law School, Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

[29] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf; See also Javier Rubinstein, Georgina Fabia, *The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries,* in Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice (E. Gaillard, D. Di Pietro eds., 2008); See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[30] Recommendation 1(c), Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards.

[31] *Renusagar Power Co. Ltd. v. General Electric,* AIR 1994 SC 860.

CHAPTER 2. INTERNATIONAL ARBITRATION AND INTERNATIONAL TREATIES

In this section, an overview of international arbitration and international treaties on arbitration will be provided. Firstly, the focus will be on the brief history of international arbitration. Secondly, the focus will be on the treaty regime of international arbitration. the provisions of the New York Convention will be explained briefly. Finally, an overview of obligations under the treaties dealing with international arbitration will be provided.

2.1. Brief History of International Commercial Arbitration

Globalization has been an important phenomenon. This has led to the interaction of business entities all over the world. Globalization can be considered as the driving force behind the increase in cross border business transactions.[32] With globalization, business dealings between domestic companies and foreign companies increase simultaneously because of which disputes between them become inevitable.[33] When companies from two or more different countries have a dispute, there are different factors which we have to take into consideration while resolving their dispute. Firstly, it is important to plan for a fair and successful method of dispute resolution. The domestic laws of all the countries are different and when two private entities get into any dispute, the issue of conflict of laws issues surface. It is a known fact that disputes between states are governed by Public International law and the disputes between two foreign entities are governed by Private International Law. However, international commercial arbitration between business entities involving foreign countries is dealt under the New York Convention, 1958. International treaties are dealt under Public International Law. The international treaties are applicable to only the states who ultimately become signatories to the treaty by signing and ratifying the same. This shows the public international legal point of view of the New York Convention which will be the point of discussion here. We will be discussing how the public policy exception to the recognition and enforcement of foreign arbitral awards has not been applied uniformly across the member states. Arbitration is the most popular

[32] *Dispute Settlement,* International Commercial Arbitration, United Nations Conference on Trade and Development, Available at: https://unctad.org/en/Docs/edmmisc232add38_en.pdf.

[33] Gabor Szalay, *A Brief History of International Arbitration, Its Role in the 21st Century and the Examination of the Arbitration Rules of Certain Arbitral Institutions With Regards to Privacy and Confidentiality,* Law Series of the Annals of the West University of Timisoara, 2016, Available at: https://www.academia.edu/38304766/A_Brief_History_of_International_Arbitration_Its_Role_in_the_21st_Century_and_the_Examination_of_the_Arbitration_Rules_of_Certain_Arbitral_Institutions_With_Regard_to_Privacy_and_Confidentiality.

method of resolving disputes involving cross border transactions.[34] Most of the countries across the world have enacted arbitration laws or revised their existing laws in accordance with the international standards. They have also ratified treaties and adopted those guidelines to model their domestic laws according to it in order to lure foreign businesses to invest and to be able to compete in the world markets. Several arbitral institutions have been formed for dealing with arbitration matters and such institutions are found all over the world now.[35] It is an undeniable fact that arbitration enjoys wide and increasing use as a method of resolving international disputes between corporations, nation-states and individuals.[36] Arbitration as a means of dispute resolution has emerged as the best alternative form of dispute resolution when compared with litigation. Arbitration is a form of dispute settlement. The decision makers are not judges of state courts, but arbitrators. In many jurisdictions, the decision of the arbitrators, the award, has the same legal force as the final judgment of a state court of last instance. The disputing parties refer their dispute to an arbitral tribunal. This arbitral tribunal consists of arbitrators and the disputing parties agree to be bound by the decision of the arbitrators. Arbitration is often used as a method of dispute resolution for the resolution of commercial disputes, especially in the context of international commercial transactions. Since it constitutes a deviation from the fundamental right of recourse to the state courts, the parties must agree upon arbitration. Therefore, an arbitration agreement must be concluded between the parties. In practice, usually an arbitration clause is inserted into a contract for this purpose. Unless, the parties to arbitration settle their claims, an arbitral award concludes the arbitration. An arbitral award is quite similar to a judgment of a state court. Arbitral awards are not subject to appeal and, therefore, regarded to be final. The New York Convention as well as the domestic legislations of the Contracting States, however, allow arbitral awards to be challenged on limited grounds, such as the violation of public policy[37] or the lack of jurisdiction of the arbitral tribunal.[38]

---

[34] Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, DISP. RESOL.J.,June 1994, at 12, 12.

[35] Robert D. Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941 app. at 975 (1995).

[36] Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, *infra* in this issue of THE REVIEW, at 297, 298-301.

[37] Leon Trakman, *Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection,* The Chinses Journal of Comparative Law (2018) Vol. 6 No. 2, pp. 174-227.

[38] Maurice Kenton & Peter Hirst, *Advantages of International Commercial Arbitration,* 30 July 2015, Available at: https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration.

It has already been said that arbitration is a matter of great importance to international commerce. The primary advantage of international arbitration is enforceability. It is because of the New York Convention that enforceability of foreign arbitral awards has become easier. The great majority of countries of significance in international commerce are party to the Convention. The Convention requires courts of the Contracting States, to give effect to arbitration agreements and to recognize and enforce foreign arbitral awards.[39]

International commercial arbitration is the process through which business disputes are resolved between or among transnational parties. In the process of arbitration, arbitrators decide the dispute between the parties. The parties usually agree to arbitration and the decision is usually binding on the parties.

As the number of international commercial disputes increases so does the use of arbitration to resolve the same. The process of arbitration is quasi-judicial. It does not involve intricate judicial procedures. This has proven to be more effective as far as results and time are concerned. Parties may or may not trust foreign legal system when entering into business deals with a foreign party. It is an undeniable fact that initiating litigation in a foreign country is usually expensive and time-consuming. Litigation in a foreign country is also complicated owing to the fact that the parties to the litigation may not be well versed in the domestic law of that foreign country. Another important point to note here is that a decision rendered in a foreign court is potentially unenforceable in another state. However, a foreign arbitral award can be recognized and enforced in the country who are signatories to the New York Convention. Another reason why arbitration proves to be an effective means of dispute settlement is the fact that the parties nominate and choose the arbitrators to arbitrate the matter. The individuals selected as arbitrators are usually people who have specialized knowledge in any relevant field. Arbitral awards are final and are binding on the parties concerned.[40] Arbitration seeks to avoid any appeals that may arise. One of the other reasons for the growth of arbitration is that there are a number of arbitral bodies and the parties can select one that is best suited to their needs.[41]

International commercial arbitration has a long history of its evolution. It is not a recent phenomenon. It is important to look at the historical evolution of international commercial arbitration in order for us to assess why has it become so important in the twenty first century. Its growth has been so enormous that arbitration has become the most preferred method of

---

[39] Lord Mustill, *The History of International Commercial Arbitration-A Sketch-Chapter 1,* The Leading Arbitrators' Guide to International Arbitration–2nd Edition, March 2008, Available at: https://arbitrationlaw.com/library/history-international-commercial-arbitration-sketch-chapter-1.
[40] Stipanowich, *supra* note 36; See also Mustill, *supra* note 39.
[41] Mustill, *supra* note 39.

resolving cross border commercial disputes.[42] However, we have to bear this in mind that the concept of disputant parties referring their dispute to a neutral third party of their choice for resolving their dispute is very old. It dates back to the beginning of recorded human society.[43] Arbitration is said to have existed 'long before law was established, or courts were organized, or judges had formulated the principles of law'.[44]

It is not easy to draw the distinction between arbitration and litigation when we first talk about the written history of arbitration. There must first be a system of formal courts whose work can be contrasted with that of the arbitrators. Moreover, until modern times, and in some places still, the first objective has been to produce a settlement which restores order, with both parties expecting to receive something, if only to preserve their reputations. Parties have as a matter of course used arbitration together with litigation in the same dispute, and sometimes judges have taken the initiative to interweave the processes.[45]

The roots of international arbitration can be traced back to ancient time and to be precise it first appeared in the sixth century BC. In ancient Greek and Roman Empire, arbitration was used to settle political disagreements and territorial disputes. Commercial disputes were also resolved through arbitration. This was due to the increasing trade and business between them.[46]

If we are to consider the Middle Ages, the use of arbitration as a means to settle disputes was less frequent. During that time, war was considered a way for resolving disputes. There was a race to create individual states and in those circumstances the feuding kings and princes chose war as the means to resolve their dispute rather than a peaceful means of arbitration. However, from the 13th century the use of arbitration increased in some parts of Europe. In ancient Germany, arbitration clauses were added in treaties through which they formed alliances with smaller states.[47] In the Baltics small but independent states used arbitration not just as a method of disputes resolution between states but also applied it to disputes involving

---

[42] Ibid.

[43] Macassey, Lynden, *International Commercial Arbitration,—Its Origin, Development And Importance*, American Bar Association Journal 24, no. 7 (1938): 518-82. Accessed May 12, 2020. www.jstor.org/stable/25713701.

[44] Roebuck, Derek, *Sources for the History of Arbitration: A Bibliographical Introduction*, Arbitration International 14, no. 3 (1998); 237-343.

[45] Ibid.

[46] Emerson, Frank D. (1970). History of Arbitration Practice and Law. Cleveland State Law Review, Vol. 19, Issue 1. 155-156. Furthermore, see in general Roebuck, D., & Fumichon, B.D. (2004). Roman Arbitration. Oxford: Holo Books, The Arbitration Press. (From the observations of Professor Roebuck and Professor Fumichon it can clearly be derived that the arbitration of commercial disputes was present in the Roman Empire).

[47] Fraser, H.S. (1926). *A Sketch on the History of International Arbitration.* Cornell Law Review Volume 11, Issue 2. 190-193; See also Macassey, *supra* note 43.

individuals. Arbitration also developed in Italian states, medieval Iceland, France and England as well.[48]

At this juncture, it is also important for us to analyze how the merchants during the early times played an important role in the in the materialization of the law on international commercial arbitration as it stands today. In the early times when the legal system of around the world was not so well established and when the same could not trusted by the people to deliver justice, merchants conducted their business according to their own law. The merchants developed their own system of laws which helped them conduct their business and also resolve any dispute that may have arose in the course of their business transaction. Though the law of the merchants was not enforceable in any national court, yet the merchants all over the trading cities and countries followed this system.[49] It was like their unwritten code which they had to abide by. It was enforced by the consular courts. England constantly objected to foreign courts deciding matters. Soon after there was decline in Europe in great fairs which was followed by a decline and eventual disappearance of the merchants courts and in England courts of Pie Powder also lost its importance. The reason for this was that the national legal systems of the countries all over the world had started to codify the merchants' laws. But this was not good enough for the merchants and they still had this mistrust in the legal system. Many reasons were attributed to this. One of the reasons why the merchants believed that this codification was not good enough was the fact that the whole process was too slow. The whole process of the codification was so slow that it led to increase in the mistrust of the merchants in the legal system. Another reason for this was the fact that the codified law only covered commercial transactions which was done domestically. The commercial transaction involving foreign merchants was not usually covered under the codified merchant law.so merchants' dispute in regard to transactions with foreign merchants were not capable of being determined under the codified law. Even during the medieval times, the merchants, whose cases were being tried, were not quite satisfied with the whole procedure.[50] This is evident from the fact that merchants often preferred to write off as a bad debt any commercial dispute which could otherwise be prosecuted. They were ready to incur the expense rather than spending the time required to prosecute the same. The merchants at that period of time were definitely deprived of their own

---

[48] Fraser, H.S., *supra* note 47.

[49] Earl S. Wolaver, *The Historical Background of Commercial Arbitration,* December, 1934, Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review; See also Macassey, *supra* note 43.

[50] Jones, Sabra A., *Historical Development of Commercial Arbitration in the United States,* (1928). Minnesota Law Review. 2296, Available at: https://scholarship.law.umn.edu/mlr/2296; See also Macassey, *supra* note 43; See also Wolaver, *supra* note 49.

courts and were repelled by the technicalities of the courts at that time to resolve their disputes. These difficulties faced by them ultimately induced them to resort to other means of dispute settlement. These difficult situations induced them to resort to arbitration for resolving their disputes. In his historic book, "The Ancient Law Merchant" (London 1685) Gerard Malynes describes how in places in France, Italy and Germany where no merchant's courts were available, commercial disputes between merchants were referred for determination to other neutral merchants to determine as arbitrator.[51] Arbitration evolved gradually in different parts of the world too.

International commercial transactions gained more ground in the early modern period of Europe. Arbitration as a means to settle private commercial disputes emerged simultaneously. The new age of international arbitration arrived in the 18th century. The great Britain and the United States of America concluded the Jay Treaty in the year 1794.[52] Through this treaty an arbitral tribunal was established. The main aim of the treaty was to assist in the resolution of disputes emerging as a result of the American Revolutionary War which could not be addressed in an appropriate manner by diplomatic relations between the parties. Furthermore, in 1768, the New York Chamber of Commerce was established. The New York Chamber of Commerce promoted the use of arbitration between its members. It also served as the only civil tribunal in the United States when it was under the occupation of the British.[53] Arbitration as means of dispute settlement was promoted in other areas too. Arbitration soon gained the popularity and was termed as the most reasonable means of dispute resolution between citizens.

In the 19th century, arbitration was mainly used in diplomatic and commercial disputes. There was the Industrial Revolution during this period which helped in the growth of international trade and commerce. Due to this regulations and treaties started to appear on a more frequent basis in Europe as well as in the Americas. There were many important treaties signed during this time which helped in establishing arbitration as a reliable means of dispute resolution in the international arena. The following are the treaties:

1. An arbitration clause was included in the Treaty of Guadalupe Hidalgo, which put an end to the Mexican war. This is considered to be the first permanent arbitration clause to appear in history.[54]

---

[51]Macassey, *supra* note 43; See also Wolaver, *supra* note 49.
[52] Georg Schwarzenberger, *Present-Day Relevance of the Jay Treaty Arbitrations*, 53 Notre Dame L. Rev. 715 (1978), Available at: http://scholarship.law.nd.edu/ndlr/vol53/iss4/3; See also Katja S Ziegler, *Jay Treaty (1794),* Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e50.
[53] Mentschikoff, S. (1961), *Commercial Arbitration*, Columbia Law Review, Volume 61, Issue 5. 855
[54] Fraser, H.S., *supra* note 47.

2. The Treaty of Washington (considered to be the descendant of the Jay Treaty) was signed in 1871 between the Great Britain and the United States of America to further assist in the conciliation of disputes that would arise out of the Revolutionary War.[55]
3. Another important document in the history of international arbitration is the Hague Convention, concluded as part of the 1899 and 1907 Hague Peace Conferences. It is the first multilateral treaty which promoted the use of arbitration as a means of dispute resolution.[56]

2.2. The Geneva Treaties

The next milestone in the development of law on international arbitration was the adoption of the Geneva Protocol on Arbitration Clauses, 1923. After the end of the World War I, commensurate with importance of international trade and the increased use of international commercial arbitration, a need was felt for providing proper arbitral machinery for the resolution of disputes between the contracting parties subject to the jurisdiction of different states. To emphasize the importance of this, the International Chamber of Commerce promoted an international convention for removal of impediments to the enforceability of the arbitral clause.[57] The first serious effort in this regard was made in the League of Nations. The League of Nations took on this task and concluded the Geneva Protocol on Arbitration Clauses in the year 1923. The Geneva Protocol was initially signed and ratified by 30 member states. The Geneva Protocol sought to do away with the difficulties that were hindering the process of international arbitration. When international commercial arbitration was first being established at the beginning of the 20th century, it relied on domestic arbitration laws that differed considerably from each other, thus proving inadequate for the needs of international arbitration.[58] The problem here was that the arbitral clauses were non-enforceable. The arbitral clause mentioned that any future dispute between the parties should be solved by means of arbitration. This is the reason why a multilateral convention was negotiated in the framework of the League of Nations. Its aim was to unify the position of the signatory states on this matter. Despite a desire to internationalize commercial arbitration, the Geneva Protocol left much to

[55] Schwarzenberger, *supra* note 52.
[56] Eyffinger, A. A, *Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference*, Neth Int Law Rev 54, 197–228 (2007). https://doi.org/10.1017/S0165070X07001970.
[57] Contini, Paolo, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, The American Journal of Comparative Law 8, no. 3 (1959): 283-309. Accessed May 12, 2020, doi:10.2307/837713; See also Lim, C. L., *Geneva Still Inspires? An Appellate Mechanism for Investment Treaty Arbitration* (January 5, 2019). *Paradise Lost or Found? The Post-WTO International Legal Order (Utopian & Dystopian Possibilities)*, University of Tokyo Workshop. Available at SSRN: https://ssrn.com/abstract=3310738 or http://dx.doi.org/10.2139/ssrn.3310738.
[58] Paolo, *supra* note 57; See also Lim, C. L., *supra* note 57.

be desired. In addition to clauses that permitted individual national policies to govern the arbitration process, drafting defects hindered the enforcement process.[59] For example, nations could have varying interpretations on what was a commercial matter. Another problem that would arise would be that nations would keep changing their interpretation of existing and future changes. Further, it would also be possible that the states were unable to decide which disputes could be resolved through arbitration. An important thing to note here is that the provisions of the Geneva Protocol could only be applied to arbitration cases where both the parties, who had applied for arbitration, belonged to states that had ratified the treaty. In complying with the jurisdiction component, some courts held it to be a nationality requirement, while others held it to be a requirement of residence, domicile or usual place of business.[60] Most significantly, the Geneva Protocol did little to impose guarantees of enforcement once the award was decided. Ratifying nations needed only to enforce awards rendered in their own jurisdiction. Consequently, even if both disputing parties were determined to be in a jurisdiction that adhered to the Geneva Protocol, if the nation in which the award was made was not the nation in which the awards was to be enforced, the successful party lacked power to enforce the award.[61] This limitation defeated the fundamental purpose of the national nature of the Geneva Protocol which was to enforce arbitration awards across borders. The Geneva Protocol on Arbitration Clauses, 1923 only focused mainly only on the validity of arbitration agreements. The problem of enforcement of arbitral awards was not dealt with in the 1923 Protocol. With the increase in international commercial arbitration it was deemed necessary to provide certainty that arbitration awards would be enforced in foreign countries where assets of the award debtor were located. It was because of this that a new convention was drawn up under the auspices of the League of Nations. The convention was called the Geneva Convention on the Execution of Foreign Awards of 1927.[62] The main subject of this Convention was the enforcement of arbitral awards rendered on the basis of arbitration agreements falling under the Geneva Protocol. The Geneva Convention of 1927 expanded the force of the Geneva Protocol by introducing enforcement of foreign arbitral awards outside the state in which the award was made.[63] However, the nation in which the enforcement was sought

[59] Lim, C. L., *supra* note 57.
[60] Sabra A., *supra* note 50; See also Macassey, *supra* note 43; See also Wolaver, *supra* note 49; See also Paolo, *supra* note 57; See also Lim, C. L., *supra* note 57.
[61] Lim, C. L., *supra* note 57.
[62] Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September, 1927, Available at: https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=549&chapter=30&clang=_en.
[63] Volz, Jane L. and Haydock, Roger S. (1996), *Foreign Arbitral Awards: Enforcing the Award against the Recalcitrant Loser,* William Mitchell Law Review: Vol. 21: Iss. 3, Article 22.
Available at: http://open.mitchellhamline.edu/wmlr/vol21/iss3/22; See also Lim, C. L., *supra* note 57.

was supposed to be a party to the Convention, only then could enforcement be sought there. The Geneva Convention of 1927 tried to limit the deficiencies of the Geneva Protocol of 1923.[64] However, without substantive enforcement provisions, this treaty also lacked the actual power needed to allow for the recognition and enforcement of both arbitration clauses and awards. Under the provisions of the Geneva Convention, if a party wanted to enforce an award in a contracting nation, however, the award was made in a different contracting nation, Article 1(d) was invoked. It required that the award which was sought to be enforced should first become final in the country in which it has been made. What final meant was left to the discretion of the nation in which the arbitration took place. In some countries it was required to get court approval from the country where the award was rendered for an award to be considered final. These were some of the difficulties that were faced in the actual enforcement of the foreign awards. While the Geneva Convention was an improvement over the Geneva Protocol, its limitations proved daunting when attempting to enforce a foreign award. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Awards of 1927 provided some mechanism for international arbitration initially, both of them combined failed eventually to provide a concrete system of rules for international commercial arbitration.[65] The Geneva Treaties, though now only historical remnants, are still considered the building blocks of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 which is more commonly known as the New York Convention.[66]

2.3. The New York Convention-Brief History and Important Provisions

The New York Convention made a number of significant improvements in the regime of the Geneva Treaties.[67] The most important improvement was that the New York Convention established a single uniform set of international legal standards for the enforcement of arbitration agreements and arbitral awards. The New York Convention is a key instrument in international arbitration. Its importance can be emphasized by the fact that this Convention is considered to have allowed arbitration to become the primary method of solving disputes involving international commercial transactions. It applies to the recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. There was dissatisfaction with the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the

[64] Volz, Jane L. and Haydock, Roger S, *supra* note 63.
[65] Lim, C. L., *supra* note 57.
[66] Ibid.
[67] Volz, Jane L. and Haydock, Roger S, *supra* note 63.

Execution of Foreign Arbitral Awards of 1927. There was need for another international treaty dealing with the recognition and enforcement of foreign arbitral awards that would rectify the shortcomings of the Geneva Treaties. The initiative to replace the Geneva Treaties came from the International Chamber of Commerce (ICC), which issued a preliminary draft convention in 1953. The ICC's initiative was taken over by the United Nations Economic and Social Council (ECOSOC) which produced an amended draft convention 1955.[68] The draft was discussed during a conference at the United Nations Headquarters in May-June 1958, which led to the establishment of the New York Convention.

The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is one of the few examples where a transnational commercial law instrument elaborated by one of the specialized intergovernmental agencies or the United Nations became a true success story.[69]

The purpose of the New York Convention can be ascertained from the *travaux préparatoires* of the Convention itself. According to the *travaux préparatoires,* the Convention was adopted to improve the consistency and predictability in international commercial arbitration so as to encourage and facilitate cross-border commercial transactions.[70]

The New York Convention was signed on June 10, 1958 and entered into force on June 7, 1959.[71] This Convention is considered to be one of the most successful international treaties. The New York Convention is also considered to be the cornerstone of current international commercial arbitration. It has also been referred to as the single most important pillar on which the edifice of international arbitration rests. The Convention was brought into the international legal framework because of the growing importance of international commercial arbitration. The need of transnational business disputes was addressed by the Convention. The Convention provides for international legislative standards for the recognition of arbitration agreements and the recognition and enforcement of arbitral awards. The New York Convention, being one of the most ratified international treaty, has contributed to the globalization of international commercial arbitration. Furthermore, it provided an incentive for the Contracting States to revise their national arbitration laws in the light of the international standards.[72]

---

[68] Fraser, H.S. *supra* note 47; See also Volz, Jane L. and Haydock, Roger S, *supra* note 63.
[69] Herbert Kronke, Patricia Nacimiento, Dirk Otto & Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention,* pp. 1-18.
[70] New York Arbitration Convention, History: 1923-1958 http://www.newyorkconvention.org/travaux-preparatoires.
[71] The New York Convention, 1958, Available at: http://www.newyorkconvention.org.
[72] Ibid.

Together with the other international conventions on arbitration and also the Model Law, it has brought about modernization and harmonization of the national laws governing international arbitration. While the Convention laws down certain general principles, the Model Law provides detailed provisions for the different stages of arbitration. We have already discussed the treaties and conventions that preceded the New York Convention.[73]

After discussing the brief history of the New York Convention, we should shift our focus on the provisions of the Convention. The provisions of the Convention will be discussed briefly.

1. Article I(1) provides that the Convention applies to arbitral awards made in any state other than the one where recognition and enforcement are sought and to awards that are not considered to be domestic in the State where their recognition and enforcement are sought. Article I(3) sets forth two reservations that can adopted by States that accede to the Convention, the reciprocity and the commercial reservation.[74]
2. Article II(1) defines the arbitration agreement and obliges the Contracting States to recognize such an agreement. Article II(2) defines one requirement of a valid agreement, namely that it is in writing. Article II(3) obliges the courts of the Contracting States to refer matter to arbitration upon request by a party if it is covered by an arbitration agreement.[75]
3. Article III obliges each Contracting States to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the country where the award is being relied on. There shall be no discrimination against foreign arbitral awards as compared to domestic arbitral awards.[76]
4. Article IV sets forth the formalities to be observed to obtain recognition and enforcement of an arbitral award. It specifies the evidence to be submitted by the party applying for recognition and enforcement.[77]
5. Article V, one of the Convention's core provisions, consists of the grounds for refusal of recognition and enforcement of an arbitral award. The party against whom the award is invoked must raise certain defenses as mentioned in Article V of the Convention. While refusing recognition and enforcement of an arbitral award, the courts are to consider the grounds only mentioned in Article V of the Convention.[78]

---

[73] UNCITRAL Model Law on International Commercial Arbitration, 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
[74] Article I, The New York Convention, 1958.
[75] Article II, The New York Convention, 1958.
[76] Article III, The New York Convention, 1958.
[77] Article IV, The New York Convention, 1958.
[78] Article V, The New York Convention, 1958.

6. Article VI allows a court of a Contracting State to suspend the decision on enforceability of an arbitral awards if the challenge proceedings have been initiated against the arbitral award in the country of the award's origin.[79]
7. Article VII contains a more favorable rights provision. A party seeking recognition and enforcement of an arbitral awards may base its respective request on any other treaty or domestic law, if it deems this to be appropriate.[80]
8. Article VIII specifies which countries may join the New York Convention and how the ratification process is to be conducted. Article IX provides for the accession by States that were not among the original signatories to the Convention. Article X addresses the territorial scope of application. Article XI addresses the application in federal Contracting States. Article XII provides for the entry into force of the Convention. Article XIII provides for denunciation by a Contracting State. Article XIV addresses issues of reciprocity among the Contracting States. Article XV and Article XVI specify administrative aspects.[81]

The New York Convention depicts an equilibrium in spite of assimilating two different concepts. This was achieved by widening its field of application, embodying the principle of universality by refraining from the principles of strict reciprocity embodied in the Geneva Convention and at the same time enabling a State to make a reservation in respect of reciprocity, making the applicability of the Convention to awards rendered in the territory of another Contracting State which might otherwise be discouraged from ratifying it.[82]

The New York Convention provides a general principles dealing with international commercial arbitration and the Model Law provides us with detailed provisions dealing with different stages of arbitration. The Model Law was developed to address considerable disparities in national laws on arbitration.[83] This basically means that the national laws were often particularly inappropriate for international cases. The UNCITRAL Model Law in International Commercial Arbitration was adopted in the year 1985. There were certain amendments brought about in the year 2006.[84] The Model Law is designed to assist the States

[79] Article VI, The New York Convention, 1958.
[80] Article VII, The New York Convention, 1958.
[81] Articles VIII, IX, X, XI, XII, XIII, XIV, XV and XVI, The New York Convention, 1958.
[82] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[83] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.
[84] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

in reforming and modernizing their laws on arbitration procedure so as to take into account the particular features and need of international commercial arbitration. All the procedure of the arbitration process is covered by the Model Law. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[85] The Contracting States have modeled their domestic arbitration laws as per the UNCITRAL Model Law. This shows that there is some sort of uniformity in the arbitration laws across the world. The incorporating legislation of most of the Contracting States have borrowed heavily from the Model Law or have directly copied the provisions for their domestic laws on arbitration. The Model law constitutes a sound basis for the desired harmonization and improvement of national laws. It covers all stages of the arbitration process.[86] The Model Law has come to represent the accepted international legislative standard for a modern arbitration law and as mentioned above most of the countries have enacted their domestic arbitration laws based on the Model Law.[87]

2.4. Obligation to enforce arbitral award under the New York Convention

Treaties are an important source of international law.[88] In municipal law, various legislations and statutes give rise to rights and obligations for the citizens. In contrast, creation of rights and obligations under international law is quite different. International law is more limited as far as the mechanisms for the creation of new rules are concerned.[89] Sources of international law are mentioned under Article 38(1) of the Statute of the International Court of Justice.[90] Article 38(1) of the Statute of the International Court of Justice is widely recognized as the most authoritative and complete statement as to the sources of international law.[91] Article 38(1) of the Statute of the International Court of Justice states that:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a) International conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b) International custom, as evidence of a general practice accepted as law;
> c) The general principles of law recognized by civilized nations;

[85] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.
[86] Dr. Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* Third Edition, 2010, Sweet & Maxwell.
[87] Ibid.
[88] Article 38(1)(a), Statute of the International Court of Justice, Available at: https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[89] Malcolm N. Shaw, *International Law,* 8th Edition, Cambridge University Press, 2017.
[90] Article 38(1), Statute of the International Court of Justice, Available at: https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf.
[91] *Oppenheim's International Law.*

d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
[Article 38(1), Statute of the International Court of Justice]

Treaties give rise to obligation for nation-states in international law.[92] Treaties are known by a variety of different names such as conventions, international agreements, pacts, general acts, charters, through to statutes, declarations and covenants. All these refer to a similar transaction, the creation of written agreements whereby the states participating bind themselves legally to act in a particular way or to set up particular relations between themselves. A series of conditions and arrangements are laid out which the parties oblige themselves to carry out. The obligatory nature of treaties is founded upon the customary international law principle that agreements are binding.[93] This principle is expressed with the Latin maxim *pacta sunt servanda.*[94] This means that agreements have to be kept and have to be performed in good faith.[95]

All international treaties are interpreted according to the rules of interpretation as mentioned in the Vienna Convention on the Law of Treaties.[96] However, it is important to note that the VCLT applies only to treaties which are concluded after the VCLT became effective. Therefore, the rules of the VCLT are not directly applicable for the interpretation of the New York Convention. However, the Preamble to the VCLT reaffirms that the rules of customary international law will continue to govern questions not regulated by the provisions of the VCLT. The VCLT only codifies the rules of customary international law with respect to the observance, application and interpretation of treaties and conventions. The principle of *pacta sunt servanda* which is stipulated in Article 26 of the VCLT is a general principle of international law and in accordance with Article 38(1)(c) of the Statute of the International Court of Justice part of public international law, it is the most important principle of international law.

The third preamble to the VCLT states that the principles of free consent and good faith and the *pacta sunt servanda* rule are universally recognized. Article 26 of the VCLT mentions the rule of *pacta sunt servanda.* It states that:

---

[92] James Crawford, *Brownlie's Principles of Public International Law,* 8th Edition, Oxford University Press.
[93] Lukashuk, I. I., *supra* note 9.
[94] Article 26, Vienna Convention on the Law of Treaties, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.
[95] Malcolm N. Shaw, *International Law,* Eighth Edition, Cambridge University Press.
[96] William W. Park and Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration,* 58 Hastings Law Review 251 (2006), Available at: https://www.arbitrationicca.org/media/4/99181769719243/media012584292944710park_treaty_obligations.pdf.

"Every treaty in force is binding upon the parties to it and must be performed in good faith."[97]

It is important to note that the principle of *pacta sunt servanda*[98] applies only to treaties that are in force. The New York Convention is very much in force to this day. It has not been replaced by any new treaty so the Contracting States to the New York Convention. It is an established principle that when a State signs a treaty and ratifies is bound by the terms of the treaty and is obliged to perform their part of the obligations. Once a state signs a treaty subject to ratification or indicates its consent to be bound by the treaty should refrain from acts which would defeat the object and purpose of the treaty. This has been mentioned in Article 18 of the VCLT. Article 18 of the VCLT states that:

> A state should refrain from acts which would defeat the object and purpose of a treaty when:
> (a) It has signed the treaty subject to ratification, until it shall have made its intention clear not to become a party to the treaty; or
> (b) It has expressed its consent to be bound by the party, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.
> (Article 18, Vienna Convention on the Law of Treaties, 1969)

A state expresses its consent to be bound by a treaty through various means.[99] One of the ways is by ratifying it.[100] Ratification takes place after signing of the treaty. According to Article 18 paragraph (b) of the VCLT, once a state has expressed its consent to be bound, obligation to refrain from acts which would defeat the object and purpose of the treaty. Hence, a state in such a situation is obliged to act accordingly so as not to defeat the object and purpose of the treaty.[101] This is before the treaty actually comes into force provided that the entry into force is not unduly delayed. After a treaty comes into force, all the states who ratify the treaty are bound by the same. If a party to a treaty does not perform it, the party will, to the extent of the non-performance, will be in breach of its international obligations. Non-performance of treaty obligations would raise issues of state responsibility for the breach. The *pacta sunt servanda* rule is found in Article 26 of the Vienna Convention on the Law of Treaties. Followed by this in Article 27 of the VCLT we find the corollary to Article 26. Article 27 states that:
"A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty, which would include supranational law."[102]

---

[97] Article 26, Vienna Convention on the Law of Treaties, 1969.
[98] Article 26, Vienna Convention on the Law of Treaties, 1969.
[99] Article 11, Vienna Convention on the Law of treaties, 1969.
[100] Article 14, Vienna Convention on the Law of Treaties, 1969.
[101] Article 18, Vienna Convention on the Law of Treaties, 1969.
[102] Article 27, Vienna Convention on the Law of Treaties, 1969.

Thus, if a new law, or modification to an existing law, is needed in order to carry out the obligations imposed by a treaty, a negotiating state should ensure that this is done at least by the time the treaty enters into force for that party. If this is not done, not only will the state risk being in breach of its treaty obligations, but will be liable in international law to another party if this results in that party or its nationals suffering harm.[103] Although it may be tempting, a state cannot plead that it is waiting for its parliament to legislate. Even if the treaty does not enter into force for the state at the time it consents to be bound, the date of entry into force may come earlier than expected. It is therefore desirable that any necessary legislation is in place before the state gives its consent, though the actual coming into force of the legislation can certainly be postponed until the entry into force of the treaty for that state. Even when a treaty does not require full implementation in domestic law, a party must ensure that it will be able to comply with those obligations which do not require legal implementation. So it is the duty of the states to make sure that they perform their treaty obligations after consenting to an international treaty.[104]

As stated above that in accordance with Article 27 of the Vienna Convention on the Law of Treaties, internal law cannot be a justification for not performing the treaty obligations. Similarly, domestic courts may not invoke state law provisions that hinder the performance of the New York Convention. Under a strict interpretation of the *pacta sunt servanda*[105] rule courts may not ignore the obligations conferred by the New York Convention by taking the excuse of internal laws.[106]

Under customary public international law, each state who becomes a party to the New York Convention is obliged to observe its duties under the Convention whether it has fully or partially implemented the Convention into domestic law or not at all.[107] This is confirmed by Article 27 of the VCLT and by Article 3 of the International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts.[108] An act under the law of nations remains so even is a nation's law deems otherwise.

---

[103] Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations Between States in International Law*, British Yearbook of International Law, Volume 73, Issue 1, 2002, Pages 141–185, https://doi.org/10.1093/bybil/73.1.141.

[104] Ibid.

[105] Article 26, Vienna Convention on the Law of Treaties, 1969.

[106] "Article 27. Violation of Treaty Obligations." The American Journal of International Law 29 (1935): 1077-096. Accessed May 12, 2020. doi:10.2307/2213694.

[107] The New York Convention, 1958, Available at: http://www.newyorkconvention.org.

[108] Draguiev, Deyan, State Responsibility for Non-Enforcement of Arbitral Awards (December 31, 2014). World Arbitration and Mediation Review 2014 Vol. 8, No. 4 . Available at SSRN: https://ssrn.com/abstract=2573230; See also Bernardo Sepulveda-Amor and Meeryl Lawry-White, *State Responsibility and the Enforcement of Arbitral Awards,* Arbitration International, 2017.

An international treaty is entered into by the states representing the national interests at the international sphere.[109] There are different ways in which states can express their consent to an international treaty. Consent can be expressed by signature, exchange of instruments, ratification and by accession.[110] When a treaty is adopted, the contracting states sign and ratify the same and are under an obligation to incorporate the terms and conditions of the treaty into their domestic law. A legislative statute incorporating the international treaty emphasizes that the contracting state has acted towards its obligations under the international treaty to which it became a signatory. In most of the countries the principles of international law are not directly applicable domestically. A legislative statute or an enforcing statute is required for the same. According to rules of international law, however, neither a constitutional mandate nor the enactment of a statute provides and excuse for a treaty violation.[111] Prevailing opinion holds that an act wrongful under the law of nations remains so even if a nation's internal law deems otherwise.[112]

The New York Convention, after getting approval from the New York Conference's members, the text of the Convention was open for signature on 10 June, 1958.[113] The Convention is now closed for signature. This Convention has to be ratified by the states who are willing to become parties to it. Since signature is closed for signature at this point, it is open to accession by any member state of the United Nations or any state which is a member of any specialized agency of the United Nations or is a party to the Statute of the International Court of Justice.[114]

Under the New York Convention, the Contracting States have an obligation to recognize and enforce foreign arbitral awards.[115] To incorporate the New York Convention, the Contracting States have modeled their domestic arbitration laws based on the international legal standards

---

[109] Bernardo Sepulveda-Amor and Meeryl Lawry-White, *supra* note 108.

[110] Article 11, Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[111] Article 27, Vienna Convention on the Law of Treaties, 1969, Available at: https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf.

[112] Article III, International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts.

[113] The New York Convention, 1958, Available at: http://www.newyorkconvention.org; See also Gary B. Born, *The New York Convention: A Self-Executing Treaty*, 40 Mich. J. Int'l L. 115 (2018). Available at: https://repository.law.umich.edu/mjil/vol40/iss1/4.

[114] Article VIII and Article IX, The New York Convention, 1958, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf; See also Accession Kit for States intending to become Parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention, 1958, United Nations Commission on International Trade Law, Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/convnewyork1958_accession_kit_en.pdf.

[115] Article III, The New York Convention, 1958, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

as mentioned in the Convention and the Model Law which is also sought to make the recognition and enforcement of foreign arbitral awards easier across the world.[116] However, arbitral awards enforcement still remains an issue till date. The New York Convention leaves some room for the national legislatures of the Contracting States to determine certain rules with regard to how the award will be recognized and enforced.[117] Analyzing the context of the provision makes it clear that the language of Article III gives Contracting States freedom in fashioning the practical mechanics of award enforcement.[118] The provision indicates that the process of obtaining award recognition or enforcement is flexible and which is to be determined by the local procedures. It is evident from the language of the provision that it provides for ways as to how will the foreign arbitral awards will be granted recognition.[119] It does not state or mean to state that the recognition of foreign arbitral awards will not be granted at all. The treaty text gives no hint of a suggestion that a contracting state has the right to create roadblocks to award recognition.[120] The treaty creates a sort of full faith and credit obligation towards enforcement of foreign arbitral awards.[121] However, there are certain grounds on which the court can refuse recognition and enforcement of foreign arbitral award.[122] Treaty obligations do not simply require mere signaling national acceptance of a general norm.[123] There are different ways through which a state accepts treaty obligations. National acceptance in the form of a legislation is only one of the ways through which a state accepts its treaty obligations. What matters more is how the legislation gets properly implemented in order to fulfil the treaty obligations. The provisions of the national legislation creates rights to be invoked by private beneficiaries of arbitration clauses. These provisions of the national legislation are routinely enforced by national courts.[124]

---

[116] UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Available at: https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration.

[117] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[118] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[119] Ibid.

[120] William W. Park and Alexander A. Yanos, *supra* note 96.

[121] Ibid; See also Article III, The New York Convention, 1958, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[122] Article V, The New York Convention, 1958, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/New-York-Convention-E.pdf.

[123] William W. Park and Alexander A. Yanos, *supra* note 96.

[124] William W. Park and Alexander A. Yanos, *supra* note 96; See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

At this point it is important for us to discuss Article III of the New York Convention in details. Article III states that:

> 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.
> (Article III, The New York Convention, 1958)

Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards contains the basic provision that Contracting States shall recognize arbitral awards as binding, thus solidifying the Convention's pro-enforcement bias. Article III affirmatively obliges Contracting States to recognize and enforce foreign arbitral awards under the rules and procedure in the country where the award is being relied on, unless one of the Article V grounds is proven.[125] This provision has two parts. The first part requires the Contracting States to recognize and enforce arbitral awards under the enforcing court's rules of procedure, but those rules of procedure are subordinated to the conditions laid down by the New York Convention.[126] The second part provides that the Contracting States cannot discriminate against foreign arbitral awards by imposing substantially more onerous conditions or higher fees or charges on foreign awards than the conditions that are imposed on domestic awards.[127] It addresses the procedures governing the recognition and enforcement of awards, adopting the position that they are governed by the *lex fori,* i.e., the rules of the territory in which recognition and enforcement of the award is sought.[128] It contains important limitations regarding the application of *lex fori.* It makes clear that the application of *lex fori* to the recognition or

[125] Article III, The New York Convention, New York Convention Guide, Shearman & Sterling, Columbia Law School, Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

[126] Ibid; See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also William W. Park and Alexander A. Yanos, *supra* note 96.

[127] Article III, The New York Convention, New York Convention Guide, Shearman & Sterling, Columbia Law School, Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

[128] Bryan Cave Leighton Paisner, *Recognition and Enforcement of of Awards: UK Supreme Court allows appeal against order of security,* Blog Expert Legal Insights, Lexology, 2 March, 2017, Available at: https://www.lexology.com/library/detail.aspx?g=5d316d77-4ad6-4b11-a00f-ac2d750a98e4.

enforcement procedure may not be used to circumvent the conditions laid down in the following articles of the New York Convention.[129]

National courts and commentators have stressed the mandatory nature of this rule, evidenced by the use of the word "shall". Therefore, Contracting States are obliged to recognize and enforce foreign arbitral awards unless the requirement in Article IV are not met or unless one of the exceptions applies from Article V's exhaustive list of grounds for non-recognition and non-enforcement.[130] While Article III sets forth a presumptive obligation to recognize and enforce awards where the New York Convention's prerequisites are met, conversely, there is no affirmative obligation to deny recognition or enforcement.[131] This basically means that the New York Convention does not prevent a Contracting States from recognizing or enforcing a foreign arbitral award.[132] The language of Article III also suggests that it seeks to achieve a balanced solution whereby the Contracting States are not only permitted to apply its own national rules of procedure to recognize and enforce foreign arbitral awards but also ensuring that the recognition and enforcement of foreign arbitral awards will comply with a number of fundamental principles.[133]

This chapter of the thesis establishes that the Contracting States to the New York Convention have the obligation to enforce foreign arbitral awards in their jurisdiction. It is expected of the states to fulfill this obligation in accordance with the principle of *pacta sunt servanda.* States can become parties to the New York Convention and express their consent by any means as mentioned in the VCLT. Once they become parties, they are bound by the provisions of the Convention. The Contracting Sates after expressing their consent have enacted national legislations to incorporate the provisions of the New York Convention and the UNCITRAL Model Law in the domestic jurisdiction. The local legislations govern the enforcement of arbitral awards in the domestic jurisdictions of the Contracting States. Analyzing the national legislation and judicial decisions will prove whether the Contracting States are actually fulfilling the obligation of enforcing foreign arbitral awards.

---

[129] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also The New York Convention, 1958, Available at: http://www.newyorkconvention.org.

[130] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also The New York Convention, 1958, Available at: http://www.newyorkconvention.org.

[131] Albert Jan van den Berg, *The New York Convention of 1958:An Overview,* Available at: https://www.arbitration-icca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf.

[132] Ibid.

[133] Article III, The New York Convention, New York Convention Guide, Shearman & Sterling, Columbia Law School, Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

CHAPTER 3. PUBLIC POLICY EXCEPTION TO THE RECOGNITION OF FOREIGN ARBITRAL AWARDS

This chapter will provide an overview of the public policy exception. Firstly, the public policy exception under Article V(2)(b) of the New York Convention is explained. Public policy exception under the UNCITRAL Model Law is also explained. Secondly, different categories of public policy is explained. Finally, the author makes an analysis of how the public policy exception has been interpreted across different jurisdictions.

3.1. Public Policy Exception under Article V(2)(b) of the New York Convention

The New York Convention is very often regarded as the cornerstone of international commercial arbitration.[134] As has been stated above, the main objective of the Convention is to ensure the easement in the enforcement of foreign arbitral awards in the jurisdictions of the Contracting States. The Convention aims to secure the enforcement of arbitral award outside the country in which the award was made.[135] The Convention encourages enforcement of arbitral award by limiting the grounds based on which arbitral awards can be refused recognition and enforcement.[136] There are grounds for refusal of recognition and enforcement of arbitral awards mentioned in Article V of the New York Convention.[137] One of the grounds is public policy as mentioned under Article V(2)(b). If an arbitral award is considered to be against the public policy of the enforcing state, the court can refuse to recognize and enforce such awards. Article V(2)(b) states as below:

> "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:
> ……..
> b. The recognition or enforcement of the award would be contrary to the public policy of that country."
> [Article V(2)(b), The New York Convention, 1958]

It is important for us to examine the language of Article V(2)(b). It is clearly stated in the provision that an award will be refused recognition and enforcement if it is found that the award

[134] Albert Jan van den Berg, *When is an Arbitral Award Non-domestic in Nature under the New York Convention of 1958,* 1965, 6(1) Pace Law Review 25.
[135] The New York Convention, 1958, Available at: http://www.newyorkconvention.org.
[136] Troy Harris, *The Public Policy Exception to Enforcement of International Arbitration Awards Under the New York Convention,* 2007, 24(1) Journal of International Arbitration.
[137] The New York Convention, 1958, Available at: http://www.newyorkconvention.org.

is against the public policy of the country where the recognition and enforcement is sought. "That country" refers to the country where recognition and enforcement of the foreign arbitral award is sought.[138] The language of the provision is very plain and it throws light on the intention of the drafters which was to indicate that public policy means the national public policy, the public policy or *ordre public* of the state of the enforcing court. This interpretation is warranted because the purpose behind the exception was to permit a country to refuse to enforce and award that was contrary to its own system.[139] The language in Article V(2)(b) very clearly indicates an intention to provide ultimate control to that State to decide whether it will admit a foreign arbitral award into its legal order and use its executive powers to give effect to the award. On the plain reading of the provision it is clear that the Convention does not refer to any universally applicable definition or common interpretation of the term "public policy".[140] The Convention through the words of the Article V(2)(b) emphasizes that it is upon the Contracting States to decide what their public policy would amount to.[141] It is because of the fact that there is no clarity regarding the fact what the term public policy and the fact that courts all over the world had been interpreting it differently, that the International Bar Association Subcommittee carried out a project to review the public policy exception in over 40 jurisdiction. Like many legal experts, the International Bar Association Subcommittee is of the opinion and has stated in its report on the public policy exception that the term public policy was intentionally not defined by the drafters in the Convention which is why it is being interpreted and applied quite differently in all the jurisdiction across the world.[142] Many legal experts state that the reason behind not providing a concrete definition of the term public policy was to leave some room for the legislatures of the Contracting States to make their own rules which would ultimately lead in wide compliance of the Convention. The New York Convention also contemplates a significant role for domestic law. The New York Convention sought to create a legal regime that protects national autonomy in various regards and one that often

---

[138] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[139] Margaret Moses, *Public Policy: National, International and Transnational*, Kluwer Arbitration Blog, November 12 2018, http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/.

[140] Gary B. Born, International Arbitration: Law And Practice 18 (2d ed. 2016); See also Moses, *supra* note 139; See also Alex Mills , *The Dimensions of Public Policy in Private International Law,* Published in (2008) 4 Journal of Private International Law 201.

[141] Gary B. Born, *supra* note 140.

[142] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.

makes it more likely that a treaty will gain more adherents, since such an instrument protects state sovereignty on any open issues. However, language allowing or requiring reliance on domestic law creates some difficulties as an analytical matter[143] like it is causing in the case of public policy exception.

3.2. Drafting History of Article V(2)(b)

Since the public policy criterion is of fundamental significance, it does not come as a surprise that the 1927 Geneva Convention already contained a public policy restriction for the recognition and enforcement of foreign arbitral awards. Under Article 1(e) of the Geneva Convention, not only a violation of the public policy of the country of enforcement hindered recognition and enforcement, but also an award could not be enforced if it was contrary to the principles of the law of the country in which it was sought to be relied upon.[144]

The 1953 ICC draft omitted the reference to the violation of principles of law contained in the Geneva Convention and limited its Article IV(1)(a) to the violation of public policy. The UNCITRAL Committee on the Enforcement of International Arbitral Awards adopted a more comprehensive wording. According to its draft Article IV(h), recognition and enforcement was to be denied if "the recognition and enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of law of the country in which the award is sought to be relied upon.[145] By using restrictive words like "clearly" and "fundamental", the Committee intended to limit this ground to cases in which the recognition or enforcement of a foreign arbitral award would be distinctly contrary to the basic principles of the legal system of the country where the award is invoked. A number of governments and non-governmental organizations took the opportunity to comment on the Article IV(h) of the Committee draft.[146] They mainly requested omission or at least clarification of the "incompatible with fundamental principles of law" alternative. Those commenting saw no need for such a second path alongside the violation of public policy and feared that it would give rise to difficulties and open the question of a revision of the award as

[143] Strong, S.I., Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law (December 15, 2012). "Basic Concepts of Public International Law: Monism and Dualism," edited by Marko Novakovic, Forthcoming; University of Missouri School of Law Legal Studies Research Paper No. 2012-39. Available at SSRN: https://ssrn.com/abstract=2189905/

[144] Lim, C. L., *supra* note 57; See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[145] Gary B. Born, *supra* note 113.

[146] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also Gary B. Born, *supra* note 113.

to its substance. In the course of the first week of the Conference, a number of redrafts were submitted. The Netherlands redraft, which the Conference in its 11th meeting on May 27, 1958, designated as the basis for its further discussion, made it a ground for refusing recognition and enforcement "if the award would have the effect of compelling parties to act in a manner contrary to the public policy in the country of enforcement". Similarly, the German redraft and the three-power working paper proposed by France, Germany and the Netherlands restricted the wording incompatibility with the public policy of the state in which the award is sought to be relied upon. Other redrafts were closer to the original Committee draft. In 14th meeting held on May 29, 1958, the Conference discussed the different proposals amid some controversy. Most delegations which took the floor suggested upholding the Geneva Convention and the Commission draft. Some however, argued in favor of the German redraft and the three-power working paper. Japan warned of permitting an overly wide interpretation of public policy which would defeat the purpose of the Convention. At the end of its meeting, the Convention installed a working group to consider the then draft Articles III, IV and V. working Party No. 3 presented its report in the 17th Commission meeting on June 3, 1958.[147] The reason behind its wording "incompatible with the public policy of the country in which the award is sought to be relied upon" was that the public policy criterion should not be given a broad scope of application. The Working Party therefore recommended the deletion of references to the subject matter of the award and to fundamental principles of the law. Italy noted that a violation of *res judicata* would be covered by the public policy. The proposal by a number of delegations to add the term "fundamental principles of the law" was rejected by the Conference. Likewise, Israel's suggestion to equate illegal awards with those violating public policy did not prevail. Finally, the Convention adopted the Working Party's draft which obtained its ultimate wording by the Drafting Committee on June 6, 1958.[148]

3.3. Public Policy Exception under UNCITRAL Model Law

The Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law in the year 1985.[149] The national legislations were considered to be inconsistent with international standards. The Model Law was introduced in

[147] Gary B. Born, *supra* note 113.
[148] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[149] Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985); adopted by the United Nations Commission on International Trade Law on 21 June 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

the attempt to bring uniformity in international commercial arbitration law.[150] Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law contain a public policy exception.

According to Article 34(2)(b)(ii):

> "(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."
> [Article 34(2)(b)(ii), UNCITRAL Model Law, 1985]

The public policy ground of Article 34(2)(b)(ii) is less easy to determine and remains a fairly vulnerable point which can be easily attacked in the courts.[151]

According to Article 36(1)(b)(ii):

> "(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:
> ii. the recognition or enforcement of the award should be contrary to the public policy of this State."
> [Article 36(1)(b)(ii)]

The Model Law also does not define public policy in a similar manner as it has not been defined in the New York Convention.[152] Public policy is to be understood as serious departures from fundamental notions of procedural justice. This is all that is mentioned in the explanatory note by the UNCITRAL secretariat in regards to explaining the term 'public policy'.[153]

3.4. Public Policy Exception in other International Treaties

It is important to discuss how public policy exception has been discussed in other international treaties. As stated above, the predecessor to the New York Convention, Geneva Convention of 1927, also contained a provision in Article 1(e) which stated that an arbitral award would be refused enforcement if the award was contrary to the public policy or to the principles of the law of the country in which the arbitral award was sought to be relied.[154] Another international convention which contains a public policy exception is the 1975 Panama

---

[150] Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985); adopted by the United Nations Commission on International Trade Law on 21 June 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[151] Binder, *supra* note 86.

[152] Audley Sheppard, *Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards,* 2003, 19(2) Arbitration International; See also 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,* Available at: http://www.austlii.edu.au/au/journals/AUIntLawJl/2011/8.pdf.

[153] Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985); adopted by the United Nations Commission on International Trade Law on 21 June 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI-1985, United Nations publication, Sales No. E.87.V.4).

[154] Article 1(e), Convention on the Execution of Foreign Arbitral Awards, 1927.

Convention. Article 5(2)(b) of the Convention states that recognition and execution of an arbitral decision will be refused if the arbitral award is found to be contrary to the public policy of the state where the enforcement is sought.[155] The next international convention is the 1979 Montevideo Convention. Article 2(h) of the Convention states that if an arbitral award is manifestly contrary to the principles and laws of the public policy of the exequatur state, it will not be considered to have extraterritorial validity in the States Parties.[156]

The 1983 Riyadh Convention also contains a provision which has the public policy exception. Article 30 of the Convention states that recognition of judgments shall be refused if the recognition of the judgment will be in contradiction with the stipulations of the Islamic Shari'a, the provisions of the constitution, public order or the rules of conduct of the requested party.[157] The 1987 Amman Convention also contains a public policy exception provision. Article 35 of the Convention states that the Supreme Court of the contracting states can refuse the enforcement of an arbitral award if the award is contrary to the public order.[158]

Another important international convention on enforcement of arbitral award is the ICSID Convention of 1965. The ICSID Convention is also known as the Washington Convention. The ICSID Convention does not expressly contain a public policy exception for the refusal of enforcement of arbitral awards.[159] There are certain grounds for annulment of the award that have been mentioned in Article 52 of the Convention.[160] Some grounds of annulment does implicitly fall within the scope of public policy. These grounds are if there was corruption on the part of member of the Tribunal and that there has been a serious departure from a fundamental rule of procedure.[161]

3.5. General Concept of Public Policy

[155] Article 5(2)(b), Inter-American Convention on International Commercial Arbitration, Concluded at Panama City on 30 January 1975.
[156] Article 2(h), Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards, Concluded at Montevideo on 8 May 1979.
[157] Article 30, Riyadh Arab Agreement for Judicial Cooperation, 6 April 1983.
[158] Article 35, Arab Convention on Commercial Arbitration, Concluded at Amman on 14 April 1987.
[159] Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, at 222.
[160] Article 52, Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965.
[161] Article 52, Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965.

a) Overview

The terms public policy and *ordre public* are mostly used interchangeably.[162] There are several grounds under which a party to an arbitration process can resist the enforcement of the arbitral award. However, the parties most commonly resort to the public policy exception for resisting the recognition and enforcement of an arbitral award in international commercial arbitration. As discussed earlier, since there is no concrete definition of the term public policy the domestic courts have interpreted the term differently despite the fact that the domestic arbitration laws of the Contracting States have been modeled along the lines of the UNCITRAL Model Law on Arbitration.[163]

Public policy is often invoked, but its manifestations remain uncommon, and recognition and enforcement of a foreign award are rarely refused under Article V(2)(b) of the Convention. However, in India we can see a difference in attitude as far as public policy exception is concerned which is evident from a serious of court decisions that ultimately acts as a hindrance to development of an internationally accepted concept of public policy.[164]

The practical relevance of public policy manifesting can be explained with how difficult it is to grasp the concept of public policy.[165] In the words of an English court:

> "Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail."
> (*Richardson v. Mellish,* [1824] All E.R. 258, 266)

Public policy exception is like a safety-valve. This safety-valve helps the Contracting States to prevent the enforcement of any foreign arbitral awards which may be against their public policy and which they consider so intrusive that such awards are irreconcilable with the legal system.[166] This purpose is consistent with the public policy defense's vagueness. The crucial significance of public policy for the Contracting States also explains why it is the only ground under which the court can refuse recognition and enforcement of foreign arbitral awards on its own motion. A public policy defense is a common element in conventions on recognition and

---

[162] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[163] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also Gary B. Born, *supra* note 113.
[164] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[165] *Richardson v. Mellish*, [1824] All E.R. 258, 266.
[166] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also Gary B. Born, *supra* note 113.

enforcement and was also not questioned during the 1958 Conference. It is most unlikely that the Convention would have had the success it actually had if Contracting States were denied the possibility of retreating to public policy.[167]

However, there are some undesirable obstructions caused due to the public policy exception. The obvious downside of the public policy defense, apart from its ambiguity, is that it opens the floodgates for obstructing the recognition and enforcement of foreign arbitral awards.[168] If the term public policy is defined in broad terms then it would definitely lead to situations where the Contracting States would deny any undesired foreign award recognition and enforcement quite often. This would totally be against the principles of pro-arbitration and pro-enforcement that are the underlying principles of the New York Convention. It would lead to frequent instances where the Contracting States would take the defense of public policy to deny recognition and enforcement to arbitral awards.[169] There are a number of court decisions which have pursued this avenue. Moreover, what is an enforcement hostile public policy complicating cross-border trade to some may be protection from prejudiced awards to others. Regardless of how a state handles public policy defenses, the concept's vagueness can incentivize abusive objections brought by the party resisting recognition and enforcement. These risks associated with the public policy defense have caused numerous attempts to limit the concept of public policy and to increase its predictability. However, the tension between its sensible use as a safely-valve and its abuse is unlikely to be ever fully resolved.[170]

Article V(2)(b) explicitly stipulates the law of the country where recognition and enforcement is sought as governing the public policy. Moreover, the public policy of no other source could satisfy the public policy defense's function of providing states with a safety-valve. The public policies of third countries including the countries where the parties of the arbitration are seated are of no relevance unless the recognition country's public policy incorporates them by way of reference. However, if the arbitral award violates the public policy at the seat of arbitration, it can be set aside in that country so that recognition and enforcement can be denied under Article V(1)(e).[171]

---

[167] C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[168] Ibid.
[169] Ibid.
[170] Bartlomiej Orawiec, *The Public Policy Exception Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The UK Perspective),* Comparative Law Review, 21, 2016, Available at: https://apcz.umk.pl/czasopisma/index.php/CLR/article/viewFile/CLR.2016.003/10960.
[171] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012; See also Gary B. Born, *supra* note 113.

b) Domestic public policy, international public policy and transnational public policy

There has always been an ambiguity regarding what public policy means. The vagueness of the term public policy is such that it becomes very difficult to ascertain what comes under the ambit of public policy and what does not.[172] Public policy can be domestic or international, however, the scope of public policy is variable. It is often referred to as an amorphous exception.[173] The public policy exception is also equated with an unruly horse.[174] Public policy includes both domestic and international features. On the one hand, public policy operates in its entirety in domestic relationships. But when applied to international arbitration, it serves as a limitation on the access of foreign law to the domestic law. It is important for us to examine the international character of public policy since it is relates to the recognition and enforcement of foreign arbitral awards. Domestic public policy of a state is the set of standards that a state decides to abide by in their domestic matters. It is influenced by the kind of legal system that is prevalent in that state. A state apart from having domestic public policies also has a set of international public policies. A state's international public policy tends to be interpreted more narrowly than its domestic policy, such that the foreign arbitral award is less likely than a domestic one to be refused recognition and enforcement.[175] According to scholars, a state's international public policy is not something that would be considered a truly international public policy or a set of transnational public policy. It is important for us to understand that a state's international public policy is a set of standards set by the state itself for dealing with recognition and enforcement of foreign arbitral awards. So this set of standards is set by the state itself and is defined at the state level. It will never be the same standards as set by other states. There will always be difference in standards of the international public policy which a state sets for itself as compared to the standards of other states. The international public policy standards set by states are the public policy of that state which will be different from their domestic public policy. As stated earlier, these international standards will differ from state to state. For uniformity in the interpretation there has to be a separate set of international standards set which the states can apply when dealing with the recognition and enforcement of foreign

[172] Elie Kleiman and Claire Pauly, *Arbitrability and Public Policy Challenges,* Available at: https://globalarbitrationreview.com/chapter/1178487/arbitrability-and-public-policy-challenges

[173] Matthew Gearing, *The Public Policy Exception: Is the Unruly Horse Being Tamed in the Most Unlikely of Places?,* Kluwer Arb. Blog (Mar. 17, 2011), http://arbitrationblog.kluwerarbi tration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the- most-unlikely-of-places-4/; See also Moses, *supra* note 139.

[174] *Richardson v. Mellish*, [1824] All E.R. 258, 266.

[175] Moses, *supra* note 139.

arbitral awards.[176] The question that arises here is that what does international public policy include. The International Law Association Committee on International Commercial Arbitration defines international public policy in its final report.[177] It has defined international public policy as follows:

> The body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of the award would entail their violation on account either of the procedure pursuant to which it was rendered or of its contents.
> [Recommendation 1(c), Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 253]

Given the lack of uniformity and the risks associated with national public policy standards, it is comprehensible that legislatures, courts and scholars have undertaken attempts to internationalize the standard, in particular by invoking a standard of international public policy. Under this catchphrase, a number of different concepts are being discussed including an international standard deriving from international sources, contemplated by standards common to nation states; a national standard which is in conformity with international sources or simply a national standard specifically for international awards which is more generous than for domestic awards.[178] The first and second approach can effectively replace an autonomous national standard of public policy with an international or supranational standard. Such substitution is irreconcilable with the wording and purpose of Article V(1)(b). The only approach compatible is the third approach. The third approach is the concept of an international public policy as a national standard for the recognition and enforcement of international arbitral awards as opposed to national public policy as the national standard for the recognition and enforcement of domestic awards. International public policy is commonly understood to be narrower than domestic public policy; not every public policy ground for which a domestic award may be denied recognition also qualifies for denial of recognition and enforcement of international awards.[179] While the distinction of national and international public policy is commonly used, it is not imposed by Article V(2)(b). Since the Convention provides the Contracting States with the freedom to shape their public policy standard, they are allowed to define separate standards for domestic and international awards just as they are entitled to apply

---

[176] Nivedita Chandrakanth Shenoy, *Public Policy under Article V(2)(b) of the New York Convention: Is there a Transnational Standard?*; See also Moses, *supra* note 139; See also Mills, *supra* note 140.
[177] Pierre Mayer & Audley Sheppard, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 19 ARB. INT'L 249, 253 (2003).
[178] Shenoy, *supra* note 176.
[179] Moses, *supra* note 139; See also Mills, *supra* note 140.

a uniform standard. However, for reasons of comity, the best practice standard involves a generous treatment of foreign arbitral awards.[180]

Transnational or supranational public policy is understood to imply something different from international public policy. It has been described as a concept that involves identification of principles that are commonly recognized by political and legal systems around the world.[181] According to some scholars, transnational public policy is a set of standards which is comprised of fundamental rules of natural law. It is also comprised of principles of universal justice, *jus cogens* as recognized under public international law and general principles of morality that is accepted by the civilized states. It is more like standards, principles and accepted norms of conduct that form a consensus among nations.[182] There are some legal experts who have taken it upon themselves to define transnational public policy. Jacob Dolinger defines it as a "world public policy" that establishes universal principles in various fields of international law and relations to serve the higher interests of the world community and the common interests of the individual nations.[183] Another legal expert Buchanan states in his research that while transnational public policy represents the common fundamental values of the world community, international public policy reflects a particular or selfish character. What he means by this is that international public policy is traceable to its origin to the power of a sovereign state. On the other hand, transnational public policy does not belong to any state. It belongs to the entire international community as a whole.[184] It depends on the countries if they would want to change how they interpret and apply the public policy exception. If a transnational perspective to public policy is adopted by the countries, it is sure to bring about certain uniformity in the way courts apply public policy exception when dealing with enforcement of foreign arbitral awards. Adopting a transnational perspective to a certain extent will encourage the domestic courts of the Contracting States to become less parochial.[185]

---

[180] Moses, *supra* note 139.

[181] Fazilatfar, Hossein, Transnational Public Policy: Does it Function from Arbitrability to Enforcement? (December 1, 2011). 3 (2) City U. Hong Kong L. R. (2012) . Available at SSRN: https://ssrn.com/abstract=2397315; See also Shenoy, *supra* note 176.

[182] Shenoy, *supra* note 176.

[183] Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws*, 17 Tex. Int'l L.J. 167, 172 (1982); See also Shenoy, *supra* note 176; See also Mills, *supra* note 140; See also *The Public Policy and Mandatory Rules of Third Countries in International Contracts*. (2006). Journal of Private International Law. 2, (1), 27-70. Research Collection School Of Law. Available at: https://ink.library.smu.edu.sg/sol_research/881; See also Fazilatfar, Hossein, *supra* note 181.

[184] David J.A. Cairns, Transnational Public Policy and the Internal Law of State Parties, TDM (Apr. 27, 2007), https://www.transnational-dispute-management.com; See also Julian D.M. Lew, *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals,* 2018, ISBN: 978-84-17385-07-1.

[185] Moses, *supra* note 139; See also Louis Kossuth, *Transnational (or Truly International) Public Policy and International Arbitration,* Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series, 1986 New York Volume 3, Kluwer Law International, pp. 258-318, Available at:

It is still not settled among the nation states what type of public policy they would be applying. The interpretation and application of public policy exception is still far from gaining uniformity across the world.

3.6. Interpretation of public policy- Inaccuracies or a standard interpretation?

> "Interpretation and application of the public policy exception in most jurisdiction is usually on the side of enforcement. This is termed as the pro-enforcement bias. Pro-enforcement is itself a public policy."[186]

Given the dependence of public policy on national definitions, it is used as an instrument by national courts to safeguard the interests of a single state, especially when a foreign legal element would otherwise undermine those interests. It is recognized as a safety valve invoked by a state to protect its national interests.[187] It has been stated several times that it is up to the domestic courts of the Contracting States to decide whether or not any foreign arbitral award can be denied recognition and enforcement on the ground that it is against the public policy of that country. It is all because of the fact that there still remains an ambiguity over the term public policy. There is a changing character of public policy as is evident from the arbitration practice.[188] It is because of these factors that the domestic courts of the Contracting States are not able to stick to one uniform interpretation of the term public policy in dealing with foreign arbitral awards. Some experts also believe that this situation is concerning because of the fact that many national courts may use public policy self-interestedly for local and personal interests. What their main concern is that if all the Contracting States start using the defense of public policy for their personal interests, it will result in a high rate of non-enforcement of arbitral award which will ultimately defeat the aim of uniformity in international commercial arbitration.[189] The International Law Association in its interim report states that: "It is difficult to ascertain whether the practice of courts is less rigorous when asked to recognize or enforce

---

https://www.lalive.law/data/publications/58_-_Transnational_(or_Truly_International)_Public_Policy_and_International_Arbitration__in_Comparative_Arbitration_Practice_and_Public_Policy_in_Arbitration_1986.pdf; See also Fazilatfar, Hossein, *supra* note 181.

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

[187] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010).

[188] Malhotra, O. (2007), *The Scope of Public Policy under the Arbitration and Conciliation Act, 1996*, Student Bar Review, 19(2), 23-29. Retrieved June 13, 2020, from www.jstor.org/stable/44306673.

[189] Anton Maurer, The Public Policy Exception under the New York Convention: History, Interpretation and Application (Juris, 2012).

a foreign arbitral award than they are when asked to set aside an award made in their own jurisdiction."[190]

It has been stated above numerous times that the domestic public policy of a state is construed in a wider sense as compared to the international public policy of the state. However, there are times when a court construes public policy widely when dealing with a foreign arbitral award. The domestic courts of the Contracting States are known to have shifted from their earlier stance and taking a new approach which makes it difficult to have a uniform approach universally among the domestic courts of the states when it comes to public policy exception in international commercial arbitration.

A narrow approach to the public policy exception is believed to facilitate the enforceability of arbitral awards. The International Law Association in its 70th Conference observed that the courts seldom articulate their reasoning when applying the public policy exception.[191] This was one of the reasons that in the resolution of the International Law Association, there was a specific recommendation regarding this.[192] Recommendation 1(g) of the ILA Resolution stated that:

> If the court refused recognition or enforcement of the arbitral award, it should not limit to a mere reference to Article V(2)(b) of the New York Convention 1958 or to its own statute or case law. Setting out in detail the method of its reasoning and the grounds for refusing recognition or enforcement will help to promote a more coherent practice and the development of a consensus on principles and rules which may be deemed to belong to international public policy.
> (Recommendation 1(g) of the ILA Resolution, Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002)

When a matter is referred to a court for enforcement proceedings, the court or the relevant authority first identifies if there is an applicable public policy. The question analyzed by the court is whether the alleged public policy falls within the public policy exception. It is upon the court to decide whether the public policy in question is part of the international legal standard which has the consensus of the Contracting States. It should be confined to mandatory rules of public policy. The next thing that the court does is to identify if there is any violation of the applicable public policy. While deciding if there is a violation of the applicable public

[190] ILA Interim Report 230.
[191] Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002.
[192] Recommendation 1(g) of the ILA Resolution, Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002.

policy, the court will face certain questions as to what would exactly amount to being contrary to the applicable public policy. It will be very subjective owing to the fact that there is no universally accepted standard for deciding that. It may be violation of public policy for one judge but may not be for another. What may be a public policy violation in one country may not be public policy violation in another country. The court then uses its discretion to allow or refuse the recognition and enforcement of foreign arbitral awards. According to Article V(2)(b) of the New York Convention, it is upon the enforcing country's domestic court's to decide whether they want to allow or deny the recognition and enforcement of foreign arbitral awards after taking into consideration all the factors. The court can enforce wholly or partially the foreign arbitral awards.[193]

Another important aspect that the enforcing courts have to abide by is the no merits review principle when it comes to recognizing and enforcing foreign arbitral awards. The no merits review principle is corollary to the principle of judicial non-intervention or minimal judicial intervention in arbitration.[194] The judiciary of the enforcing court is expected to not intervene too much in the matters of arbitration. When deciding enforcement proceedings, it is expected of the deciding to courts to focus on the issues that are being challenged rather than reviewing the award as a whole again.[195] The award as whole cannot be reviewed again by the enforcing court which is only deciding on the enforcement issues. The award by the arbitral tribunal is deemed to be final and binding on the parties unless they challenge it based on other factors. The court is technically not allowed to question the reasoning in the award, the evidence, the underlying facts or any new evidence during the enforcement proceedings. The International Law Association has analyzed this issue in details in its interim and final reports. According to the International Law Association, the enforcement court will not need to look further than the award itself when determining whether the enforcement of a foreign arbitral award would contravene substantive public policy. However, when the court is dealing with procedural public policy, the court may need to carry out a wider enquiry.[196]

The domestic courts of the Contracting States interpret public policy entirely at their own discretion and a lot also depends on the attitude of the court and the particular judge. The

---

[193] Maurer, *supra* note 189; See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010).

[194] Paul Obo Idornigie, *Anchoring Commercial Arbitration on Fundamental Principles*, (2004) 23 The Arbitrator & Mediator 65, 75; See also Justice David Byrne, *The Evolution of Commercial Arbitration in Victoria*, (1995) 11 The Arbitrator 168, 174-175.

[195] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (4th ed, 2004) 500; See also Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (1981) 270.

[196] International Law Association Interim Report.

International Law Association tried to deal with this problem in its reports by formulating a universally accepted concept of international public policy but they failed. They failed to reach a consensus as to what should constitute international public policy. There is only a vague idea of what international public policy is just like the vagueness surrounding the public policy exception as mentioned in the New York Convention.

There still exists a kind of uncertainty as to how the domestic courts across the world should interpret the public policy exception. However, it has been seen that in most developed arbitral jurisdictions, the public policy exception has been interpreted narrowly by the domestic courts of the Contracting States. Most of the countries have adopted a pro-enforcement attitude towards foreign arbitral awards.

An example of developed arbitral jurisdiction is the United States of America. The United States have generally been consistent in recognizing and enforcing awards rendered in both domestic and foreign arbitrations.[197] It is evident from the decisions of the US courts that they have taken a conservative approach to interferences with international arbitration and the issue of public policy. The landmark case highlighting this is the case of *Scherk v. Alberto-Culver Co.*[198] The court in that case was of the opinion that there would be a problem in in conducting business across the world if all the disputes were to be settled according to the American laws. Another case highlighting the pro-enforcement bias of the American courts is the case of *American Construction Machinery & Equipment Corporation Ltd v. Mechanized Construction of Pakistan Ltd.*[199] In this particular case, the Southern District of New York ignored the fact that a Pakistani Court had declared both the arbitration agreement and the ICC arbitral award invalid. Instead of setting aside the arbitral award, the US Court stated that the American public policy would be violated if the arbitral award was not enforced. In another case, a judge observed that the courts should avoid expansive construction of the public policy exception since that would vitiate the New York Convention's basic effort to remove obstacles to enforcement. He stated: *"To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility."*[200]

The approach adopted by the US Court in the *Parsons & Whittemore*[201] case has been applied ever since in most of the cases. The US courts have taken a restrictive approach on

---

[197] Pedro J. Martinez Fraga, *The American Influence On International Commercial Arbitration, Doctrinal Developments And Discovery Methods* (2009), At 6.
[198] 417 US 506 (1974).
[199] 659 F. Supp 426 (SDNY, 1987).
[200] Parsons & Whittemore Overseas Co., Inc. v. Société Générale de l'Industrie du papier (RAKTA), 508 F.2d 969, 975 (2d Cir. 1974).
[201] Ibid.

relation to the public policy exception. The courts are of the opinion that any interference by the national courts should be minimal and that the public policy exception should be construed narrowly. The decisions of the US courts make it very clear that they have adopted a uniform approach in all the cases. It seems to be unambiguous. In the US, the aim of promoting international arbitration and international business relations consistently outweigh public policy concerns in the enforcement of foreign arbitral awards.[202]

France also adopts a similar approach as the US. They apply pro-enforcement approach in dealing with cases with public policy exception. The French courts in their decisions have drastically limited the scope of public policy.[203]

Common law jurisdiction and a popular arbitration location Hong Kong courts have been firm in holding that public policy defense has to be construed narrowly. Most of the decisions from the courts of Hong Kong prove that the courts have constantly adopted a conservative approach.[204] Singapore is another place which is preferred for arbitration. The courts in Singapore have also adopted a conservative approach and have stated in most of their decisions that the public policy defense has to be construed narrowly. The courts through their decisions prove that they believe in less-interventionist approach when it comes to international commercial arbitral.[205]

However, the Indian courts are often criticized for having a totally different approach when it comes to public policy exception under the New York Convention. The Indian Arbitration and Conciliation Act which is modeled along the lines of the UNCITRAL Model Law was introduced in the year 1996.[206] The aim of introducing this piece of legislation was to reduce the judicial intervention in the arbitration process. However, it is evident from the decision of the Indian judiciary that it is still interfering in matters of international arbitration. The Indian judiciary is known to interfere the most during the enforcement proceedings of foreign arbitral awards.

---

[202] L Reed and J Freda, 'Narrow Exceptions: A Review of Recent US Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention', Journal of International Arbitration, (2008) Vol. 25(6) 649 at 656.

[203] CA Paris, November 18, 2004, Thalès v Euromissile, J.D.I. 357 (2005).

[204] Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 H.K.C. 205, [1999] 1 H.K.L.R.D. 665 (C.F.A.) (H.K.); Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, [2007] 5 H.K.C. 91 (C.A.), [2009] 2 H.K.C. 303 (C.F.A.) (H.K.); and Gao Haiyan v. Keeneye Holdings Ltd., [2011] 3 H.K.C. 157, [2012] 1 H.K.C. 335 (C.A.) (H.K.).

[205] VV v. W, [2008] SGHC 11, [2008] 2 S.L.R. 929 (Sing.); PT Asuransi Jasa Indonesia (Persero) v. Dexia Bank SA, [2006] SGCA 41, [2007] 1 S.L.R. 597 (Sing.); and AJU v. AJT, [2011] SGCA 41, [2011] 4 S.L.R. 739 (Sing.).

[206] Preamble, The Arbitration and Conciliation Act, 1996, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.

The Supreme Court of India has been considered infamous for a series of where the scope of the public policy exception was widened to include mere error of law. This approach which has been rejected by the United States of America as well as most of the European jurisdictions was being endorsed by the highest court in India i.e., the Supreme Court of India. The Indian Arbitration and Conciliation Act, 1996 is the law governing the arbitration process in India and has been amended twice in 2015 and 2019. When the Act was amended in the year 2015, the amendment sought to remove patent illegality as an additional ground for proving public policy exception.[207] This has been upheld in many recent cases, the most notable being the case of *Cruz City 1 Mauritius Holding v. Unitech Limited*[208]. The court very specifically held that the public policy exception has to be construed narrowly. This has been the recent trend that is being followed by the Indian judiciary which has given us hopes that this approach will be followed uniformly from now onwards. The legal fraternity in India is being quite optimistic as far as this is concerned but they are cautious at the same time too because the Indian judiciary is known to oscillate from one approach to another.

India offers a good example to discuss this question because the Government of India has made efforts to make India an arbitration friendly nation. The Indian Arbitration and Conciliation Act of 1996 was amended twice (2015 & 2019) to introduce changes so as to make India a favorable seat for arbitration. However, as stated above that Indian courts have been quite infamous for adopting erratic approach when interpreting the public policy exception. This is evident from the decisions of the Supreme Court of India in a series of cases *Renusagar*[209] to *Sri Lalmahal*[210] and *Saw Pipes*[211] to *Western Geco*[212]. All these cases depict the contrasting approaches adopted by the Indian judiciary. The Indian judiciary has committed to reduced judicial intervention in arbitration process and this is evident from Section 5 of the Indian Arbitration and Conciliation Act. However, if the judicial decisions are analyzed, it portrays how the Indian judiciary is far from fulfilling this commitment. The Indian courts have assumed the power to modify arbitral awards and assumption of this power clearly indicates that the judiciary in India is of the opinion that intervention is necessary in the process of arbitration. In some of the other decisions, the courts in India have went to expand the meaning

---

[207] Shaheen Parikh et. al, *Arbitration in India- A Story of Growth and Opportunity,* Cyril Amarchand Mangaldas, 2019, Available at: http://www.cyrilshroff.com/wp-content/uploads/2019/06/Arbitration-in-India-—-A-Story-of-Growth-and-Opportunity.pdf.

[208] EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.

[209] AIR 1994 SC 860.

[210] (2014) 2 SCC 433.

[211] (2003) 5 SCC 705.

[212] (2014) 9 SCC 263.

of public policy. While expanding the meaning the courts have also added an additional ground of patent illegality to prove that there was a violation of public policy. It can be said that the judiciary in India clearly wants to assert its superiority so that it can control and regulate the process of arbitration. Assumption of power to modify arbitral awards and expanding the scope of public policy act as detriment to the arbitration framework in India. Another major step taken by the courts in India was the peculiar broadening of the interpretation of 'fundamental policy' which resulted in the adamant compliance to 'all principles which ensure justice'. The Supreme Court of India had warned about this in its decision in the case of *Renusagar*[213]. In that case, the Supreme Court of India rightly cited the US Supreme Court decision in *Fritz Scherk v Alberto-Culver*[214] which states that '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.'[215] Another landmark US decision in the case of Mitsubishi was cited by the court in which it was stated: 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system' should be warranted[216]. The two abovementioned instances of broadening public policy are the most recent invasion of the autonomy of the parties and the integrity of the arbitral process. On the other hand in a recent case of *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*[217] decided in 2020, the Supreme Court of India took a narrow approach to the public policy exception. It is still not clear if the Indian courts will be sticking to one proper interpretation. In yet another recent case, the Supreme Court of India refused enforcement of an arbitral award and adopted a wider interpretation for the public policy exception.

At the end of this chapter it can be concluded that the term 'public policy' has not been defined in any of the international instruments concerned with international arbitration i.e., the New York Convention and the UNCITRAL Model Law on International Commercial Arbitration. The term 'public policy' has been interpreted differently by the national courts of the Contracting States because of which there is no uniformity on its interpretation. There have been different notions of public policy i.e., national public policy, international public policy and transnational public policy. There is still confusion as to which one should be applied in order to bring about some uniformity in the interpretation of the public policy exception. Most of the states have stuck to a narrow interpretation of the term 'public policy' as opposed to a

[213] AIR 1994 SC 860.
[214] 417 U.S. 506 (1974).
[215] Ibid.
[216] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).
[217] Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

wider interpretation. This has resulted in the establishment of an international standard of narrow interpretation of the public policy exception in order to ease the enforcement proceedings for foreign arbitral awards. The Indian judiciary has been criticized for not adopting a narrow interpretation of the public policy exception. The Indian judiciary seems to be adopting a contrasting approach in all the cases that they decide. These cases will be analyzed in the subsequent sections, which will prove that because of this contradictory approach of the judiciary, India is not fulfilling its obligation of enforcing foreign arbitral awards.

CHAPTER 4. INDIAN JUDICIAL PRACTICE AND PUBLIC POLICY EXCEPTION

In this chapter, an overview of the arbitration laws in India will be provided. Landmark cases on this subject matter will be described first and then the decisions delivered by the Indian judiciary will be analyzed. The problem of non-enforcement of foreign arbitral awards by invoking the public policy exception will be dealt with in this chapter. It will be analyzed as to whether India is in breach of its obligations under the New York Convention. It will also be analyzed how in case of breach of international obligations can a state be held responsible for the non-enforcement of foreign arbitral awards. Overall, it will be analyzed as to whether public policy exception is being used as an exception to comply with international obligations.

4.1. Brief History of Arbitration Laws in India

India became a signatory to the Convention on the Recognition and Enforcement of Arbitral Awards or the New York Convention as it is known popularly on June 10, 1958 and ratified the same on July 13, 1960.[218] India has often been criticized as a non-friendly arbitration jurisdiction by the international jurisdiction mainly due to the decisions delivered by the courts here and also the fact the judiciary had been following a policy of excessive judicial intervention.[219] Before we analyze the position of the Indian courts with regards to the public policy exception under the New York Convention, it would be worthwhile to discuss the brief history of arbitration laws in India. India's arbitration laws can be traced to its very early times and even religious texts have evidence that arbitration as means for dispute resolution has been used for a very long time now.[220]

India's arbitration laws can be traced to its long history and tradition.[221] In early times, there was a tradition of settling disputes between the parties where they would choose the tribunal.

---

[218] Kumar A., Upadhyay R., Jegadeesh A., Chheda Y. (2017) Interpretation and Application of the New York Convention in India. In: Bermann G. (eds) Recognition and Enforcement of Foreign Arbitral Awards. Ius Comparatum - Global Studies in Comparative Law, vol 23. Springer; See also Tariq Khan and Muneeb Rashid Malik, *History and Development of Arbitration Law in India,* 30 April, 2020, Bar and Bench, Available at: https://www.barandbench.com/columns/history-and-development-of-arbitration-law-in-india; See also Shaheen Parikh, *supra* note 207.

[219] SC Limits Scope of Public Policy in Foreign Arbitral Awards, Singapore International Arbitration Centre, www.siac.org.sg, Available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/SC_Limits_Scope_of_Public_Policy_in_Foreign_Arbitral_Awards.pdf.

[220] Bibek Debroy & Suparna Jain, *Strenghtening Arbitration and its Enforcement in India-Resolve in India,* Available at: https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf.

[221] Sumit Kumar, *Historical Growth of Arbitration Law in India,* IJITKM 0973-4414, Volume-10, Number-2, Jan-June 2017, Available at: http://csjournals.com/IJITKM/PDF%2010-2/21.%20Sumit.pdf; See also Ambransh

During that period, arbitrators would belong to different grades and there were provisions for appeal where an aggrieved party could appeal against the award of lower grade arbitrator if the award was not deemed satisfactory to the aggrieved party. This is similar to the hierarchy of courts that we have now in this present era. Arbitration as a means to resolve dispute between parties can be found in the ancient texts of *Yajnavalka* and *Narada.*[222] In those texts, reference has been made to three courts which were popular then. The three courts known to have adopted arbitration as a means of dispute settlement were *Puga, Sreni and Kula.*[223] Apart from that, there were *Panchayats* at the village level who had adopted alternate dispute resolution mechanisms. The British ruled India for a very long time and the British laws have been known to influence Indian laws for quite some time now. During its reign, the British government through the East India Company introduced a numerous legislations in which arbitration was recognized as a form of dispute settlement. Some of the legislations include the Bengal Regulation Act of 1772, 1780, 1781 and the Cornwallis Regulation of 1787. These legislations were introduced in the presidency town of Calcutta. After this, the Bengal Regulation Act 1793, the Madras Regulation Act of 1816 and the Bombay Regulation Act of 1827 were introduced which also provided for arbitration as a means to settle disputes.[224] In 1859 when the Civil Code of the Courts was codified, there were provisions for arbitration. Subsequently, in the Codes of Civil Procedure of 1877 and 1882 there were provisions for arbitration as well. Though there were no major changes brought about by the subsequent amendments.[225] In 1899 the Indian Arbitration Act was enacted. Subject matter of suits could not be settled by arbitration. the Act was focused to solve disputes where the parties had agreed to resolve their dispute through arbitration and court intervention was not required. The Act only applied in the Presidency towns. Further, it did not permit arbitration in disputes which were being adjudicated through a suit. In 1908, the Civil Procedure Code was amended. This Amendment removed the limitation of arbitration being applicable only in the Presidency towns.[226] It was felt that there should be modifications to the arbitration laws prevalent then. During the 1920s,

---

Bhandari, *History of Evolution of Arbitration Law in India,* 5 November, 2019, B&B Associates LLP, Available at: https://bnblegal.com/article/history-of-evolution-of-arbitration-law-in-india/.

[222] Debroy & Jain, *supra* note 220.

[223]Debroy & Jain, *supra* note 220; See also Parvez, Shahid, Development of Arbitration Law in India (November 9, 2009). Available at SSRN: https://ssrn.com/abstract=1502812 or http://dx.doi.org/10.2139/ssrn.1502812; See also India: Evolution of Arbitration in India, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india.

[224] Sumit Kumar, *supra* note 221; See also Shaheen Parikh, *supra* note 207.

[225]Debroy & Jain, *supra* note 220; See also Shahid, *supra* note 223; See also India: Evolution of Arbitration in India, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india; See also Bhandari, *supra* note 221.

[226] Bhandari, *supra* note 221.

the Civil Justice Committee was appointed and they also had the task of coming up with suggestions for modifying and bringing positive changes to the arbitration laws. It did take time for changes to be introduced and initially it was not very successful. In 1938 the Government of India finally appointed an officer to revise the Arbitration Law of India. This time around it was expected to yield positive results. The Arbitration Laws back then was heavily influenced by the British Arbitration Laws.[227] This led to the enactment of the first proper Arbitration Act for India. In the year 1940 the first Arbitration Act of India was enacted. It is important to note that the Act of 1940 did not have provisions to deal with the enforcement of foreign arbitral awards. There was a separate law which dealt wholly with the recognition and enforcement of foreign arbitral awards.[228] Foreign Awards (Recognition and Enforcement) Act, 1961 was enacted which shows that India had acted towards its obligations under the Geneva Convention of 1927 and the New York Convention of 1958 to which India was a signatory.[229] The Act did not provide positive results and was found to be unsatisfactory because it allowed excess court intervention which ultimately defeats the whole purpose of arbitration. It was only time when the functioning of the Act was questioned and in 1977 the Law Commission of India examined the Act on the ground of delay and hardship caused due to clogs that affect smooth arbitral proceedings. It was recommended by the Commission to amend certain provisions of the Act. They were in favor of bringing about only certain changes to the Act rather than enacting a whole new legislation. However, a new Act was enacted in the year 1996. The Indian Arbitration and Conciliation Act was enacted in 1996 which was based on the 1985 UNCITRAL Model Law.[230]

After the enactment of the 1996 Act, it was realized that this Act also led to some practical problems. There were several reports by different Commission which came up with suggestions to rectify the faults in the 1996 Acts. Some of the Reports that highlighted the challenges are the 176th Report of the Law Commission (2001), Justice B.P. Saraf Committee (2004), the Report of the Departmental Related Standing Committee on Personnel, Public Grievances, Law and Justice (2005) and the 246th Report of the Law Commission (2014).[231] In 2015, amendments were proposed to the 1996 Act and finally the Indian Arbitration and

---

[227] Ibid.
[228] Ibid.
[229] Shahid, *supra* note 223; See also See also India: Evolution of Arbitration in India, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india.
[230] Preamble, The Arbitration and Conciliation Act, 1996, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.
[231] Krishna Sarma, Momota Oinam, Angshuman Kaushik, *Development and Practice of Arbitration in India- Has it Evolved as an Effective Legal Institution,* CDDRL Working Papers, Number 103, October 2009. Available at: https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/No_103_Sarma_India_Arbitration_India_509.pdf.

Conciliation (Amendment) Act 2015 was enacted. The 2015 Act was enacted to overcome the shortcomings of the 1996 Act.[232] The most notable amendment was the one relating to the public policy exception. The Indian Arbitration and Conciliation Act makes a differentiation between domestic awards and foreign awards. The provisions relating to both which deals with grounds for refusal of recognition and enforcement of foreign awards and lists public policy as a ground were amended. Explanations were added to both the provision to elaborate what public policy would mean. The new Amendment sought to limit the scope of public policy so as to reduce the judicial intervention. In simple words, an award could be set aside on the ground of public policy on if the:

i. The award is vitiated by fraud or corruption;
ii. It is in contravention with the fundamental policy of Indian law;
iii. It is in conflict with basic notions of morality and justice.[233]

It has been clarified in the amendment that the additional ground of patent illegality can only be taken in domestic arbitration cases. The ground of patent illegality would not be applicable to international arbitration. The intention of the amendment was to narrow the scope of public policy so as to reduce judicial intervention and also accord finality to the award of the arbitral tribunal.[234]

The Act was amended again in the year 2019. In 2019 Act, there were no significant amendments relating to the public policy exception which is the main focus of this thesis. The issue of public policy exception was not addressed in the new Amendment Act.[235]

4.2. Evolution of Indian Jurisprudence

In this section, the author will discuss the important case laws. These case laws demonstrate how the Indian jurisprudence has evolved over the years on the subject matter of public policy acting as a bar to the enforcement of foreign arbitral awards. The reason for selecting the following cases for this analysis is because these cases clearly demonstrate how the Indian jurisprudence has evolved and also how the decisions in these cases have impacted the Indian legal system by drawing international attention. The cases below will depict that the decisions have mostly attracted criticism for the Indian judiciary which has reflected badly on the Indian judiciary. The cases selected have been decided by the Supreme Court of India apart from the

[232] The Arbitration and Conciliation (Amendment) Act, 2015, Available at: http://www.adrassociation.org/pdf/acact2015.pdf.
[233] Explanation 1 and 2 to Section 34 ; Explanation 1 and 2 to Section 48 of the Arbitration and Conciliation (Amendment) Act, 2015.
[234] Ibid.
[235] Shaheen Parikh, *supra* note 207.

Cruz City 1 decision which has been decided by the High Court of Delhi. The author would like to establish that India follows the principle of precedents which means that the decisions of the Supreme Court of India are binding on all other courts in India and are authoritative. Hence, these decisions have set precedents for other courts to follow. There are several other cases on this subject matter decided by the lower courts in India, however, the decisions of the Supreme Court establishes the law in India. Therefore, these following cases are given priority for the analysis.

4.2.1. *Renusagar Power Co. Ltd. v. General Electric Co.*[236]

i. Background

The appellant in this case is Renusagar Power Co. Ltd. The appellant company has been incorporated under the Indian Companies Act, 1956. The respondent in this case is General Electric Company. The respondent company has been incorporated under the laws of the State of New York in the United States of America.[237] The appellant company was involved in the production and supply of electric power whereas the respondent company was involved in the business of manufacturing and selling electrical products among other ancillary activities.[238] The companies had entered into a contract whereby it was stated that General Electric would supply equipment to Renusagar which would be utilized in the setting up of a thermal plant. The agreement also included an arbitration clause and the arbitration between the parties was to be governed by the Arbitration Rules of the International Chamber of Commerce (ICC Rules). During the setting up of the plant, a dispute arose between the parties with respect to the payment of the instalments. General Electric decided to arbitrate the matter according to their contract and hence, a notice was served on Renusagar. The ICC took cognizance of the matter and was of the opinion that there was *prima facie* dispute according to the contract of the parties. The arbitral tribunal rendered the award in favor of General Electric. General Electric then instituted enforcement proceedings in the Bombay High Court under the Foreign Awards Act.[239] Renusagar had instituted a suit in the Court of Civil Judge, Mirzapur seeking the court to declare that the award made by the arbitral tribunal was a nullity and for restraining General Electric by a perpetual injunction from denying Renusagar's rights.[240] They also prayed for taking any action affecting Renusagar's rights in any manner whatsoever on the

---

[236] *Renusagar Power Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860.
[237] Ibid.
[238] Ibid.
[239] The Foreign Awards (Recognition and Enforcement) Act, 1961 was applicable when this case was decided. The Arbitration and Conciliation Act, 1996 was enacted later along the lines of the UNCITRAL Model Law.
[240] *Renusagar Power Co. Ltd. v. General Electric Co.*. AIR 1994 SC 860.

basis of the said award.[241] At the same time General Electric filed a transfer petition seeking that the suit filed by Renusagar in the Mirzapur court be transferred to the Bombay High Court. General Electric obtained a stay on the proceedings in the Mirzapur court and the court also stated that the proceedings would be stayed until the enforcement proceedings are concluded.[242] The single Judge delivered the judgment and held in favor of General Electric stating that the foreign arbitral award was enforceable under the provisions of the Foreign Awards Act. Renusagar appealed against this decision to the Division Bench of the Bombay High Court. The claims of Renusagar were again rejected by the court and hence, Renusagar then appealed to the Supreme Court of India. General Electric was not satisfied with some findings of the Division Bench of the Bombay High Court, hence they filed an appeal against this judgment in the Supreme Court of India. One of the grounds on which Renusagar was resisting the enforcement of the ICC award was that the award of interest on interest or compensatory damages in lieu of interest on regular interest and delinquent interest and the award of compound interest was contrary to public policy.[243] Public policy exception is the main focus of this thesis, hence only this ground will be dealt with in details and the decision of the court will also focus only on that part.

ii. Decision

Renusagar contested that the award rendered by the ICC was against the public policy under Section 7(1)(b)(ii) of the Foreign Awards Act, 1961.[244] The Supreme Court of India took into consideration the narrow and broad approaches to the notion of public policy and stated that their choice of the standard applicable was dictated by the context and purpose of the provision. The court was of the opinion that 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.[245] The court also stated that the courts are slower to rely on the broader notion of public policy when a foreign element is involved. The court in its reasoning was careful to give importance to the pro-enforcement bias and the need to give disputes finality. These were the main principles on which the New York Convention and the Foreign Awards Act[246] were based. Public policy according to these legal instruments could not include a review of the merits of

[241] Ibid.
[242] Ibid.
[243] Ibid.
[244] The Foreign Awards (Recognition and Enforcement) Act, 1961 was applicable when this case was decided. The Arbitration and Conciliation Act, 1996 was enacted later along the lines of the UNCITRAL Model Law.
[245] *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.
[246] The Foreign Awards (Recognition and Enforcement) Act, 1961 was applicable when this case was decided. The Arbitration and Conciliation Act, 1996 was enacted later along the lines of the UNCITRAL Model Law.

the award. Challenge of the award during enforcement proceedings should not be construed as appeal proceedings.[247] The court further stated that neither the Foreign Awards Act nor the New York Convention indicates that the term public policy includes a mere violation of the laws of India or the provisions of the contract.[248] The court held that:

"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."[249]

The court went on to explain that:

"This would imply that the defense of public policy which is permissible under Section 7(1)(b)(ii) of the Foreign Awards Act should be construed narrowly."[250]

The court in this case laid down that the enforcement of the award would only be refused if the award is contrary to

i. Fundamental policy of Indian law
ii. Interests of India
iii. Justice or morality[251]

However, the court did not define these three criteria. The court simply stated that if the award was against any of these criterion, then it would be considered to be against the public policy of India. The court specifically held that a mere contravention of law alone will not be enough to invoke the public policy exception. Substantial transgression would have to be proved.[252]

4.2.2. *Oil and Natural Gas Co. v. Saw Pipes*[253]

[247] AIR 1994 SC 860.
[248] *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.
[249] *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.
[250] See *supra* note 219.
[251] *Public Policy in Arbitration Gets New Wings: Review of Indian Supreme Court Decisions in 2014,* Mondaq, 21 January, 2015, Available at: https://www.mondaq.com/india/trials-appeals-compensation/367752/public-policy-in-arbitration-gets-new-wings-review-of-indian-supreme-court-decisions-in-2014; See also Shaneen Parikh & Surya Sambyal, *Enforcement of Foreign Awards in India-Have the Brakes been Applied?,* 27 April, 2020, Cyril Amarchand Mangaldas, Available at: https://corporate.cyrilamarchandblogs.com/2020/04/enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied/; See also Ankoosh Mehta et. al, Supreme Court denounces speculative litigation seeking to resist enforcement of foreign awards, 15 April ,2020, Cyril Amarchand Mangaldas, Available at: https://corporate.cyrilamarchandblogs.com/2020/04/supreme-court-denounces-speculative-litigation-seeking-to-resist-enforcement-of-foreign-awards/.
[252] Parikh & Sambyal, *supra* note 251.
[253] AIR 2003 SC 2629.

The decision delivered by the Supreme Court of India in this case has been criticized[254] because of the contrasting stance taken by the court as compared to the decision in the *Renusagar*[255] case.[256]

i. Background

This case is concerned with the enforcement of domestic arbitral award. The appellant in this case is Oil and Natural Gas Corporation Limited which is owned by the Government of India. The respondent in this case is Saw Pipes Limited which is owned by the O.P. Jindal Group. Both the companies have been registered in India according to the laws of India. ONGC invited a tender for the supply of casing pipes and Saw Pipes responded to the invitation to tender. There was a dispute between the parties regarding the payment and this dispute was referred to the Arbitration Tribunal under the Arbitration and Conciliation Act, 1996. Saw Pipes was aggrieved because ONGC had retained a certain amount of money because the goods were delivered was not delivered on the stipulated date and there was an extension of 45 days to which both the parties had agreed after negotiations. There was one condition on which it was agreed upon. The condition was that the amount equal to the liquidated damages would be recovered from Saw Pipes. It was this deduction of damages was the reason why the dispute had arose between the parties.[257]

During the arbitration proceedings, the tribunal was of the opinion that the appellant did not prove that it had suffered any loss or damage because of the delay caused by the respondent. The arbitral tribunal decided in favor of the respondent. The appellant, aggrieved by the decision of the arbitral tribunal, appealed to the Bombay High Court. The Bombay High Court dismissed the petition and ruled in favor of the respondent.[258] The Bombay High Court was of the opinion that the award could not be set aside on the grounds of public policy under Section 34(2)(b)(ii) if there was only a mere violation of law and nothing more.[259] The appellant then appealed to the Supreme Court of India.

---

[254] 176th Report of the Law Commission of India.

[255] *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.

[256] D.R. Dhanuka, *A Critical Analysis of the Judgment ONGC v SAW Pipes Ltd.,* 2003 (2) Arb. L.R. 5 (SC)- *Plea for Consideration by Larger Bench,* 51(3) Arb. L.R. 1 (2003); See also S. Gupta, *Challenge to Arbitral Awards on Public Policy: A Comment on ONGC v. Saw Pipes Ltd.,* 52(3) Arb. L.R. 1 (2003); See also O.P. Malhotra, *The Scope of Public Policy under the Arbitration and Conciliation Act, 1996,* Published in Articles section of www.manupatra.com, Available at: http://docs.manupatra.in/newsline/articles/Upload/BBDF2776-0E16-457D-9337-F46D4F0FD303.pdf.

[257] *ONGC v. Saw Pipes,* AIR 2003 SC 2629; See also Saushthav Guha, *Case Comment: Oil and Natural Gas Corporation Ltd. v. Saw Pipes,* Legal Service India, Available at: http://www.legalserviceindia.com/legal/article-1557-case-comment-oil-and-natural-gas-corporation-ltd-v-s-saw-pipes-ltd.html.

[258] Guha, *supra* note 257.

[259] AIR 2003 SC 2629; See also See also Guha, *supra* note 257.

ii. Decision

The Supreme Court of India allowed the appeal of the appellant. The court was of the opinion that the Arbitral Tribunal had acted beyond its jurisdiction and had not adhered to the provisions of the Act when deciding the matter. The court also held that the award rendered by the Arbitral Tribunal was patently illegal and that such an award should be set aside under Section 34 of the Act.[260] The court in its decision reviewed the judgement of *Renusagar* case where the court had taken a narrow approach to the public policy exception.[261] The court held that:

> "There is no necessity of giving a narrower meaning to the term public policy of India. On the contrary, a wider meaning is required to be given so that, a patently illegal award passed by the Arbitral Tribunal could be set aside."[262]

The court was of the opinion that the concept of public policy connotes some matter which concern public good and the public interest. The concept of public policy keeps varying with time and hence it would not be viable to stick to one meaning of the concept.[263] The court further stated that an arbitral award could be set aside if it is patently illegal. The court went on to clarify that the illegality must be of a serious nature. If the illegality is of a trivial nature then it would not be considered to be against the public policy of India. The court further held that an arbitral award can also be set aside if it is unfair and unreasonable in a manner so as to shock the conscience of the court. such awards would be considered to be against the public policy of India.[264] A patently illegal award has to be set aside otherwise it would promote injustice. The decision delivered in this case was a departure from the decision taken by the Supreme Court in the case of *Renusagar.* The important point to note here is that the court clarified in its decision that the test of 'patent illegality' will only apply to domestic awards.[265]

4.2.3. *Bhatia International v. Bulk Trading SA*[266]

i. Background

---

[260] Guha, *supra* note 257.
[261] *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.
[262] *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629.
[263] Ibid; See also Malhotra, *supra* note 256.
[264] Malhotra, *supra* note 256; See also *Widened Scope of 'Public Policy' Leaves Arbitral Awards Susceptible to Further Scrutiny by Courts,* Nishith Desai Associates, 6 October, 2014, Available at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/widened-scope-0f-public-policy-leaves-arbitral-awards-susceptible-to-further-scrutiny-by-courts.html?no_cache=1&cHash=bd6a9abae83687808f2ccb78211ea511.
[265] *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629; See also *supra* note 251.
[266] (2002) 4 SCC 105.

The appellant in this case is Bhatia International which is an Indian company. The respondent in this case is Bulk Trading SA which is headquartered in Switzerland. The two companies had entered into a contract. The contract included an arbitration clause which provided for arbitration in case of any dispute according to the Arbitration Rules of the International Chamber of Commerce (ICC Rules).[267] After a dispute arose between the parties, the respondent filed for arbitration with the ICC. Both the parties agreed to the arbitration and the arbitration was supposed to be held in Paris according to the ICC Rules. A sole arbitrator was appointed to arbitrate this matter.[268] The respondent then filed an application under Section 9[269] of the Arbitration and Conciliation Act. This application was filed before the IIIrd Additional District Judge, Indore, Madhya Pradesh. The reason for filing this application was that the respondent wanted to secure an injunction restraining the appellant from alienating its property and assets located in India. The appellant opposed this application by contending that Part I of the Act only applies to arbitrations that take place in India. The objection of the appellant was dismissed and the application was admitted by the court. The appellant then appealed to the Supreme Court of India. The Supreme Court of India had to decide in this case whether an the domestic courts of India can provide interim relief under Section 9 in cases where the arbitration was held outside India.[270]

ii. Decision

This is another important case on the subject of interventionist nature of the Indian judiciary. In the case of *Saw Pipes*[271], the court had dealt with enforcement of domestic awards and it had taken a broad approach to the public policy interpretation and added an additional ground of patent illegality when dealing with public policy exception. The court was, however, silent on the fact as to whether patent illegality would also be applicable to foreign awards as well. The decision in *Saw Pipes* was implicit with regards foreign awards.[272] That became apparent when the court dealt with the case of *Bhatia International v. Bulk Trading SA.*[273] In this case the

---

[267] *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105; See also Sharma, Raghav, *Bhatia International vs. Bulk Trading SA: Ambushing International Commercial Arbitration Outside India?*, (January 1, 2009). Journal of International Arbitration, 26(3): 357-372, 2009. Available at SSRN: https://ssrn.com/abstract=1337451.

[268] Sharma, *supra* note 267.

[269] Section 9: Interim measures, etc., by Court- [(1)] A party may, before or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-
…
(ii) for an interim measure of protection in respect of any of the following matters, namely:-
(a) The preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement

[270] *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105; See also Sharma, Sharma, *supra* note 267.

[271] AIR 2003 SC 2629.

[272] Sharma, *supra* note 267.

[273] (2002) 4 SCC 105.

Honorable Supreme Court of India held that Part I of the Indian Arbitration and Conciliation Act cannot be only restricted in its application to domestic awards. It applies to all arbitrations. It was very explicitly stated in the decision that Part I of the Act also applies to international commercial arbitrations seated outside of India as well.[274] The facts of the case only dealt with the applicability of Section 9, however, the judgment incorporated the larger application of the whole Part I to foreign arbitrations. According to the facts of the case, there was an arbitration between the two parties who had agreed that the proceeding would be governed by the ICC Rules. The parties had also agreed that the seat of the arbitration would be Paris. An interim measure suit was filed under Section 9 of the Act in the Indore District Court. The opposite party argued that there can be no interim measure granted in this case since this case involved international commercial arbitration and the seat of the arbitration was outside India. There was an appeal made in the higher courts and it was finally heard by the Honorable Supreme Court of India.[275] In this case the Honorable Supreme Court of India erased the difference in scope of public policy exception between domestic awards and foreign awards. The court also made the use of patent illegality ground available to resist enforcement of foreign arbitral awards as well. In this case, the court had interpreted Section 2 of the Act in manner that allowed Part I of the Act to be applied even in the context of arbitration seated outside of India.[276] This decision had made many authors and commentators raise concerns about the impact and desirability of such a wide interpretation.[277]

4.2.4. *ONGC Ltd. v. Western Geco International*[278]

The decision delivered by the Supreme Court of India was considered to be an impediment in Indian arbitration scenario.[279]

i. Background

ONGC had contracted Western Geco for the supply of hydrophones for upgrading their vessels. Western Geco had agreed to supply the US made hydrophones but due to inability to

---

[274] *Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105; See also Vivek Kumar Verma, *Bhatia International vs. Bulk Trading S.A. & Anr.,* Indian Case Laws, 15 April, 2012, Available at: https://indiancaselaws.wordpress.com/2012/04/15/bhatia-international-vs-bulk-trading-s-a-anr/.

[275] Verma, *supra* note 274.

[276] Sharma, *supra* note 267; See also Verma, *supra* note 274.

[277] Verma, *supra* note 274.

[278] (2014) 9 SCC 263.

[279] Arthad Kurlekar, *ONGC v Western Geco- A new impediment in Indian Arbitration,* Kluwer Arbitration Blog, 7 January, 2015, Available at: http://arbitrationblog.kluwerarbitration.com/2015/01/07/ongc-v-western-geco-a-new-impediment-in-indian-arbitration/?doing_wp_cron=1591886218.0800430774688720703125; See also *ONGC vs Western Geco International, 2014 Judgment by Supreme Court of India is a Setback for International Arbitration in India- Critical Study*, Law Senate, https://www.lawsenate.com/publications/articles/ONGC_Vs_Western_Geco_International,__2014_Judgment_by_Supreme_Court_of_India.pdf.

obtain a license there was a delay of 9 months and 28 days. According to the terms of the contract as entered into by both the parties, ONGC deducted liquidated damages while making the payments. However, Western Geco challenged and argued that the damages and period of delay is extremely exaggerated and not in consonance with the terms of the contract as agreed between them. The question that arose was who should be held responsible for this delay and how should the deductions be made. The arbitral tribunal held Western Geco was responsible only for a delay of 4 months and 22 days and the rest was attributed to ONGC that led to a reduction in damages.[280] Western Geco was not satisfied with the award and challenged this award and eventually approached the Supreme Court who examined the scope of public policy.

ii. Decision

Western Geco relied on the established principles in *Saw Pipes* and concluded that the earlier decisions made by the court do not elaborate enough on the principles of fundamental policy of India.[281] As a result, the court in its decision laid down three distinct principles within the ambit of fundamental policy of India and states that a) the judiciary should not rule on a whimsical basis, b) decisions taken by courts and competent authorities should be based on principles of natural justice and c) no decision taken by the court should be so perverse or irrational that no reasonable person would have made it.[282] These principles provided that Supreme Court with such wide powers to examine awards that it may do more harm than the test of patent illegality laid down in *Saw Pipes.*[283] Based on these principles, the court went into the facts of the case and reduced the delay to only 56 days. The decision was, yet again, a retrograde step in the ability of the judiciary to re-open well-reasoned awards.[284]

4.2.5. *Phulchand Ltd. v. OOO Patriot*[285]

This is another important case law when we discuss about how Indian courts have interpreted the public policy exception.

i. Background

[280] *Widened Scope of 'Public Policy' Leaves Arbitral Awards Susceptible to Further Scrutiny by Courts,* Nishith Desai Associates, 6 October, 2014, Available at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/widened-scope-0f-public-policy-leaves-arbitral-awards-susceptible-to-further-scrutiny-by-courts.html?no_cache=1&cHash=bd6a9abae83687808f2ccb78211ea511.
[281] *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629.
[282] *ONGC Ltd. v. Western Geco,* (2014) 9 SCC 263.
[283] *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629.
[284] Kurlekar, *supra* note 279; See also *supra* note 279; See also *supra* note 280.
[285] (2011) 10 SCC 300.

The appellant in this case is Phulchand Exports Limited which is headquartered in Mumbai, India and they are the sellers. The respondent in this case is OOO Patriot which is headquartered in Moscow, Russia and they are the buyers. These two companies had entered into a contract Indian long grain for a certain price that was determined by both the parties after negotiations. A dispute arose between the parties regarding the delivery of the goods. The dispute was supposed to be resolved through arbitration according to the terms of their contract.[286] The buyers lodged a complaint before the International Court of Commercial Arbitration at the Chamber of Commerce and Industry of the Russian Federation. The Arbitral Tribunal rendered the award in favor of the buyer. The buyers then initiated enforcement proceeding at the High Court of Bombay for the enforcement of the arbitral award under Section 47 and 48 of the Arbitration and Conciliation Act. The sellers resisted the enforcement of the award by contending that the award was contrary to the public policy of India and hence should not be enforced by the court. In the first instance, the Single Judge decided in favor of the buyer and held that the award could be enforced. The sellers then appealed to a Division Bench of the Bombay High Court. The Division Bench relied on the case of *Renusagar* and upheld the decision of the Single Judge and dismissed the petition of the seller. The appellant finally appealed to the Supreme Court of India.[287]

ii. Decision

The Supreme Court of India examined the term 'public policy' and its scope as mentioned under Section 48(2) of the Arbitration and Conciliation Act of 1996.[288]

According to Section 48(2) of the Act:

> "Enforcement of an arbitral award may be refused if the Court finds that-
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of India; or
> (b) The enforcement of the award would be contrary to the public policy of India."[289]

In its argument before the Supreme Court, the appellant cited the *Saw Pipes* decision of the Supreme Court saying that wider interpretation of the term public policy should be applied here to set aside the arbitral award. The Supreme Court accepted the reasoning of the appellant. In

---

[286] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.
[287] Ibid.
[288] Ibid; See also Robert Cutler & Timothy Webb, *India: A widening scope to avoid enforcement of foreign awards,* Clayton Utz, 8 December, 2011, Available at: https://www.claytonutz.com/knowledge/2011/december/india-a-widening-scope-to-avoid-enforcement-of-foreign-awards; See also Sherina Petit et al., *International Arbitration in India- A tale of gradual progression,* International Arbitration Report- Issue 1, Norton Rose Fulbright-2013, Available at: https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/knowledge-pdfs/international-arbitration-in-india.pdf?la=en.
[289] Section 48(2), Indian Arbitration and Conciliation Act, 1996.

their decision, the Supreme Court of India accepted the wider interpretation of public policy as was set out in the *Saw Pipes* case.[290] It was decided by the Supreme Court that a foreign award can be set aside under Section 48(2) of the Act if the award was considered to be patently illegal.[291] The court relied on the decision in the case of *Saw Pipes* and further stated in its decision 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 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 the public policy and is required to be adjudged void" [*ONGC v. Saw Pipes,* (2003) 5 SCC 705, para 31, page 727]

The court then went to examine the arbitral award on the basis of patent illegality. However, the award was not found to be patently illegal and the appeal was dismissed. Though the award was not found patently illegal in this case, the decision of the court still causes concerns. The decision is concerning because the court actually went to examine the merits of the foreign arbitral award which was rendered by a foreign arbitral tribunal. This decision had set a precedent which would allow the courts in India to examine foreign arbitral award for patent illegality. This decision was also criticized for supporting the wider interpretation of the term public policy.[292]

4.2.6. *Bharat Aluminium Co. v. Kaiser Aluminium Service*[293]

i. Background

The appellant in this case Bharat Aluminium is the appellant and Kaiser Aluminium is the respondent.[294] The parties had entered into a contract for the supply of equipment, modernization and upgradation of production facilities. Their agreement also had an arbitration clause in case of a dispute. When there was a dispute regarding the performance of the agreement, the dispute was referred to arbitration. The arbitration proceedings were carried out in London, England. There were two arbitral awards rendered by the arbitral tribunal and the awards were in favor of the respondent. The appellant was aggrieved by this and therefore they filed applications under Section 34 of the Arbitration and Conciliation Act. The claims of the

---

[290] *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629; See also Cutler & Webb, *supra* note 288; See also Petit et al., *supra* note 288.
[291] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.
[292] Cutler & Webb, *supra* note 288; See also Petit et al., *supra* note 288.
[293] (2012) 9 SCC 552.
[294] *Bharat Aluminium Co. v. Kaiser Aluminium Service*, (2012) 9 SCC 552.

appellant were dismissed by the lower courts. They finally appealed in the Supreme Court of India.[295]

ii. Decision

This is another important case. In this case, the controversial decision of the Supreme Court of India in the case of *Bhatia International v. Bulk Trading SA*[296] was overruled. The decision in this case in a manner paved the way for reduced court intervention in arbitration seated outside India. The judgment delivered by the Supreme Court is a lengthy one in this case. However, the most important takeaways from the judgment are that the decision in the case of *Bhatia International* has been overruled, Part I of the Indian Arbitration and Conciliation Act only applies to arbitrations seated within India, awards rendered in foreign seated arbitrations are only subject to the jurisdiction of Indian courts when they are sought to be enforced in India under Part II of the Act, Indian courts cannot order interim relief in support of foreign seated arbitrations and the decision of the court in *Bharat Aluminium* only applies to arbitration agreements entered into after September 6, 2012.[297]

The decision of the Honorable Supreme Court of India in this case is considered to be promising and paves the way for reduced court intervention in arbitrations seated outside India.[298]

4.2.7. *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[299]

This case is important in the Indian legal framework for international arbitration. It is in this case that the Supreme Court of India adopted a pro-arbitration approach after a series of judgment going against it.[300]

i. Background

---

[295] *Bharat Aluminium Co. v. Kaiser Aluminium Service*, (2012) 9 SCC 552; See also Niyati Gandhi and Vyapak Desai, *What Finally Happened in Bharat Aluminium Co. ["BALCO"] v. Kaiser Technical Services?,* Mondaq, 17 February, 2016, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/467264/what-finally-happened-in-bharat-aluminium-co-balco-v-kaiser-technical-services.

[296] *Bhatia International v. Bulk Trading SA*, (2002) 4 SCC 105.

[297] Petit et al., *supra* note 288; See also Ashish Chugh, *The Bharat Aluminium Case: The Indian Supreme Court Ushers in a New Era,* Kluwer Arbitration Blog, 26 September, 2012, Available at: http://arbitrationblog.kluwerarbitration.com/2012/09/26/the-bharat-aluminium-case-the-indian-supreme-court-ushers-in-a-new-era/?doing_wp_cron=1591891863.7925488948822021484375; See also Gandhi & Desai, *supra* note 295.

[298] Petit et al., *supra* note 288; See also Chugh, *supra* note 297; See also Gandhi & Desai, *supra* note 295.

[299] (2014) 2 SCC 433.

[300] PSA Legal Counsellors, *India: Pro-Arbitration Trend Continues in India?,* Mondaq, 27 March, 2014, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/302910/pro-arbitration-trend-continues-in-india; See also Arbitration Notes, *Shri Lal Mahal Ltd v Progetto Grano Spa: Supreme Court of India overrules Phulchand and reduces court interference in enforcement of foreign awards,* 22 July, 2013, Available at: https://hsfnotes.com/arbitration/2013/07/22/shri-lal-mahal-ltd-v-progetto-grano-spa-supreme-court-of-india-overrules-phulchand-and-reduces-court-interference-in-enforcement-of-foreign-awards/.

In this case the appellant is Shri Lal Mahal Ltd. and the respondent is Progetto Grano Spa. In this case there was a dispute between an Indian supplier and an Italian buyer. The contract entered into by the parties was with respect to the supply of wheat. The seller in its argument relied on a certificate of quality which was provided by a certifying agency at the port of loading in India to state that the wheat supplied was of the requisite quality. The buyer opposed the reliance on the quality certificate by the seller. The buyer also questioned other reports and argued that the quality of wheat was below the quality which was originally agreed upon between the parties through their contract.[301]

This dispute between the parties was brought before the Grain and Feed Trade Association. The GAFTA, which is seated in London, heard the dispute. The arbitral tribunal after hearing the arguments of both the parties decided the matter in favor of the buyer and instructed the seller to pay the damages to the buyer. The seller was not satisfied with the award of the arbitral tribunal and decided to appeal against it. The seller made an appeal before the Board of Appeal of the GAFTA. Their appeal was unsuccessful. After being unsuccessful in their appeal before the Board of Appeal, the seller who was still not satisfied with the award decided to appeal before the High Court of Justice in London. They made and application under Section 68 of the English Arbitration Act of 1996. Their appeal before the High Court of Justice was rejected too.[302]

The buyer decided to get this award enforced before the Delhi High Court. The seller was opposed to the enforcement of the award. In its argument, the seller contended that the arbitral tribunal when deciding the matter had placed greater reliance on quality certificates prepared by non-contractual agencies than on the quality certificate prepared by the agency nominated under the contract.[303] The seller further argued that the arbitral award delivered by the arbitral tribunal on this basis was contrary to the express provision in the contract an enforcing such an award would be contrary to the public policy of India. They were resisting the enforcement of the arbitral award on the ground of public policy exception.[304]

The Delhi High Court decided not to interfere with the award. While deciding this the court was of the opinion that it was not expected to re-determine questions of fact in enforcement proceedings. The seller was not satisfied by the decision of the Delhi High Court and decided to appeal against this decision to the Supreme Court of India.[305]

---

[301] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433.
[302] Arbitration Notes, *supra* note 300; See also PSA Legal Counsellors, *supra* note 300.
[303] Arbitration Notes, *supra* note 300.
[304] Arbitration Notes, *supra* note 300; See also PSA Legal Counsellors, *supra* note 300.
[305] PSA Legal Counsellors, *supra* note 300.

ii. Decision

In this case, the decision delivered in the case of *Phulchand* was overruled. The court considered the decision in the case of *Phulchand* to be erroneous and sought to rectify this and upheld the decision delivered in the case of *Renusagar*.[306]

The court held that at the stage of challenge to an arbitral award under Section 34 during setting aside proceedings, the arbitral award is not yet final and executable and this is in contradistinction to a challenge during enforcement where the award is final and binding.[307] The court held that the enforcement of an arbitral award can be refused by invoking the public policy ground where the award is considered to be against:

- Fundamental policy of Indian law; or
- The interests of India; or
- Justice and morality.[308]

The court also held that the additional criteria of 'patent illegality' was not required which was established in the case of *Saw Pipes.*[309]

The Supreme Court of India refused to look into the merits of the award rendered by the arbitral tribunal. It further held that the public policy exception provided in Section 48 of the Arbitration and Conciliation Act has to be construed narrowly when enforcing foreign arbitral awards.[310]

4.2.8. *Cruz City 1 Mauritius Holdings v. Unitech Limited*[311]

i. Background

---

[306] Ibid.

[307] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433; See also PSA Legal Counsellors, *supra* note 300; See also Arbitration Notes, *supra* note 300.

[308] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433; See also *Renusagar Power Co. Ltd. v. General Electric Co..* AIR 1994 SC 860.

[309] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433; See also *Oil and Natural Gas Co. v. Saw Pipes*, AIR 2003 SC 2629; See also Harisankar K.S., *Second Look At The Foreign Award Forbidden on Enforcement – Indian Supreme Court,* Kluwer Arbitration Blog, 1 August, 2013, Available at: http://arbitrationblog.kluwerarbitration.com/2013/08/01/second-look-at-the-foreign-award-forbidden-on-enforcement-indian-supreme-court/?print=pdf&doing_wp_cron=1591965307.7616319656372070312500; See also Ashish Kabra et al., *Enforcement of Foreign Awards Becomes Easier: 'Patent Illegality' Removed from the Scope of Public Policy,* Dispute Resolution Hotline, 19 July, 2013, Availabe at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/enforcement-of-foreign-awards-becomes-easier-patent-illegality-removed-from-the-scope-of-public-p.html?no_cache=1&cHash=f3767e054524db623e68a22f89adae92.

[310] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433; See also *From Regressive to Progressive: The Changing Face of Arbitration in India,* E-Newsline July 2015, Available at: http://psalegal.com/wp-content/uploads/2017/01/ENewslineJuly2015.pdf.

[311] EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.

This case was decided by the Delhi High Court unlike other cases that have been discussed above which were decided by the Supreme Court of India. This case is considered to be important because the decision in this case demonstrates that the Indian courts are not being reluctant in enforcing foreign arbitral awards.[312] In this case the appellant is Cruz City 1 Mauritius Holdings and the respondent is Unitech Limited. There were three arbitrations conducted in this case and the all the arbitrations were seated in London. Cruz City is a company that has been established under the laws of Mauritius. Cruz City had entered into an agreement between Burley Holdings, which is a wholly owned subsidiary of Unitech Limited and incorporated under the laws of Mauritius and the third party in this contract was Unitech Limited, which is a public company incorporated in India. The agreement of the parties was named 'Keepwell Agreement'. The arbitration had taken place in London in accordance with the Arbitration Rules of the London Court of International Arbitration.[313] The arbitral award rendered by the arbitral tribunal was in favor of Cruz City. Cruz City initiated enforcement proceedings in multiple jurisdictions: Isle of Man, Cyprus, Mauritius and India. The enforcement proceedings in India was instituted in the High Court of Delhi.[314] Unitech resisted the enforcement proceedings on three grounds and one of the grounds alleged by them was that the enforcement of the arbitral award would be contrary to the public policy of India as it violates the provisions of the Foreign Exchange Management Act, 1999.[315]

ii. Decision

This is another important case does prove that the Indian judiciary is moving towards reduced judicial intervention in the enforcement proceedings of foreign arbitral awards.[316] This case was decided by the High Court of Delhi in the year 2017. The enforcement proceedings were initiated before the High Court of Delhi. The enforcement proceeding was resisted by the opposite party, Unitech. The High Court of Delhi delivered its decision on April 11, 2017.

---

[312] Nandan Nelivigi et al., *In a landmark ruling, Indian court rejects objections to enforcement of a $300 million LCIA award,* White and Case, 7 June, 2017, Available at: https://www.whitecase.com/publications/alert/landmark-ruling-indian-court-rejects-objections-enforcement-300-million-lcia.

[313] EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also United Kingdom/ 02 October 2014/ England and Wales, High Court/ Cruz City 1 Mauritius Holdings v. Unitech Limited and others/ 2014 Folio 432, Available at: http://newyorkconvention1958.org/index.php?lvl=notice_display&id=4614&opac_view=6.

[314] EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.

[315] Ibid.

[316] EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also Nelivigi et al.. *supra* note 312; See also Ramgovind Kuruppath, *Alleged Violation of FEMA now a Dwindling Defence against Enforcement of Contractual Rights,* India Corporate Law, A Cyril Amarchand Mangaldas Blog, 21 April, 2017, Available at: https://corporate.cyrilamarchandblogs.com/2017/04/alleged-violation-fema-now-dwindling-defence-enforcement-contractual-rights/#more-2056.

The court rejected all the contentions of Unitech. The decision was in favor of Cruz City. The High Court of Delhi established few important legal principles with respect to the recognition and enforcement of foreign arbitral awards in India.[317] The most important one with respect to this thesis is that, the court held that the enforcement of an arbitral award in respect of an agreement that is in violation of the Foreign Exchange Management Act, 1999 is not contrary to the public policy of India. The High Court of Delhi emphasized the fact that the public policy exception has to be construed narrowly. The court stated in its decision that violation of any particular provision or a statute would not actually amount to public policy violation.[318] The court also noted that fundamental public policy of India means to include all the principles and legislative policies on which the Indian legislations are based. In its decision the court made an important distinction between violation of a statute and violation of national policy. The court stated that fundamental policy of Indian law only includes only the fundamental legislative policy and not a provision of any statute.[319] The court further discussed in its decision about the scope of Indian court's power to refuse enforcement of a foreign arbitral award under Section 48 of the Act. The court stated:

> "Thus, whilst there is no absolute or open discretion to reject the request for declining to enforce a foreign award, it cannot be accepted that it is totally absent. The width of the discretion is narrow and limited, but if sufficient grounds are established, the court is not precluded from rejecting the request for declining enforcement of a foreign award."[320]
> [*Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017]

The decision of the Delhi High Court in this case reaffirms that the Indian courts are adopting the pro-enforcement approach instead of increasingly refusing to enforce arbitral awards or intervening in the enforcement proceedings by reviewing the merits of the arbitral award. The decision of the court has been considered as a welcome step in reducing the judicial intervention in enforcement proceedings and also in aligning Indian practice on the

---

[317] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also *Delhi High Court allows enforcement of arbitral awards despite foreign exchange regulations,* Arbitration Notes, 29 June, 2017, Available at: https://hsfnotes.com/arbitration/2017/06/29/delhi-high-court-allows-enforcement-of-arbitral-awards-despite-foreign-exchange-regulations/.

[318] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.

[319] Ibid.

[320] Nelivigi et al.. *supra* note 312.

enforcement of foreign arbitral awards. There were no further appeals to the Supreme Court of India.[321]

4.2.9. *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*[322]

i. Background

This case has been decided by the Supreme Court of India. There were multiple appellants in this case and they were represented by Appellant No. 1 Vijay Karia. Vijay Karia and the other appellants are shareholders in the company Ravin Cables Limited. The appellants and Ravin Cables entered into a joint venture agreement (JVA) with the Respondent. The Respondent in this case is Prysmian Cavi E Sistemi SRL, which is a company established under the laws of Italy. According to their JVA, the respondent became a majority shareholder in Ravin Cables.[323] The respondents alleged that there were material breaches of the joint venture and the loss of effective control of the joint venture company by the appellants. Hence, this prompted the respondents to initiate arbitration proceedings against the appellants. There were four arbitral awards rendered by a sole arbitrator who was appointed by the London Court of International Arbitration. The awards rendered were in favor of the respondents.[324] The respondents then initiated the enforcement proceedings before the Bombay High Court. This enforcement proceeding was resisted by the appellants. However, the court ruled in favor of the respondents and stated that the foreign award is enforceable and it does not fulfill any conditions for the refusal of enforcement of an arbitral award as stated in Section 48 of the Arbitration and Conciliation Act. The appellants finally appealed to the Supreme Court of India.[325]

ii. Decision

---

[321] Kuruppath, *supra* note 316.

[322] Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

[323] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019; See also Ravi Singhania and Vikas Goel, *The Viewpoint: Recognition and Enforcement of Foreign Awards in India,* Bar and Bench, 15 May, 2020, Available at: https://www.barandbench.com/view-point/the-viewpoint-recognition-and-enforcement-of-foreign-awards-in-india.

[324] Vijayendra Pratap Singh and Abhijnan Jha, Enforcement of Foreign Arbitral Awards – Vijay Karia and Ors v. Prysmian Cavi E Sistemi Srl and Ors., Available at: https://www.azbpartners.com/bank/enforcement-of-foreign-arbitral-awards-vijay-karia-and-ors-v-prysmian-cavi-e-sistemi-srl-and-ors/; See also Sushmita Gandhi et al., *A Balancing Act: The Dichotomy of the Grounds to Challenge Enforcement of Foreign Arbitral Awards,* 28 February, 2020, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/898626/a-balancing-act39-the-dichotomy-of-the-grounds-to-challenge-enforcement-of-foreign-arbitral-awards; See also Prachi Bhardwaj, *Courts should be slow in rejecting enforcement of foreign awards; SC elucidates principles,* Case Briefs Supreme Court, 18 February, 2020, Available at: https://www.scconline.com/blog/post/2020/02/18/courts-should-be-slow-in-rejecting-enforcement-of-foreign-awards-sc-elucidates-principles/; See also Singhania & Goel, *supra* note 323.

[325] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

This is one of the most recent cases where the court had taken a pro-enforcement stance with respect to foreign arbitral awards. In this case the decision delivered in the case of *Cruz City* was upheld. In its judgment the Supreme Court of India outlined the scope of judicial interference with foreign arbitral awards. The court also reinforced the pro-enforcement bias as set out in the New York Convention. The court also stated that the grounds for refusal of recognition and enforcement of foreign arbitral awards should be construed very strictly so that the parties do not unnecessarily misuse these grounds to resist the enforcement of arbitral awards. The court in its decision also rejected the arguments of the appellant with respect to the merits of the award. The court was of the opinion that the objections based on the merits of the case were not sustainable.[326] The court also held that the public policy exception for denying recognition and enforcement of foreign arbitral awards should be construed narrowly.[327]

4.3. Implications of the decisions of the Supreme Court

In this section the implications of decisions of the cases detailed in the above section will be discussed.

1. The *Renusagar* case had positive implications and actually set a positive image of the Indian judiciary. The case set a precedent for future judgments to interpret the public policy exception narrowly. The decision was lauded because it was in line with the international standards.
2. The *Saw Pipes* case on the other hand set a wrong precedent for the future judgments. An additional criterion of patent illegality was added in the notion of public policy in India by the Supreme Court. The public policy exception was given a wider interpretation. The decision in this case indicates how the Supreme Court had shifted from one interpretation to a totally different line of interpretation. This case involved the enforcement of a domestic arbitral award. The decision was implicit as to whether this same stand had to be taken with respect to foreign arbitral award.
3. The decision in the case of *Bhatia International* clarified that the precedent set in the case of *Saw Pipes* will also be applicable to arbitrations held outside of India. Part I of the Arbitration and Conciliation Act, which was considered to be intrusive to domestic arbitration proceedings, would now be applicable to international arbitrations. The

[326] Singh and Jha, *supra* note 324; See also Gandhi et al., *supra* note 324; See also Bhardwaj, *supra* note 324.
[327] Bhardwaj, *supra* note 324.

decision in this case indicates that the judiciary wanted to control the arbitration proceedings- both domestic and international, as much as possible.

4. In the cases of *Western Geco* and *Phulchand,* the Supreme Court of India followed the precedents set out in the previous cases which attracted a lot of criticism from the legal fraternity.
5. The decision in the case of *Sri Lal Mahal* had positive implications and actually restored the faith in the Indian judiciary. This decision demonstrated that enforcement of foreign arbitral awards in India could be predictable since the decision of the Supreme Court in the case of *Renusagar* was upheld in this decision of the court.
6. The precedent set out in the case of *Sri Lal Mahal* was applied in the cases of *Cruz City 1* and *Vijay Karia.* These decisions of the Supreme Court restored the faith in the Indian judiciary. These cases demonstrate that for a certain period of time there was uniformity in the way the Supreme Court of India had interpreted and applied the public policy exception.
7. However, the decision in the case of *NAFED* shattered all hopes of achieving uniformity in the way Indian judiciary interprets and applies the public policy exception. The Supreme Court in this case shifted to a wider interpretation of the public policy. This decision indicates that the enforcement of foreign arbitral awards still remain unpredictable in India since it appears that the Supreme Court of India is faced with problems of not sticking to one uniform interpretation.

4.4. Analysis of the Judicial Decisions of the Indian Courts and the Doctrine of Patent Illegality

In this section, the author will analyze the cases decided by the Indian judiciary on the subject matter of invoking the public policy exception during the enforcement proceedings of foreign arbitral awards. The doctrine of patent illegality will also be analyzed. The court had held that an arbitral award can be refused enforcement on the grounds of public policy if it is found to be patently illegal.[328]

To make the analysis simple, the author will make use of a table. In the following table[329], there are three columns. The first column is the name of the case. The second column is whether the Indian court allowed or refused the enforcement of foreign arbitral award. The third column

[328] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705.

[329] This table has been compiled by the author herself. The author has referred to the cases for the compilation of this table. All the information about the cases has been retrieved from the judgment of the court. The cases are cited where the names of the cases have been mentioned.

is whether the public policy exception was interpreted narrowly or was it given a wide interpretation.

Table 1: Table depicting the shifts of the Supreme Court of India[330]

Case name	Allowed enforcement/ Refused enforcement	Narrow interpretation/ Wide interpretation of the public policy exception
Renusagar Power Co. Ltd. v. General Electric Co.[331]	Allowed enforcement of the arbitral award.	The public policy exception was given a narrow interpretation.
ONGC v. Saw Pipes[332]	Refused enforcement of the arbitral award.	The public policy exception was given a wider interpretation. Additional criterion of patent illegality was introduced.
Bhatia International v. Bulk Trading SA[333]	The court held that Part I of the Arbitration and Conciliation Act of India applies to foreign seated arbitrations as well and hence the Indian judiciary has the jurisdiction to set aside those awards. The appellant had objected to this. The Supreme Court rejected the appeal of the appellant. The important aspect in this case was the fact that the Supreme Court allowed the intervention of the Indian judiciary in international arbitration.	Public policy exception was *per se* not dealt with in this case.
Venture Global Engineering v. Satyam Computer Services Ltd.[334]	Refused enforcement of the arbitral award.	The public policy exception was given a wider interpretation.
ONGC v. Western Geco[335]	Refused enforcement of the arbitral award. The court in this case modified the arbitral award of the arbitral tribunal, ultimately increasing the intervention of the judiciary in arbitration process.	The public policy exception was given a wider interpretation.
Phulchand Ltd. v. OOO Patriot[336]	The court held that an arbitral award can be refused enforcement if it is considered to be patently illegal. The court	The public policy exception was given a wider interpretation.

[330] This table has been compiled by the author herself. The author has referred to the cases for the compilation of this table. All the information about the cases has been retrieved from the judgment of the court. The cases are cited where the names of the cases have been mentioned.
[331] *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 AIR 860.
[332] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705.
[333] *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105.
[334] *Venture Global Engineering v. Satyam Computer Services Ltd.,* (2008) 4 SCC 190.
[335] *ONGC v. Western Geco,* [2015] AIR 363 (SC).
[336] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.

	examined the merits of the case and found that it was not patently illegal. Consequently, the award was enforced but this decision is concerning because the court through its decision widened the scope of judicial intervention in enforcement of foreign arbitral awards.	
Bharat Aluminium Co. v. Kaiser Aluminium Service[337]	The decision delivered in the case of *Bhatia International* was overruled by the court. The court through its decision reduced the intervention of the judiciary in the arbitration process.	Public policy exception was *per se* not dealt with in this case.
Shri Lal Mahal Ltd. v. Progetto Grano Spa[338]	The arbitral award was enforced. It was not considered to be against the public policy of India. The decision in *Renusagar* case was upheld and the decision in *Saw Pipes* and *Phulchand* were overruled.	The public policy exception was given a narrow interpretation.
Cruz City 1 Mauritius Holdings v. Unitech Limited[339]	The arbitral award was enforced.	The public policy exception was given a narrow interpretation.
Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors[340]	The arbitral award was enforced.	The public policy exception was given a narrow interpretation.
National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.[341]	The arbitral award was refused enforcement.	The public policy exception was given a wider interpretation.

It is important to note here that the cases mentioned above have been decided by the Supreme Court of India. Supreme Court is the highest and final court of appeal.[342] There are other cases decided by the High Courts of different states as well. However, precedents hold importance in the Indian legal system. The decisions of the Supreme Court of India is binding on all the

[337] *Bharat Aluminium Co. v. Kaiser Aluminium Service,* (2012) 9 SCC 552.
[338] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433.
[339] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.
[340] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.
[341] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.
[342] Articles 132(1), 133(1) and 134, The Constitution of India, 1950, Available at: https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

courts of India.[343] Analyzing decisions of the High Courts of different states of India would increase the length of this thesis and would make it more complicated and is further beyond the scope of this thesis. The table above clearly depicts how the Supreme Court of India has been oscillating from one approach to another. Enforcement of foreign arbitral awards in India has become very unpredictable. The table shows how the Indian judiciary has assumed power to even modify arbitral awards, hence increasing the judicial intervention.

The first important case here is the case of *Renusagar Power Co. Ltd. v. General Electric Co.*[344] The Supreme Court of India rightly cited the US Supreme Court decision in *Fritz Scherk v Alberto-Culver.*[345] In that case it was stated that *'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.'*[346] Another landmark US decision in the case of Mitsubishi was cited by the court in which it was stated: 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system' should be warranted[347]. The decision delivered by the Supreme Court has been lauded by the international legal fraternity.[348]

The decision in the case of *ONGC v. Saw Pipes*[349] has been criticized for allowing more judicial intervention by introducing an additional ground of patent illegality.[350] An additional ground of patent illegality was added to the interpretation of the public policy exception. The Court also assumed power to modify the awards by reviewing the awards on merits. It is important to note here that the Supreme Court of India remained silent on the application of patent illegality ground to foreign awards under Section 48 of the Indian Arbitration and

---

[343] Article 141, The Constitution of India, 1950, Available at: https://www.india.gov.in/sites/upload_files/npi/files/coi_part_full.pdf.

[344] *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 AIR 860; Garimella, Sai Ramani, Emerging Public Policy Contours: Is Indian Arbitration Moving Closer to the Asian Scenario? (June 1, 2013). 2 (1) AALCO Journal of International Law 55 (2013). Available at SSRN: https://ssrn.com/abstract=2385441; See also Arthad Kurlekar, Gauri Pillai, To be or not to be: the oscillating support of Indian courts to arbitration awards challenged under the public policy exception, Arbitration International, Volume 32, Issue 1, March 2016, Pages 179–198, https://doi.org/10.1093/arbint/aiv066.

[345] 417 US 506 (1974).

[346] Ibid.

[347] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614 (1985).

[348] Kurlekar & Pillai, *supra* note 344; See also *Indian Arbitration and "Public Policy",* Texas Law Review, Vol. 89:699, Available at: http://texaslawreview.org/wp-content/uploads/2015/08/Rendeiro-89-TLR-699.pdf.

[349] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705.

[350] Kurlekar & Pillai, *supra* note 344; See also Gagrani, Harsh and Jhurani, Ritika, Unbridled Horse on a Run - A Critique of the Judgment - Ongc V. Saw Pipes (February 17, 2010). Indian Law Review, Vol. 1, No. 1, 2010 . Available at SSRN: https://ssrn.com/abstract=1554313.

Conciliation Act. It merely expounded upon the principles applicable to Section 34 of the Act.[351]

The decision delivered in the case of *Bhatia International v. Bulk Trading SA*[352] was criticized for encouraging judicial overreach of the Indian judiciary.[353] This decision permitted the Indian courts to set aside foreign arbitral awards and also gave power to them to appoint arbitrators in arbitrations seated abroad. This decision also created uncertainty and delay in the enforcement of foreign arbitral awards in India.[354]

The decision in the case of *ONGC v. Western Geco*[355] is another case that has drawn criticism for widening the notion of public policy and increasing judicial intervention, as has been stated above.[356] Section 5 of the Indian Arbitration Act, 1996 is based on Article 5 of the UNCITRAL Model Law. This provision prohibits the domestic courts to interfere in the enforcement proceedings. The court can interfere only when any of the grounds under Section 34 of the Act is satisfied. In this case, the Supreme Court of India blurred this distinction. The court assumed the power to modify arbitral awards. Review of merits of arbitral awards has not been mentioned anywhere in the Indian Act or even the New York Convention and the UNCITRAL Model Law.[357] The decision delivered by the Supreme Court in the case of *Western Geco*[358] is considered to not fit well even the principles of the New York Convention or international practice. The New York Convention in its provisions has set the maximum standard for refusal of enforcement of arbitral awards. A Contracting State is obligated to take into consideration all of that and is expected to abide by the guidelines. A Contracting State should not expand the grounds provided therein in such manner so as to go against the spirit of the New York Convention.[359] This decision has been considered to be against the practice of international standards and also against the scheme of the Indian Act.[360]

---

[351] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705; See also Kurlekar & Pillai, *supra* note 344; See also Gagrani & Jhurani, *supra* note 350; See also *Indian Arbitration and "Public Policy",* Texas Law Review, Vol. 89:699, Available at: http://texaslawreview.org/wp-content/uploads/2015/08/Rendeiro-89-TLR-699.pdf; See also Malhotra, *supra* note 256.
[352] *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105.
[353] Hunter, J., & Banerjee, R. (2013). Bhatia, BALCO and Beyond: One Step Forward, Two Steps Back? National Law School of India Review, 24(2), 1-9. Retrieved June 13, 2020, from www.jstor.org/stable/44283758.
[354] Niyati Nath and Khursheed Vajifdar, *Re-Visiting Bhatia Internationa,* Mondaq, 27 November, 2012, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/208590/re-visiting-bhatia-international; See also Kurlekar & Pillai, *supra* note 344.
[355] *ONGC v. Western Geco,* [2015] AIR 363 (SC).
[356] Kurlekar, *supra* note 279.
[357] Ibid.
[358] (2014) 9 SCC 263.
[359] Kurlekar & Pillai, *supra* note 344.
[360] *Widened Scope of 'Public Policy' Leaves Arbitral Awards Susceptible to Further Scrutiny by Courts,* Nishith Desai Associates, 6 October, 2014, Available at: http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/widened-scope-0f-public-policy-leaves-arbitral-awards-

The decision in the case of *Phulchand Ltd. v. OOO Patriot*[361] is another decision which has expanded the scope of judicial review of foreign arbitral awards in India.[362] The Supreme Court in this case defined what the term 'public policy' would mean. The court further stated that additional criterion of patent illegality will also be applicable to foreign arbitral awards.[363] The fact that the court applied the reasoning of the case of *Saw Pipes* to apply patent illegality to foreign arbitral awards is flawed. The Supreme Court had explicitly stated that the expression 'public policy' with regards to a foreign award does not cover the field covered by the words 'laws of India'. By examining the validity of a foreign award under the laws of India, the Supreme Court has struck a heavy blow on the very narrow construction, which was established in the case of *Renusagar.*[364]

The decision in the case of *Bharat Aluminium Co. v. Kaiser Aluminium Service*[365] was seen as a welcome sign since it sought to reduce the judicial intervention in the arbitration process.[366] The Supreme Court of India clarified the scheme of the Indian Arbitration and Conciliation Act. In its decision the Court went on to explain the entire scheme of the Act. It states that the Indian Arbitration and Conciliation Act makes a differentiation between domestic awards, dealt with under Part I of the Act and foreign awards, dealt with under Part II of the Act. Indian courts were known to have assumed wide powers under both the parts of the Act until 2013.[367]

The decision in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[368] is considered to be very important since the decision shows the shift of the Indian judiciary towards pro-enforcement principle of the New York Convention.[369] The decision of the Supreme Court of India in the case of *Sri Lal Mahal*[370] is considered to be very significant because it is through this decision that the Supreme Court removed the ground of patent illegality in consideration of awards brought for enforcement under Part II of the Indian Arbitration and Conciliation

susceptible-to-further-scrutiny-by-courts.html?no_cache=1&cHash=bd6a9abae83687808f2ccb78211ea511; See also Kurlekar, *supra* note 279.

[361] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.

[362] Cutler & Webb, *supra* note 288.

[363] Ibid.

[364] Prateek Bagaria et al., *Enforcement of Awards- Erasing the distinction between Domestic and Foreign Award,* Dispute Resolution Hotline, Nishith Desai Associates, 31 October, 2011, Available at: http://www.nishithdesai.com/fileadmin/user_upload/Html/Dispute/Dispute%20Resolution%20Hotline_Oct3111.htm; See also Cutler & Webb, *supra* note 288.

[365] *Bharat Aluminium Co. v. Kaiser Aluminium Service,* (2012) 9 SCC 552.

[366] Hunter & Banerjee, *supra* note 353.

[367] Kurlekar & Pillai, *supra* note 344.

[368] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433.

[369] PSA Legal Counsellors, *supra* note 300.

[370] (2014) 2 SCC 433

Act.[371] It was in this case that the ambit of public policy was narrowed in its application as a ground for refusal of recognition and enforcement of foreign arbitral awards. Narrow interpretation of the public policy exception is consistent with the established practice in international commercial arbitration. The same approach is taken in most of the major arbitration jurisdictions.[372] The International Law Association had released its Report in 2002 where it was stated that a strict interpretation of the public policy exception should be promoted worldwide. It also stated that the public policy exception should be used in exceptional cases only so as not to interfere with the principle of finality of the arbitration process.[373] If a reference is made to the Explanatory Note to the Model Law, it will be evident that the Model Law also promotes the concept of finality in the arbitration process over judicial interference.[374] However, the *Sri Lal Mahal*[375] case did create some obstacles. The court in this case did not address the issue of differing standards of public policy for Part I and Part II of the Indian Arbitration and Conciliation Act. The differing standards still exist.[376]

The other cases are fairly recent and show a shift of the Indian judiciary towards the principle of pro-enforcement. The decisions in the cases *Cruz City 1 Mauritius Holdings v. Unitech Limited*[377] and *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*[378] have affirmed the position of the Indian judiciary with respect to the interpretation and application of the public policy exception during enforcing foreign arbitral awards.[379] The decision delivered in the latter case depicts how far Indian law has developed on the subject matter of enforcement of foreign arbitral awards under the Arbitration and Conciliation Act after a series of contrasting decisions.[380] The Indian judiciary was of the opinion that the judicial intervention should be

---

[371]Arbitration Notes, *supra* note 300; See also Shaun Lee, *The End of Doctrine of Patent Illegality for Foreign Awards in India?,* Singapore International Arbitration Blog, 5 August, 2013, Available at: https://singaporeinternationalarbitration.com/2013/08/05/the-end-of-doctrine-of-patent-illegality-for-foreign-awards-in-india/.

[372] Kurlekar & Pillai, *supra* note 344.

[373] Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards, adopted at the International Law Association's 70th Conference held in New Delhi, India, 2-6 April 2002.

[374] Model Law on International Commercial Arbitration, UN Doc A/40/17 (1985); adopted by the United Nations Commission on International Trade Law on 21 June 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf. A commentary prepared by the Secretariat on an early draft of the Model Law appears in document A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI-1985, United Nations publication, Sales No. E.87.V.4).

[375] (2014) 2 SCC 433.

[376] Kurlekar & Pillai, *supra* note 344.

[377] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.

[378] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

[379]Nelivigi et al.. *supra* note 312; See also Singh and Jha, *supra* note 324; See also Gandhi et al., *supra* note 324; See also Bhardwaj, *supra* note 324.

[380] Nelivigi et al.. *supra* note 312.

minimum in cases of enforcement of foreign arbitral awards, rather than excessive judicial intervention. This has been considered as a positive stance taken by the Indian judiciary.[381] However, in the case of *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.*[382], there has been yet another shift in the stance of the Indian judiciary on the subject matter of invoking the public policy exception for refusing enforcement of foreign arbitral awards. The Supreme Court of India refused the enforcement of the foreign award in this case because it was held to be against the public policy of India.[383] There was a detailed review of evidence conducted by the arbitral tribunal and the findings of the arbitral tribunal was disregarded by the Supreme Court of India.[384] The court did not take note of the recent judgment in the case of *Vijay Karia*[385], further held that:

> "The fundamental policy of Indian law, as has been held in Renusagar, must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. Fundamental policy refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time honoured, hallowed principles which are followed by the courts."[386]

From the above analysis of the decisions of the apex court of India, it is very evident that it is the doctrine of patent illegality which has increased the scope of judicial intervention in the enforcement of foreign arbitral awards in India.[387] The question that arises here is that whether a separate ground is necessary which lead to a wider interpretation of the public policy exception. This is concerning because all other major arbitration jurisdictions across the world have adopted a narrow interpretation of the public policy exception and encourages reduced

---

[381] Nelivigi et al.. *supra* note 312; See also Singh and Jha, *supra* note 324; See also Gandhi et al., *supra* note 324; See also Bhardwaj, *supra* note 324.

[382] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

[383] Shreya Saho and Ishani Jammula, *The NAFED Decision: Conundrum of Enforcing a Foreign Award,* The Indian Review of Corporate and Commercial Law, 6 June, 2020, Available at: https://www.irccl.in/single-post/2020/06/06/The-NAFED-Decision-Conundrum-of-Enforcing-a-Foreign-Award.

[384] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

[385] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

[386] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020; See also *NAFED Case: Enforcement of Foreign Awards in India-Have the Braked been applied?,* Bloomberg Quint Opinion, 30 April, 2020, Available at: https://www.bloombergquint.com/law-and-policy/nafed-case-enforcement-of-foreign-awards-in-india-have-the-brakes-been-applied.

[387] This was first established in the case of *ONGC v. Saw Pipes Ltd* (2003) 5 SCC 705. See also Srinivasan, Badrinath, *Public Policy and Setting Aside Patently Illegal Arbitral Awards in India* (March 27, 2008). Available at SSRN: https://ssrn.com/abstract=1958201 or http://dx.doi.org/10.2139/ssrn.1958201.

judicial intervention in the arbitration process.[388] Patent illegality acts as an additional hindrance to the enforcement of arbitral awards.[389] The Supreme Court of India had already established in the case of *Renusagar* that an arbitral award will be violating the public policy if it is against:

- The fundamental policy of Indian law; or
- The interests of India; or
- Justice or morality[390]

Adding an additional criterion to this in a way increased the judicial intervention in the arbitration process, especially the enforcement proceedings of arbitral awards. Apart from increasing the judicial intervention, the additional ground of patent illegality, along with wider interpretation, also affects the binding nature of the arbitral awards.[391] Article III of the New York Convention clearly states that 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.[392] The Convention or the Model Law and even the Arbitration and Conciliation Act, in no way, suggest that the arbitral awards should be reviewed based on its merits. By adding an additional criterion to prove public policy violation, increases the scope of judicial intervention of reviewing the merits of the case.[393]

Patent illegality means 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 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.[394] This was held in the case of *ONGC v. Saw Pipes* and this view was reiterated in the case of *Bhatia International* and *Associate Builders.*

Some legal scholars believe that there are some advantages to the additional ground of patent illegality or it can be put in a another way that some scholars are in support of the wider

---

[388] Yash Dubey, *Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India,* Christ University Law Journal, 2018, Vol. 7, No. 2, 63-81, ISSN 2278-4332X, https:// doi.org/10.12728/culj.13.4; See also Kurlekar & Pillai, *supra* note 344.

[389] Jujjavarapu, Aparna D., *Judicial Review of International Commercial Arbitral Awards by National Courts in the United States and India,* (2007). LLM Theses and Essays. 82, Availabe at: https://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1077&context=stu_llm.

[390] *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 Supp (1) SCC 644.

[391] Srinivasan, *supra* note 387.

[392] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/english.

[393] Garima Budhiraja Arya and Tania Sebastian, *Critical Appraisal of 'Patent Illegality' as a Ground for Setting aside an Arbitral Award in India,* (2012) 24.2 Bond Law Review, Available at: http://www5.austlii.edu.au/au/journals/BondLawRw/2012/12.pdf.

[394] *ONGC v. Saw Pipes,* (2003) 5 SCC 705; See also *Bhatia International v. Bulk Trading S.A.,* (2002) 4 SCC 105; See also *Associate Builders v. Delhi Development Authority,* (2015) 3 SCC 49.

interpretation of the public policy exception.[395] O.P. Malhotra in his critique of the case *Saw Pipes,* supports the wider interpretation of the public policy exception and the decision delivered by the Supreme Court of India. In his article he states that:

> The rules on which the public policies of a nation are founded at a particular time, on proper occasion, are capable of expansion and modification. In modern progressive society with fast-changing social norms and concepts, it is more and more imperative to evolve new heads of public policy. The courts have responded to this challenge in the past by minting new heads of public policy and when the exigencies of justice require they will do so again.
> [O.P. Malhotra, *The Scope of Public Policy under the Arbitration and Conciliation Act, 1996,* Vol. 19(2), at 28]

He justifies the decision of the court based on this. He also states that before the court decided the *Renusagar*[396] case and introduced the three parameters for deciding public policy violations, these parameters did not really exist. Before that case the scope of public policy was not defined. Hence, the decision in the case of *Saw Pipes* can be faulted for adding one additional parameter.[397] He further states that the presence of the parameter of 'patent illegality' can be found in the parameter of fundamental policy of Indian law which was already established in the case of *Renusagar.*[398]

Another scholar believes that the additional ground of patent illegality has created more problems than it has solved for the arbitration framework of India.[399] He states the introduction of the additional ground of patent illegality has brought breach of substantive law under the purview of Section 34(2)(a)(v)[400], which is not what the Arbitration and Conciliation Act intends.[401] The courts following the decision rendered in the case of *Saw Pipes* have set aside arbitral awards on the ground of patent illegality. This had set a wrong example for the other courts.[402]

---

[395] R.A Sharma, *Case of ONGC v. Saw Pipes Ltd.,* 2003 (2) Arb.LR 5 (SC)- No Need for Reconsideration, 2007 (1) Arb.LR 9; See also Malhotra, *supra* note 256; See also William W. Park, *Why Courts Review Arbitral Awards,* 2001, Available at: http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf; See also Banerji, G. (2009). Judicial Intervention in Arbitral Awards: A Practitioner's Thoughts. National Law School of India Review, 21(2), 39-53. Retrieved June 14, 2020, from www.jstor.org/stable/44283802.
[396] *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 Supp (1) SCC 644.
[397] Malhotra, *supra* note 256.
[398] *Renusagar Power Co. Ltd. v. General Electric Co.,* 1994 Supp (1) SCC 644; See also Malhotra, *supra* note 256.
[399] Srinivasan, *supra* note 387.
[400] Section 34(2)(a)(v)- Procedure of the arbitral tribunal. Supreme Court of India construed arbitral procedure as substantive law of India in the case of *Saw Pipes, ,* (2003) 5 SCC 705.
[401] Srinivasan, *supra* note 387.
[402] *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors,* 2006 (2) Arb.LR 498 (SC); *Union of India v. Satyanarayana Construction Co.*, 2005 (2) Arb.LR 496 (AP).

Another scholar Sarah Hilmer has opined against the patent illegality ground.[403] She states in her article that:

> "Unfortunately, in Saw Pipes the Supreme Court has opened the floodgates to arbitral litigation. That means, once more that the 'lawyers will laugh and legal philosophers weep'"[404]

There are several challenges in an arbitration process. One of which to secure a balance between finality of arbitral awards and justice and fairness which can be assured through judicial review. The problem with this is that the arbitration procedure should be free of excessive judicial intervention, however, in India we can see that there is excessive judicial intervention. This defeats the purpose of arbitration and causes unnecessary delays in the enforcement of arbitral awards.[405]

4.5. Is India breaching its treaty obligations?

In this section, the author will analyze whether India is breaching its treaty obligations by not enforcing foreign arbitral awards. This will be dealt under the following heads which serve as arguments.

4.5.1. Patent Illegality

The first argument against India is that there was no need to introduce an additional criterion of patent illegality for establishing violation of public policy. As discussed in the previous section, the additional ground of patent illegality was introduced by the Supreme Court of India in the case of *Saw Pipes*[406] and the reasoning in the decision was applied in several other cases.[407]

The author contends that the additional ground of patent illegality allows for more judicial intervention leading to non-enforcement of foreign arbitral awards. The scope of public policy becomes broader with the addition of the patent illegality ground. This results in India's breach of obligation under the New York Convention.[408] It has been discussed in Chapter 2 that Article III of the New York Convention bestows an obligation on the Contracting States to enforce

---

[403] Srinivasan, *supra* note 387.
[404] Sarah E. Hilmer, *Did Arbitration Fail India or did India Fail Arbitration,* 10 Int. A.L.R. 2007 33, 34 (2007).
[405]Srinivasan, *supra* note 387; See also P.C. Rao & William Sheffield (EDS.), Alternative Dispute Resolution: What it is and How it Works (1997).
[406] *ONGC v. Saw Pipes,* (2003) 5 SCC 705.
[407] *Bhatia International v. Bulk Trading S.A.,* (2002) 4 SCC 105; See also *Associate Builders v. Delhi Development Authority,* (2015) 3 SCC 49; *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors,* 2006 (2) Arb.LR 498 (SC); See also *Union of India v. Satyanarayana Construction Co*., 2005 (2) Arb.LR 496 (AP).
[408] India signed the New York Convention on 10 June, 1958 and ratified it on 13 July, 1960. Available at: http://www.newyorkconvention.org/countries.

arbitral awards.[409] The obligation of Contracting States under the New York Convention has already been dealt with in Chapter 2, hence, it will not be discussed in details here. The main takeaway from that chapter is that the Contracting States to the New York Convention are obligated to enforce arbitral awards in accordance with the rules and procedures of the territory.[410]

The Arbitration and Conciliation Act is the legislation governing the arbitration framework in India. The Act was enacted along the lines of the UNCITRAL Model Law and shows that the Indian legislators wanted to commit to the UNCITRAL's philosophies.[411] The UNCITRAL Model Law or the New York Convention in no way expresses that the scope of public policy should be broadened. Though these international legal instruments allow the states to make their own rules, they should not be in contravention of the international legal instruments to which a state has pledged commitment and consented to incorporate in their domestic legal system.[412] The national legislation is supposed to fill the gaps which an international treaty does not provide for.[413] However, the government of states is obliged to ensure that its acts are compatible with its international obligations and not in breach of them.[414]

Even before the Act was amended to add the ground of patent illegality[415], it had been applied in several cases leading to non-enforcement of arbitral awards.[416] The decision in the case of *ONGC v. Saw Pipes*[417] was upheld in the case of *Phulchand Ltd. v. OOO Patriot.*[418] These cases were, in fact, have been considered to have drawn a lot of criticism for the Indian arbitration framework.[419] The decision in the case of *Phulchand Ltd. v. OOO Patriot*[420] was

---

[409] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[410] Ibid.

[411] Preamble, The Arbitration and Conciliation Act, 1996, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.

[412] According to Article III of the New York Convention, Contracting States are obligated to enforce arbitral awards in accordance with the rules and procedures of the territory where it is relied upon. According to Article V(2)(b) of the New York Convention, an arbitral award can be refused recognition and enforcement if the award is considered to be against the public policy of that state. 'That' state refers to the state where the award is sought to be enforced.

[413] Malcolm N. Shaw, *International Law,* 8th Edition, Cambridge University Press, 2017; See also Oppenheim's International Law.

[414] Ibid.

[415] The Arbitration and Conciliation Act, 1996 was amended in the year to add the ground of patent illegality in Explanation 2A to Section 34 of the Act, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.

[416] *Mcdermott International Inc. v. Burn Standard Co. Ltd. and Ors,* 2006 (2) Arb.LR 498 (SC); *Hindustan Zinc Ltd. v. Friends Coal Carbonization,* 2006 (2) Arb.LR 20 (SC); *Oil and Natural gas Corporation Ltd. v. Schlumberger Asia Services Ltd.,* 2006 (3) Arb.LR 610 (Delhi).

[417] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705.

[418] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.

[419] Dhanuka, *supra* note 256; See also Gupta, *supra* note 256; See also Malhotra, *supra* note 256.

[420] *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300.

finally overruled in the case of *Shri Lal Mahal Ltd. v. Progetto Grano Spa.*[421] Patent illegality was no longer applied when proving whether an arbitral award is in violation of public policy.[422] However, what is concerning is the fact that in one of the very recent judgments delivered by the Supreme Court of India, the patent illegality ground was once again applied which resulted in the non-enforcement of the arbitral award.[423] Apart from making the arbitral process more technical[424], it can be stated that the ground of patent illegality is resulting in more non-enforcement of arbitral awards. This leads to non-fulfilment of the obligation to enforce arbitral awards under the New York Convention.[425]

4.5.2. Wide Interpretation of Public Policy Exception

The author contends that the wide interpretation of the public policy exception is another reason which results in India's breach of obligation under the New York Convention. Indian judiciary seems to have derailed itself from observing the principle of pro-enforcement bias as mentioned in the New York Convention. It is evident from the series of cases decided by the courts that have been discussed above.[426]

Major jurisdictions across the world have adopted a narrow or restricted interpretation of the notion of public policy.[427] Most countries across the world have been faithfully observing the pro-enforcement bias of the New York Convention.[428]

The United States of America has adopted a restricted approach to the public policy exception. The American judiciary has taken a pro-enforcement attitude which leads to minimal intervention in international commercial arbitrations. In the landmark case of *Scherk v. Alberto-Culver Co.,*[429] the court had reiterated the importance of the principle of pro-enforcement and had interpreted the public policy exception restrictively. There are other cases too where the US courts have interpreted the public policy narrowly. The courts have stated in

---

[421] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433.
[422] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.
[423] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.
[424] Srinivasan, *supra* note 387.
[425] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.
[426] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705; *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105; *Venture Global Engineering v. Satyam Computer Services Ltd.,* (2008) 4 SCC 190; *ONGC v. Western Geco,* [2015] AIR 363 (SC); *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300; *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.
[427] Dubey, *supra* note 388; See also Kurlekar & Pillai, *supra* note 344.
[428] Shenoy, *supra* note 176.
[429] *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974).

these cases that an arbitral award can be refused enforcement on the grounds of public policy, if it is in conflict with the conflict with the concept of justice and morality of the state.[430]

France has a body of set standards which form their international public policy. When enforcing foreign arbitral awards, the French courts take into consideration these standards to see if the arbitral award violates these standards.[431] The French courts have also taken a restrictive or narrow approach to the public policy exception[432] as is evident from the decisions of the courts.[433] Though there are some irregularities reported[434] too but the fact that the French courts have been observing the pro-enforcement bias shows their tendency to respect their international obligations.

English courts have also adopted a narrow interpretation of the public policy exception and have been observing the pro-enforcement bias of the New York Convention. This is evident from the few early decisions of the English courts.[435] In one of the recent judgments, the English court held that the public interest in the finality of arbitration awards outweighed an objection to enforcement on the grounds that the transaction was tainted by fraud.[436]

It is an undeniable fact that the standards of public policy varies from state to state and it is nearly impossible to bring about uniformity with respect to that. The International Bar Association's Report on the Public Policy Exception in the New York Convention bears evidence to this.[437] The report clearly states that there is no uniformity with respect to the extent

---

[430] *Parsons & Whittemore v. Societe Generale,* 508 F.2d 969 (1974); See also *International Navigation Ltd. v. Waterside Ocean Navigation Co. Inc.,* 737 F.2d 150, (2d Cir. 1984).

[431] Anton G. Maurer, The Public Policy Exception under the New York Convention: History, Interpretation, And Application; See also Shenoy, *supra* note 176.

[432] Patricia Peterson, *The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?,* Kluwer Arbitration Blog, 10 December, 2014, Available at: http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/?doing_wp_cron=1592153181.6249489784240722656250.

[433] *Swiss China Time Ltd. v. Benetton International,* European Court Reports 1999 I-03055; *Thales v. Euromissile,* 1er Ch., sect. C, 18 November 2004; *Sté SNF v. Sté Cytec Industries BV*, 1er Ch. civ., 4 June 2008; *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH c. Sté CPL Industries Limited*, Paris CA, 10 September 2009; Cour de cassation, 1er Ch. civ., 12 February 2014.

[434] Patricia Peterson, *The French Law Standard of Review for Conformity of Awards with International Public Policy where Corruption is Alleged: Is the Requirement of a "Flagrant" Breach Now Gone?,* Kluwer Arbitration Blog, 10 December, 2014, Available at: http://arbitrationblog.kluwerarbitration.com/2014/12/10/the-french-law-standard-of-review-for-conformity-of-awards-with-international-public-policy-where-corruption-is-alleged-is-the-requirement-of-a-flagrant-breach-now-gone/?doing_wp_cron=1592153181.6249489784240722656250.

[435] *Soleimany v. Soleimany,* (1998) 3 WLR 811 (C.A.); See also *Westacre Investments Inc. v. Jugoimport,* (2000) QB 288 (C.A.).

[436] *Sinocore International Co. Ltd. RBRG Trading (UK) Ltd.,* [2017] EWHC 251 (Comm); See also *Issues relating to Challenging and Enforcing Arbitration Awards: Grounds to refuse enforcement,* An extract from the first edition of GAR's The Guide to Challenging and Enforcing Arbitration Awards, Norton Rose Fulbright, August 2019, Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement.

[437] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015),

of judicial review of arbitral awards by the domestic courts of the Contracting States.[438] It would rather be not feasible to bring about uniformity in the state practice of the states with respect to how the judiciary operates. However, the states can at least follow international norms and standards with respect to the enforcement of foreign arbitral awards. Indian judiciary should strive to align its stance on the interpretation of the public policy exception with that of other countries. This will help the Indian arbitration framework to become a reliable destination for enforcement of arbitral awards. Wider interpretation leads to increasing the scope of public policy, more judicial intervention and these combined results in the reviewing the merits of the arbitral award by the courts, thus defeating the whole purpose of finality in arbitration.[439]

4.5.3. Reviewing Merits of Arbitral Awards

The author contends that reviewing the merits of arbitral awards is resulting in India's breach of its obligation of enforcing foreign arbitral awards under the New York Convention. The ground of 'patent illegality' which was introduced in the case of *ONGC v. Saw Pipes Ltd.*[440] allows for more judicial intervention. The Indian courts have assumed the power the modify arbitral awards by reviewing the merits of the arbitral awards.[441]

There is no evidence in the New York Convention or the UNCITRAL Model Law that suggest that the arbitral awards can be reviewed on its merits. Article III of the New York Convention states very clearly that the Contracting States shall recognize arbitral awards as binding and enforce them.[442]

The Model Law is based on three pillars. These pillars are party autonomy, minimum judicial intervention and fair and efficient arbitral procedure.[443] Reviewing the merits of the arbitral award or examining the reasoning of the arbitrator increases judicial intervention, and it is evident from the analysis of the decisions of the Supreme Court of India, that most of the awards that are reviewed on merits end up not getting enforced.[444]

---

https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.

[438] Ibid.

[439] This was evident in the case of *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705.

[440] (2003) 5 SCC 705

[441] *ONGC v. Western Geco,* [2015] AIR 363 (SC).

[442] [442] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[443] Binder, *supra* note 86; See also UNCITRAL Model Law on International Commercial Arbitration, 1985, Available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[444] *ONGC v. Saw Pipes Ltd.,* (2003) 5 SCC 705; *Bhatia International v. Bulk Trading SA,* (2002) 4 SCC 105; *Venture Global Engineering v. Satyam Computer Services Ltd.,* (2008) 4 SCC 190; *ONGC v. Western Geco,* [2015] AIR 363 (SC); *Phulchand Ltd. v. OOO Patriot,* (2011) 10 SCC 300; *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

4.5.4. White Industries Case (*White Industries Australia Limited v. Republic of India*[445])

This case involved the violation of the bilateral investment treaty (BIT) between India and Australia. India was held responsible for violating its obligations under the India-Australia BIT.[446] White Industries, which is an Australian investor, had entered into a contract with Coal India for supply of certain equipment. The contract entered into by the companies contained an arbitration clause and the rules applicable to it were the ICC Rules.[447] A dispute arose between the parties which led to the initiation of arbitration proceedings in London. The arbitration award was in favor of White Industries. White Industries sought to enforce the award and initiated enforcement proceedings before the Delhi High Court and at same time Coal India sought to set aside the arbitral award of the tribunal and, hence, approached the Calcutta High Court relying on the decision delivered in the case of *Bhatia International*.[448] Coal India's request was granted by the Calcutta High Court. This resulted in White Industries appealing against the decision. Due to a lot of delay by the Indian judiciary to decide the matter, White Industries decided to initiate an ITA against India under the BIT (India-Australia BIT).[449] One of the arguments of White Industries was that because of the delay caused by the judiciary in enforcing the awards, India had failed to provide effective means of asserting claims and enforcing rights to White Industries.[450] The tribunal decided in favor of White Industries. The tribunal held that Indian courts violated India's obligation to provide White Industries with effective means asserting claims and enforcing rights. The tribunal stated that the effective means provision can be borrowed from the India-Kuwait BIT[451] by relying on the

---

[445] *White Industries Australia Limited v. Republic of India,* UNCITRAL Final Award (30 November, 2011).

[446] Prabhash Ranjan, *The White Industries Arbitration: Implications for India's Investment Treaty Program,* Investment Treaty News, 13 April, 2012, Available at: https://www.iisd.org/itn/2012/04/13/the-white-industries-arbitration-implications-for-indias-investment-treaty-program/; See also Ashutosh Ray, *"White Industries" and State Responsibility: Lesser-Known Facts about the Case as Discussed during the 2014 ICCA Young Arbitration Practitioners Conference,* Kluwer Arbitration Blog, 30 June, 2014, Available at: http://arbitrationblog.kluwerarbitration.com/2014/06/30/white-industries-and-state-responsibility-lesser-known-facts-about-the-case-discussed-at-2014-icca-young-arbitration-practitioners-conference/?doing_wp_cron=1592633722.0322840213775634765625; See also SK Dholakia, *Investment Treaty Arbitration and Developing Countries: What Now and What Next? Impact of White Industries v. Coal India Award,* Volume II: Issue 1, Indian Journal of Arbitration Law, Available at: http://www.ijal.in/sites/default/files/IJAL%20Volume%202_Issue%201_S%20K%20Dholakia.pdf.

[447] Dholakia, *supra* note 446.

[448] *Bhatia International v. Bulk Traders, SA,* (2002) 4 SCC 105.

[449] Ray, *supra* note 446.

[450] *White Industries Australia Limited v. Republic of India,* UNCITRAL Final Award (30 November, 2011); See also Ranjan, Prabhash; Singh, Harsha Vardhana; James, Kevin; Singh Ramandeep [2018], *"India's Model Bilateral Investment Treaty; Is India Too Risk Averse?",* Brookings India Impact Series No. 082018, August 2018, Available at: https://www.brookings.edu/wp-content/uploads/2018/08/India's-Model-Bilateral-Investment-Treaty-2018.pdf.

[451] Article 4(5), India-Kuwait BIT states that 'each contracting party shall provide effective means of asserting claims and enforcing rights with respect to investments…'.

MFN provision mentioned in the India-Australia BIT.[452] There were other issues on which both the parties argued. The main point to note here is that the tribunal held India guilty of violating the India-Australia BIT because India did not provide effective means of asserting claims and enforcing rights, which the slowness of Indian judicial system made it impossible to comply.[453] This decision of the tribunal reflects badly on the Indian judiciary's reputation. This also points to the fact that enforcing international arbitral awards is troublesome. The Indian judiciary has been known to intervene in international arbitrations after its controversial decision in the case of *Bhatia International*[454] and other cases that followed the decision. The Indian courts followed the decision in that case which allowed them to exercise their powers under Part I of the Indian Arbitration and Conciliation Act to intervene in international arbitrations, even when the arbitrations were seated outside. Excessive judicial intervention and prolonged delay in enforcing the arbitral awards were the reasons that made White Industries initiate ITA under UNCITRAL rules. The tribunal held the ICC award to be enforceable under the laws of India, however, it did not rule on whether India was in breach of its obligations under the New York Convention because of non-enforcement of the ICC award.[455]

The ruling in the White Industries case clearly depicts how sovereign and independent functions of the Indian judiciary could be attributed to the state and could amount to violation of India's BITs. This resulted in India, as a state, being held responsible for its inaccuracy in enforcing international arbitral awards.[456] Hence, India can also be held responsible in cases of other foreign arbitral awards in a similar manner. The cases discussed above also demonstrate how the Indian judiciary has been hesitant in enforcing arbitral award by intervening way too much and also by modifying arbitral awards. This can also bring upon responsibility upon India if the decision in the case of *White Industries*[457] is followed.

It is important to bear this in mind that this is not the first instance where the Indian judiciary has delayed the enforcement proceedings or refused the enforcement of international arbitral awards or in fact intervened way too much in international arbitrations. The author contends

---

[452] Article 4(2), India-Australia BIT mentions the MFN provision according to which, 'a contracting party shall at all times treat investments in its territory on a basis no less favorable than that accorded to investments or investors of any third country'; See also Ranjan et. al., *supra* note 450.
[453] Dholakia, *supra* note 446.
[454] *Bhatia International v. Bulk Traders, SA,* (2002) 4 SCC 105.
[455] *India liable under BIT for extensive judicial delays,* Herbert Smith Freehills, Arbitration Notes, 1 March 2012, Available at: https://hsfnotes.com/arbitration/2012/03/01/india-liable-under-bit-for-extensive-judicial-delays/#more-453.
[456] Ranjan, *supra* note 446.
[457] *White Industries Australia Limited v. Republic of India,* UNCITRAL Final Award (30 November, 2011).

that India to some extent is not fulfilling its obligations under the New York Convention because of non-enforcement of arbitral awards.

4.6. State responsibility due to non-enforcement of arbitral award

The New York Convention is applied in the Contracting States by the domestic courts. The domestic courts of the Contracting States are responsible for the proper interpretation and application of the Convention in the municipal law of the Contracting States. It has been mentioned in the ICCA Guide to the New York Convention that the non-application or incorrect application of the Convention results in the international responsibility of the state.[458] It is further mentioned that the New York Convention does not have a dispute resolution clause. However, it has to be understood that the New York Convention is an international treaty and this treaty creates obligations for the Contracting States under international law.[459]

States are subjects of international law.[460] The act of the domestic courts can be attributed to the state itself. This means that the acts of the domestic courts in the application of international treaties can be considered as acts of the state itself.[461] Hence, if the domestic courts apply international treaties improperly or applies questionable grounds to refuse the recognition and enforcement of foreign arbitral awards, the enforcing state is likely to be held internationally responsible for not fulfilling its obligations under the New York Convention.[462] The ground of patent illegality introduced by the Indian Supreme Court[463] can be considered as a questionable ground for refusing enforcement of foreign arbitral awards.

It is important to note here that for establishing a basis for holding a state internationally responsible for non-enforcement of foreign arbitral awards, it has to be proved that there has been acts or omissions which can be attributed to the state. Such acts or omissions attributable to the state result in the contravention of the state's international obligations.[464] With reference to the theme of the thesis, there has to be a certain degree of wrongful interference by the domestic courts leading to the non-enforcement of foreign arbitral awards. Non-enforcement

---

[458] ICCA's Guide to the Interpretation of the 1958 New York Convention, A Handbook for Judges, Available at: https://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf.
[459] Ibid.
[460] Malcolm N. Shaw, International Law, 8th Edition, Cambridge University Press; See also James Crawford, Brownlie's Principles of Public International Law, 8th Edition, Oxford University Press; See also Udeariry, Nneoma, To What Extent do International Organizations Possess International Legal Personality? (September 15, 2011). Available at SSRN: https://ssrn.com/abstract=2052555 or http://dx.doi.org/10.2139/ssrn.2052555.
[461] ICCA's Guide to the Interpretation of the 1958 New York Convention, A Handbook for Judges, Available at: https://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf.
[462] Ibid.
[463] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 705.
[464] Article 2, Drafts Articles on Responsibility of States for Internationally Wrongful Acts, 2001, (A/56/10), Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

results in violation of the rights and interests of an award-creditor. These rights and interests of award-creditors are usually protected under international instruments[465] like BITs, if it concerns an investment arbitration, or contracts entered into between two companies for cross-border business deal, if it concerns an international commercial arbitration. The excessive interference by Indian courts by reviewing arbitral awards can be considered as an impediment to the enforcement of foreign arbitral awards in India and as stated above, the acts of the judiciary can be attributed to the state itself. This was held in the case of *White Industries.*[466] It is important to bear this mind that the procedure of enforcing the arbitral award varies from state to state.[467] However, this does not imply that there should be excessive judicial intervention in the enforcement proceedings of arbitral awards.

Another important point to note and what has already been discussed above is that under the New York Convention, the states are under a broad obligation to enforce arbitral awards[468] and that the enforcement can be refused on certain grounds which are mentioned in Article V of the Convention.[469] One of the grounds for refusal of recognition and enforcement of arbitral award is that if the award is against the public policy of the enforcing state then it would be denied enforcement. Contracting States to the New York Convention are allowed to refuse the enforcement of a foreign arbitral award if it is contrary to the public policy of the state. That would not be considered as a breach of the state's international obligations *per se.*[470] It is important to bear this in mind that the states are not under an obligation to enforce arbitral awards that are in contravention with their public policy. What becomes troublesome is the fact that the Indian judiciary has taken upon themselves to review the arbitral awards and also expanding the meaning of the public policy by introducing the criterion of patent illegality. Hence, under the garb of the public policy exception, the Indian judiciary wrongfully interferes in the enforcement of foreign arbitral awards.

There are certain difficulties in invoking state responsibility in case where the domestic courts fail to enforce an arbitral award and such failure is attributed to the state. The most

---

[465] Draguiev, Deyan, *supra* note 108; See also Bernardo Sepúlveda-Amor, Merryl Lawry-White, State responsibility and the enforcement of arbitral awards, Arbitration International, Volume 33, Issue 1, March 2017, Pages 35–61, https://doi.org/10.1093/arbint/aiw006; See also Dr. S.I. Strong, Enforcement of Arbitral Awards Against Foreign States or State Agencies, 26 Nw. J. Int'l L. & Bus. 335 (2006).

[466] *White Industries Australia Limited v. Republic of India,* UNCITRAL Final Award (30 November, 2011).

[467] Draguiev, Deyan, *supra* note 108.

[468] Article III, The New York Convention, 1958; See also Neil Q. Miller, *Enforcement proceedings against State entities- From one end to another,* Norton Rose Fulbright, Publication, May, 2018, Available at: https://www.nortonrosefulbright.com/en/knowledge/publications/e66b6bd1/enforcement-proceedings-against-state-entities-mdashbrfrom-one-end-to-another.

[469] Article V, The New York Convention, 1958.

[470] Draguiev, Deyan, *supra* note 108.

prominent is the fact that failure to enforce arbitral awards differs in each case. This cannot be generalized and applied uniformly in all the cases of non-enforcement of arbitral awards. Each case has to be analyzed differently which makes holding states responsible for not enforcing arbitral awards very difficult.[471]

In this chapter, the author analyzed the Indian judicial practice with respect to the interpretation and application public policy exception and the enforcement of foreign arbitral awards. Several case laws have been analyzed which suggest that there is excessive intervention by the Indian judiciary. This excessive intervention results in the non-enforcement of foreign arbitral awards. Indian courts through its decisions suggest that they believe that judicial intervention is required in order to have fair and just arbitration process. However, it appears that instead of observing the pro-enforcement bias of the New York Convention, Indian courts try to control the arbitration.

[471] Ibid.

CHAPTER 5: EXPLORING VIABLE SOLUTIONS

In this chapter probable solutions are provided by the author to remedy the situation of the Indian arbitration framework. The chapter is subdivided into four sections and each section deals with a probable solution.

5.1. Narrow approach to public policy exception?

The public policy exception is used as a shield to the recognition and enforcement of foreign arbitral awards. We have to bear this mind that the defense of public policy should not become a sword in the hands of those who want to limit the mobility or finality of international awards.[472] It has been stated over and over again that an arbitral award can be denied recognition and enforcement of it is against the public policy of the country where the award is sought to be recognized and enforced. There is no definition of the term "public policy" in the Convention. It is also important to note that the public policies of the Contracting States differ. The International Bar Association released a Report on the Public Policy Exception in the New York Convention that reaffirmed that public policy remains a nebulous and evolving concept that defies precise definition.[473]

It has also ben stated in the discussion above that the New York Convention has an evident pro-enforcement bias. It is the obligation of the Contracting States to enforce foreign arbitral awards according to Article III of the New York Convention. Enforcement is subject to few conditions.[474] Article V of the Convention lays down the grounds on which recognition and enforcement of foreign arbitral awards can be refused. Overall the New York Convention evinces a strong presumption in favor of enforcement.[475]

From the discussion above, it is clear that a narrow interpretation of public policy exception is favored over a wider interpretation. It is believed that a wider interpretation increases judicial intervention as compared to a narrow interpretation.[476] However, there are some scholars who are of the opinion that a wider interpretation of the public policy should be employed when

---

[472] Loukas Mistelis, '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, 248.

[473] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.

[474] Article III, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[475] Stephen Ostrowski and Yuval Shany 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73 New York University Law Review 1650, 1657-1658; Richard Garnett, 'International Arbitration Law: Progress Towards Harmonisation' [2002] 3 Melbourne Journal of International Law 400, 404.

[476] Dubey, *supra* note 388; See also Kurlekar & Pillai, *supra* note 344.

dealing with a public policy exception case. They believe that the defense of public policy becomes meaningless if the scope of public policy is limited. They believe that such restrictive interpretation of public policy exception will lead the parties enter into contracts which might basically disregard domestic laws and regulations. They support the idea that the domestic courts should be free to decide what constitutes a violation of the public policy of that state.[477] The reason for this is that, these scholars believe that arbitrators act independently and neutrally and while doing so they may not take into considerations the public interests during the process of rendering arbitral awards.[478] Also while rendering the award, the main aim of the arbitrator is to settle the dispute and also because they may not be aware of the public policies of the enforcement state that well. In spite of some scholars holding this view, most of the major arbitration jurisdictions have stuck to the narrow approach to the defense of public policy.

It is important to note that finality of arbitral awards is an important feature of the whole arbitration process. Recognizing and enforcing an arbitral award is important in the finality of awards. The New York Convention with its pro-enforcement bias and pro-arbitration in general seeks to promote finality in international commercial arbitration. The pro-arbitration policy seeks to enforce both arbitration agreements and arbitral awards, whereas the pro-enforcement policy focuses on the enforcement of arbitral awards.[479]

Public policy exception acts as an impediment to the finality of awards. Some legal experts are of the opinion that the public policy exception allows for judicial intervention. It is one of the reasons why legal experts recommend a narrow interpretation of the public policy exception. However, it is important to note that arbitral finality is not, and should not, be unlimited or unqualified. Nor is the public policy exception intended to protect the parochial or peculiar interests of the Contracting States to the New York Convention. This actually protects the vital judicial interests of those countries.[480]

It is believed that public policy exception is also in the interests of both the parties to the arbitration process. Arbitration cannot be a privatized method of resolving disputes. There has

---

[477] Sharma, *supra* note 395; See also Malhotra, *supra* note 256; See also Park, *supra* note 395; See also Banerji, *supra* note 395; See also Srinivasan, *supra* note 387; See also Dhanuka, *supra* note 256.

[478] Dhanuka, *supra* note 256.

[479] Vyapak Desai, Moazzam Khan and Payel Chatterjee, Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India; See also Arpan Kr. Gupta, A New Dawn for India- Reducing Court Intervention in Enforcement of Foreign Awards, Indian Journal of Arbitration Law, Volume II: Issue 2; See also Mahajan, Pallavi, The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India (September 7, 2015). Available at SSRN: https://ssrn.com/abstract=3449565 or http://dx.doi.org/10.2139/ssrn.3449565

[480] Okezie Chukwumerije, Choice of Law in International Commercial Arbitration (1994) 204. See also Joel Junker, 'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards' (1977) California Western International Law Journal 228, 250.

to be some sort of legal checks and balances on the process of arbitration. Public policy, as a ground for refusal of recognition and enforcement of arbitral awards, serves as a check which ultimately acts as a sign of respect for the juridical interests.[481]

The public policy exception, in a way, seeks to promote, rather than diminish, public confidence in arbitration as an effective and fair means of dispute resolution. In a way public policy prevents injustice in the process of arbitration.[482]

It can be said some judicial intervention is actually required in arbitration to make sure that no injustice is done. But the question here is where do we draw the line? The Indian scenario was discussed in the last chapter. It is evident from that the Indian judiciary has intervened way too much in the enforcement proceedings on the grounds of public policy. One reason of this can be the fact that there is no uniform understanding of public policy exception which can be applied in all the Contracting States. Lack of uniform definition has resulted in various interpretation by courts all over the world.[483] There is no guidance available as to how public policy should be interpreted. The International Bar Association its report on Public Policy Exception stated that the concept of public policy is very subjective and can have varied interpretation.[484] Another factor can be the discretionary nature of Article V. The usage of the word 'may' indicates that Article V is discretionary or permissive.[485] It is not mandatory or obligatory. It is not like that the courts have to refuse recognition and enforcement of arbitral awards on the grounds mentioned in Article V.[486] However, it is important to note that it is evident from the language of Article V that the residual discretionary to enforce awards is vested in the enforcement courts.[487] What has happened in the Indian scenario is that the Indian judiciary has made use of this discretionary power rather erratically. The question that pops up here is how can the actions of the Indian judiciary be harmonized? The major jurisdictions around the world have been sticking to a strict and narrow interpretation to the public exception.

---

[481] Sharma, *supra* note 395; See also Malhotra, *supra* note 256; See also Park, *supra* note 395; See also Banerji, *supra* note 395; See also Srinivasan, *supra* note 387; See also Dhanuka, *supra* note 256.
[482] Dhanuka, *supra* note 256.
[483] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.
[484] Ibid.
[485] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[486] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.
[487] Article V, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

India amended its arbitration laws in 2015 and in 2019. In 2015, the amendments sought to introduce a narrow interpretation for the public policy exception.[488] However, Indian courts are notorious for oscillating from one point of view to another. From its past decisions it is clear that the Indian judiciary has followed an anti-arbitration interventionism rather than following a pro-arbitration and pro-enforcement principles which are the underlying principles of the New York Convention. The International Bar Association in its report released in 2015 have stated that India is one of the few countries to have broadened the meaning of public policy. According to the Report India has given a much broader content.[489]

> In India the enforcement of a foreign arbitral award may be refused[490] by an Indian court on the ground of public policy if such enforcement would be contrary to:
> (i) Fundamental policy of Indian law; or
> (ii) Interests of India; or
> (iii) Justice or morality
> (Quoting *Renusagar Power Co. Ltd. v. General Electric Co.* [AIR 1994 SC 860])

However, from that particular report it is evident that in most of the other major jurisdictions adhere to a narrow interpretation of public policy exception. According to the conclusion of the Report, the predominant trend is to limit the review to a conformity-check of the arbitral decision itself, not its reasons.[491] The following has also been stated in the Report:

> Whether it refers to the basic or fundamental rules on which a society rests or to more colored values such as justice, fairness and morality, whether it is expressly given an international character or not, public policy as a ground for refusing the recognition or enforcement of foreign awards under Article V(2)(b) of the Convention is overwhelmingly considered to include only a very limited number of fundamental rules or values.
> [International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015), at 18]

It can be stated that even though there is no uniformity on the notion of public policy exception, it is strongly believed that if India, being one of the biggest developing countries, also sticks to a narrow interpretation of public policy rather than changing its stance with every case, it will be a step forward in bringing some uniformity in the interpretation because most of the major jurisdictions follow a strict and narrow approach to the public policy exception.[492]

---

[488] The Arbitration and Conciliation (Amendment) Act, 2015, Available at: http://www.adrassociation.org/pdf/acact2015.pdf.
[489] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015).
[490] *Renusagar Power Co. Ltd. v. General Electric Co.* [AIR 1994 SC 860].
[491] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015).
[492] Ibid.

Though the International Law Association Report on Public Policy (released in 2002) and the International Bar Association Report on Public Policy (released in 2015) are loose-ended guidelines and will never be considered sufficient to make the States adhere to it, however, if the States do start adhering to it and setting an example, other states may follow this lead. Though there is no certainty in this because the legal systems of the states are very different with different legal standards, they will definitely hesitate in adopting something which might be against their legal system. However, one can hope that some positive step will be taken in this regard in the coming future because arbitration as a means to resolve disputes has come to become the most desired method of resolving disputes of the business and even inter-state dispute. And as far India is concerned, with the right approach, India does have the potential of becoming one of the leading arbitral jurisdictions in Asia. If India seeks to increase its chances of becoming a desired destination for arbitration, Indian laws should promote more neutrality, clarity and consistency in the meaning of public policy. Analyzing from the discussion above, it is clear that the domestic-international dichotomy is still not developed properly in the Indian context. The 2015 Amendment Act did provide a clearer picture of what would be considered against the public policies of India, however, there is a clear distinction between domestic awards and foreign awards and in case of domestic awards the courts have the power to review the merits of awards according to the relevant provision which means broader interpretation of public policy when dealing with domestic awards.[493] The International Bar Association in its Report had also dealt with the issue of distinction between domestic public policy and international public policy. It had stated that there are several countries that make a distinction between domestic public policy and international public policy. The problem here is that there is no uniform definition of international public policy. The domestic public policies are different for all the countries owing to the fact that they have distinct legal systems and culture.[494] The Report states the following:

> While the definition of international or transnational public policy is not necessarily the same in those jurisdictions, the purpose of making such a distinction is always to narrow down the scope of the public policy which must be considered for assessing whether the enforcement of a foreign award is compatible or not. [International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015), at 4]

[493] Amendment to Section 34 and Section 48, The Arbitration and Conciliation (Amendment) Act, 2015, Available at: http://www.adrassociation.org/pdf/acact2015.pdf.

[494] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015).

> On the contrary, in other jurisdictions, courts do not distinguish between domestic or national public policy and international public policy. This absence of distinction does not, however, always mean that courts adopt a broader interpretation of public policy than in the jurisdictions where the distinction exists. In some jurisdictions, however, the reference is clearly seen as referring to domestic public policy, allowing the courts to exert a stricter control on alleged violations thereof.
> [International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015), at 5]

From the Indian legislations it is clear that there is only a distinction between the enforcement of domestic and foreign awards. There is no distinction as to what constitutes domestic public policy and international public policy. According to the text of Article V(2)(b), it refers to domestic public policy of India since there is no reference to international public policy. It can be said that the Indian judiciary exercises a stricter control on the alleged violations because of the domestic policies of India, which also leads them to intervene a lot in the enforcement proceedings of foreign arbitral awards apart from interfering in the domestic awards.

This problem of distinction stems from the fact that the categories of public policy overlap. There is no clear distinction which makes the whole situation more confusing. For uniformity across the world over this issue, there needs to be some international standards set by an appropriate authority which would enable the countries to interpret it more uniformly. The Indian judiciary should move towards minimal intervention in international arbitration also.

5.2. No Merits Review?

There has to be a balancing act when the extent of judicial inquiry is to be determined for the applying the public policy exception. It has to be taken into consideration whether the alleged public policy violation is serious enough to outweigh the pro-enforcement policy and more importantly the policy of upholding arbitral finality.[495] It has been stated in the discussion above that the process of arbitration is intended to arrive at a final and binding result of a dispute. It is the aim of the whole arbitration process that the dispute between the parties will be resolves amicably as agreed to between the parties and the outcome of the arbitration, which is known as the award or the decision of the arbitrators, will be binding upon both the parties

[495] Sharma, *supra* note 395; See also Malhotra, *supra* note 256; See also William W. Park, *Why Courts Review Arbitral Awards,* 2001, Available at: http://www.williamwpark.com/documents/Why%20Courts%20Review%20Awards.pdf; See also Banerji, *supra* note 395; See also Srinivasan, *supra* note 387.

to the arbitration.[496] Usually, it is not possible for the parties to obtain a merits-review of an arbitral award. In simple words merits review means reopening and retrying the merits of an arbitral award. It basically means re-examining the reasoning behind the award and the arbitrator's interpretation of legal principles.[497] The principle of no merits review in a way follows from an already proven principle in arbitration i.e., judicial non-intervention. It is expected of the judiciary that it would not intervene in the arbitration process in any kind and that would also include refraining from reviewing an arbitral awards on its merits or the reason of the arbitrator. It can be said that this one way of reducing judicial intervention in the process of arbitration. It is settled that the enforcement court can only look into the dispositive aspect of the award. It has to refrain from reviewing the reasoning of the arbitrator, the evidence considered during the arbitration proceedings and also not look into the facts of the case. No new evidence has to be presented during the enforcement proceedings.[498]

The enforcement court does not really have authority to review the award on merits or even substitute its own decision for the decision of the arbitral tribunal even if the arbitrators had made an erroneous decision. If the provisions of the New York Convention are analyzed we will find that there is no provision which allows for an appeal on procedural issues. Only grounds for refusal of recognition or enforcement of foreign awards is mentioned in Article V of the Convention.[499]

The whole idea behind the pro-arbitration and pro-enforcement principles underlying the New York Convention is to reduce the judicial intervention of the judiciary in the arbitration process. It can be inferred from the language of the Convention that it is not in favor of reviewing the arbitral awards based on its merits, since the focus of Article V is more on the procedural part as compared to substantive part of the award. The language of Article V clearly indicates that it is concerned with the enforcement of the award rather than the reasoning behind rendering the award. A full review of the award at the enforcement stage is more likely to defeat the whole purpose of the New York Convention.[500]

---

[496] *What is Arbitration?,* Available at: https://www.wipo.int/amc/en/arbitration/what-is-arb.html.

[497] Veiji Heiskanen, *Dealing with Pandora: The Concept of 'Merits' in International Commercial Arbitration,* Arbitration International, Vol. 22, No. 4, Available at: https://www.lalive.law/data/publications/vhe_Pandora_Arb_Intl_2006.pdf; See also Black's Law Dictionary (6th Edition).

[498] Rukmini Das & Anisha Keyal, Judicial Intervention in International Arbitration, 2 NUJS L. Rev. 585 (2009).

[499] Article V, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf.

[500] Ibid.

Looking back at the discussion on the decisions of the Indian judiciary with respect to public policy exception, the decisions are very erratic. In the landmark case of *Renusagar*[501] the Supreme Court of India had rejected the argument of unjust enrichment simply on the ground that the unjust enrichment must relate to the enforcement of the award, rather than the merits of the award. However, in the case of *Western Geco*[502], the Court took it upon itself to modify the arbitral award. By doing that, the court expanded the approach to public policy resulting in an increased interference from the judiciary during the enforcement stage. In that case, the court reviewed the merits behind the case and later in its judgment modified the award.

The International Bar Association in its Report on Public Policy has stated that:

"Whatever the exact delineation of the contravention of public policy, it always serves to narrow the scope of the intervention to be made by the enforcing court and to prevent it from reviewing the merits of the case at the enforcement stage, or at least to limit such review of the merits."[503]

It is further stated in the Report that:

> "In several jurisdictions, courts stress that the verification of compatibility with public policy should be limited to the result or the operative part of the award only and should not extend to the reasoning adopted by the arbitrators or, in general, to the merits of the dispute which should not be reviewed."[504]

On the other hand it is believed that in some cases it is difficult to examine whether the enforcement of an award would be contrary to public policy without examining whether the award is itself contrary to public policy. In cases where there are questions involved with respect to illegality or any other substantive public policies, a review of an arbitral award based on its merits seems unavoidable. To support this view, there is one of the recommendations providing for exceptions to the no merits review in the Report of the International Law Association which was released in 2002. Recommendation 3(c) of the Report states that:

> "When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the facts of the case, the court should be allowed to undertake such reassessment of the facts."[505]

In paragraph 52[506], the Committee has mentioned:

---

[501] AIR 1994 SC 860.
[502] (2014) 9 SCC 263.
[503] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, (Oct. 2015).
[504] Ibid.
[505] International Law Association, Final Report, 2002.
[506] International Law Association, Final Report, 2002.

> There has been a debate amongst commentators (and amongst members of the Committee) as to whether the enforcement court should: (a) only look to the dispositf of the award and whether its enforcement would be contrary to public policy; (b) also be entitled to review the reasoning in the award; or (c) also be entitled to review the underlying facts and any new evidence presented by the party resisting enforcement. The majority of the Committee concluded that the court, when enforcement is resisted on grounds of lois de police, should be entitled to review the underlying evidence presented to the tribunal and, in exceptional cases, any new evidence. However, the court should undertake a reassessment of the facts only when there is a strong prima facie argument of violation of international public policy.
> (International Law Association, Final Report, 2002, paragraph 52)

This seems to be a bit problematic. Let us point to the fact that the report confines merits review to alleged violations of public policy rules. This can be one of the three categories of international public policy. The problem that we face here is that the three categories of international public policy can overlap which may ultimately cause inconsistencies. This report seems to be unclear about the fact as to whether the public policy violation must be manifest, obvious or clear. If we look at Recommendation 1(b), we will see that the phrase 'would be against international public policy' is used. However, when we look at Recommendation 4, the word 'manifest' has been added in the context of violation of international obligations.[507] Moving on to Recommendation 3(c), as mentioned above, states that merits review can be allowed if public policy rules are involved. But in Recommendation 3(b)(ii), the word 'manifestly' is used in the context of disrupting the essential interests protected by the public policy rules. It has also been stated in the Report that 'the public policy must usually be relatively obvious or clear'.[508] So overall, it can be concluded from the Report of the International Law Association that there are several inconsistencies which need to be reconciled. Another problem with this Report is the fact that it was released in the year 2002, almost two decades ago, and can be considered redundant. It is because there has been a lot of development in the field of international commercial arbitration and a lot of cases laws have surfaced dealing with this same subject matter but with complete new interpretations. The most recent one can be considered the International Bar Association's Report on Public Policy Exception which was released in the year 2015 and this has been discussed above too. In that report, it was concluded that most countries are sticking to a narrow approach to the public policy exception which basically means that there should be no merits review of the arbitral awards too. To bring some uniformity in this area it is recommended that the states follow this

[507] Ibid.
[508] Ibid.

while dealing with cases involving public policy exception during the enforcement proceedings.[509]

The defense of public policy acts as an exception to both pro-enforcement policy of the New York Convention and also the no merits review policy which is also one of the guiding principles of the New York Convention.[510] It can be agreed at this point that the public policy exception should be construed narrowly which is has been the trend for quite some time now. The narrow interpretation of public policy exception is justified because it ensures that the parties to an arbitration case do not use this defense solely for the purpose of resisting or delaying the enforcement of the arbitral award. Indian courts should seek to create a balance between excessive or intrusive scrutiny which unduly prolongs the arbitral process and the cursory or inadequate review which overlooks arbitral injustice.[511]

5.3. Consistency in the Judicial Application? Obligation to apply transnational public policy?

It is quite clear that the nations worldwide have different legal systems and different legal standards. A pertinent question here is: how do we make sure that there is a consistency in the way the domestic courts of the Contracting States to the New York Convention apply the public policy exception as a ground for refusal of recognition and enforcement of foreign arbitral award? Should there be a set of transnational public policies that should be applied when dealing with foreign arbitral awards?

If the language of the New York Convention is analyzed, it is clear that it does not indicate the Contracting States are obligated to apply a transnational notion of public policy in recognizing and enforcing foreign arbitral awards. When dealing with the recognition and enforcement of foreign arbitral awards, some scholars believe that the application of the public policy exception should be restricted to cases where the international public policy of a state is violated. This will help in managing the tension between the obligation to recognize and enforce foreign arbitral awards under the New York Convention.

It has been discussed above that the public policy exception acts as a safety-valve and how the decision to decide what public policy means was left to the Contracting States was an attempt to protect the sovereignty of the states as well as to make sure that more and more

---

[509] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.

[510] The New York Convention, 1958, Available at: http://www.newyorkconvention.org.

[511] Rukmini Das & Anisha Keyal, Judicial Intervention in International Arbitration, 2 NUJS L. Rev. 585 (2009).

states complied with the provisions of the Convention.[512] The Contracting States are free to decide the concept of public policy and the limits of public policy exception. However, it is very clear from the language of Article V(2)(b) of the New York Convention that it does not really promote the notion of transnational public policy when dealing with the recognition and enforcement of foreign arbitral awards. The reason would be that not all nations share common values and standards on various matters. The European Union is very strong regional association where the concept of transnational or supranational public policy can be seen as a success. That is entirely because of the fact that European countries are quite similar when it comes to their values and standards regarding various matters.[513] Another reason that can be stated here is the fact that they have accepted the rules of the European Union as a part of their legal system. They accept the European Union as their supranational authority in the region and are obligated to follow those rules and obligations. Also the European Court of Justice acts as the common authority for the European countries.[514] The important point to note here is that the European countries are obligated to the EU regulations and laws.[515] There is no denying that the nations states are not obligated to follow the international norms and standards. However, as far as the language of Article V(2)(b) is concerned, there is no obligation per se to follow a transnational system of public policy. The language clearly mentions the public policy of 'that' state. 'That' state definitely refers to the state where the recognition and enforcement of foreign arbitral award is being sought. There does not seem to be an obligation for the Contracting States to follow and apply a set of transnational public policy during enforcement proceedings.[516] The question that arises here is that: Is it possible for the states to apply transnational public policy when dealing with recognition and enforcement of foreign arbitral awards?

The answer to that question would be that it is a difficult or maybe near to impossible thing to do. The reasons for this would be that: firstly, to apply transnational or supranational public

---

[512] Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

[513] Shenoy, *supra* note 176; See also Treaty Establishing the European Community, European Union, 25 March, 1957, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

[514] Treaty Establishing the European Community, European Union, 25 March, 1957, Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

[515] Shenoy, *supra* note 176.

[516] Article V, The New York Convention, 1958, Available at: http://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf; See also Herbert Kronke et al, Recognition and Enforcement of Foreign Arbitral Awards (Wolters Kluwer, 2010); See also C.H. Beck et al, New York Convention, Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958, Edited by Dr. Reinmar Wolff, 2012.

policy there has to be some sort of commonality among the states. This is difficult to achieve since all the states have so many differences when it comes to legal systems, their historical experience which has shaped their present. It is difficult to find common grounds in all the states. Secondly, it has been discussed above that social and political beliefs of the state help in the formation of their public policy. So basically that will be quite subjective and will depend from state to state. There will hardly be any similarities among the states because different factors influence each state. In such a situation it seems to be a difficult task for the states to apply transnational public policy. National interests play an important role when the states determine their public policies.

However, it cannot be denied that there are certain matters where there is universal consensus like prohibition of terrorism, drug trafficking, genocide, piracy, etc. The consensus on such matters are usually found in the international conventions and other instruments which form a part of the public international law. This may very rarely affect the enforcement of a foreign arbitral award under the New York Convention.

It is difficult to ensure that there will be uniformity in the application of transnational public policy because of the fact that the enforcing state is the one that will ultimately interpret those transnational standards.

India has recently moved away from a position of refusing to enforce a foreign award that violated Indian law. At least part of India's reason for changing its approach was likely that its decisions were out of step with what other countries were doing. Thus, and incentive to incorporate a more transnational perspective may come from a pragmatic perception that when a country is an outlier with respect to what other countries are doing, there are economic costs. The Indian government has expressed a desire to make India a hub for international arbitration. it understands that to do this, it must change its reputation as a country unfriendly to arbitration.[517] However, it is important to note here that the Supreme Court of India had held in the case of *Renusagar*[518] that a transnational definition of the concept of public policy would be unworkable in India. The court accepts that the term public policy mentioned in Article V(2)(b) of the New York Convention should mean the public policy of the enforcing state.[519]

Though there are certain difficulties with achieving uniformity, however, it can be said that with the increase in international arbitration, a transnational perspective will kind of be helpful.

---

[517] Moses, *supra* note 139.

[518] *Renusagar Power Co. Ltd. v. General Electric Co.,* AIR 1994 SC 860.

[519] Article V(2)(b), The New York Convention, New York Convention Guide, Shearman & Sterling, Columbia Law School, Available at: http://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=617&opac_view=-1.

It will encourage the application of public policy in a way that is reasonably congruent with the international public policy of a broad community of nations. Altogether it will help in strengthening the pro-enforcement bias of the New York Convention. Though this may still remain a far-fetched dream as of now because there has been no attempt made in this regard and even when some step is taken, it will take quite some time for all the Contracting States to come to some agreement in this regard.

5.4. Re-orienting the public policy exception in India?

In India, there is a distinction made between domestic arbitration and international arbitration as mentioned in the Arbitration and Conciliation Act. This distinction was clarified in the case of *BALCO.*[520] Domestic awards are dealt under Part I of the Act and foreign arbitral awards are dealt under Part II of the Act. Both domestic and foreign arbitral awards can be refused enforcement if it is against the public policy of India. However, it is important to note here is that there are different criteria under the public policy defense for domestic and foreign arbitral award fir refusing enforcement. This was added through the 2015 amendments to the Act which aimed at clarifying the notion of public policy in India. Explanation 1 and 2A to Section 34(2)(b)(ii) of the Act provides that an award will be considered to be contrary to the public policy of India if it is induced by fraud or corruption, it is in contravention with the fundamental policy of Indian law, it is in conflict with the most basic notions of morality or justice or if the award is vitiated by patent illegality appearing on the face of the award.[521] Explanation 1 to Section 48(2)(b) provides that an award will be considered to be contrary to the public policy if it is induced by fraud or corruption, it is in contravention with the fundamental policy of Indian law or it is in conflict with the most basic notions of morality or justice.[522]

It is evident from the provisions of the Act that the Indian judiciary adopts a broader interpretation of public policy when it comes to domestic arbitral awards as compared to foreign arbitral awards. However, the problem arises in India because if the seat of arbitration is located in India but one of the parties is not Indian, the arbitration is considered to be international arbitration and this is enforced under the domestic law of India rather than the provisions of the New York Convention.[523] The award rendered in such arbitrations are

[520] *BALCO v. Kaiser,* (2012) 9 SCC 552.
[521] Explanation 1 and 2A, Section 34(2)(b)(ii), The Arbitration and Conciliation Act, 1996, Added by 2015 Amendment Act, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.
[522] Explanation 1, Section 48(2)(b), The Arbitration and Conciliation Act, 1996, Added by 2015 Amendment Act, Available at: http://legislative.gov.in/sites/default/files/A1996-26.pdf.
[523] Kurlekar & Pillai, *supra* note 344.

subjected to a broader notion of public policy which results in more judicial intervention. This ultimately results in non-enforcement of arbitral awards in most cases as has been discussed above. This was an effect of the decision in the case of *BALCO.*[524] There has been several cases after this where the judiciary seems to have adopted a less interventionist approach, however, going by the trac record of the Indian judiciary it appears difficult to stick to uniform approach. As far as public policy is concerned, Indian legislature can do three things:

- The interpretation of public policy for both domestic and foreign arbitral awards can be unified. This means that the standard of interpretation of public policy under Part I and Part II of the Arbitration and Conciliation Act can be unified to do away with the problem of considering international arbitral awards as domestic arbitral awards.[525]
- The next thing that can be done is the creation of an alternate arbitration regime for domestic arbitration and domestic awards which would purely be between domestic parties. Presence of any international party technically means that it is an international arbitration. This problem of Indian judiciary treating international arbitration as domestic arbitration would be remedied if there are separate regime for dealing with domestic and foreign awards.[526]
- The next thing that can be done is that adopting a narrow interpretation for even domestic awards under the present arbitration laws prevalent in India.[527] The Supreme Court of India has come a long way and has shown potential when it comes to adopting a narrow approach while interpreting the public policy exception as is evident from the recent judgments in the case of *Cruz City*[528] and *Vijay Karia*[529]. However, the Supreme Court of India then again in the case of *NAFED*[530] adopted a broader interpretation, thus demonstrating that it is still indecisive as to which approach to finally adopt and set a firm precedence for the time to come.

5.5. Appropriate boundaries of judicial intervention? Jurisprudential certainty?

[524] *BALCO v. Kaiser,* (2012) 9 SCC 552.
[525] Kurlekar & Pillai, *supra* note 344.
[526] Ibid.
[527] Ibid.
[528] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017.
[529] *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.
[530] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.

India is considered to be a hostile jurisdiction for enforcement of foreign arbitral award. This is not just an abstract statement that the author is making. This has been concluded in one of the surveys. A survey conducted by PricewaterhouseCoopers in collaboration with School of International Arbitration, Queen Mary, University of London, according to which India was considered as an hostile jurisdiction for the enforcement of foreign arbitral awards.[531] Though this survey was conducted in the year 2008, the decisions of the Supreme Court of India and other subordinate courts do no prove otherwise. In fact the results of the survey is demonstrates how India still remains a hostile jurisdiction for the enforcement of foreign arbitral awards. The Indian judiciary has, over the years, found it difficult to demarcate an appropriate boundary of judicial intervention in international arbitrations. This resulted in excessive judicial intervention as is evident from the cases that have been discussed above in details. The fact that the Supreme Court of India, being the apex court of India, has been oscillating from one approach to another rather than sticking to one uniform approach has also resulted in jurisprudential uncertainty. It seems rather important for the Indian judiciary to define its boundary of judicial intervention in international arbitrations and to stick to one approach while dealing with enforcement of arbitral awards so as to establish jurisprudential certainty.

The Arbitration and Conciliation Act was amended in the year 2015 and later in the year 2019. The amendments of 2015 are important with respect to this thesis because the 2015 amendments clarified the notion of public policy exception in India. Judicial decisions after the enactment of the 2015 amendments dealing with the challenge of foreign arbitral awards in Indian courts did follow a principle of minimum judicial intervention. These decisions reflected a shift towards minimal intervention and adoption of pro-enforcement bias.[532] The decision in the case of *Western Geco*[533] depicts a contradictory view of the Supreme Court where the court went on to modify an arbitral award, which is not advocated by the New York Convention or the UNCITRAL Model Law.

The Supreme Court of India has delivered controversial decisions on the subject of enforcement of foreign arbitral awards over the years[534] which has developed fickle

[531] PricewaterhouseCoopers and Queen Mary College, *International Arbitration: Corporate attitudes and practices 2008*, Available at: https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.
[532] *Cruz City 1 Mauritius Holdings v. Unitech Limited,* EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also *Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL & Ors*, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.
[533] *ONGC Ltd. v. Western Geco,* (2014) 9 SCC 263.
[534] Dubey, *supra* note 388; See also Jaya VS, *Finality and Enforcement of Foreign Arbitral Awards: Reflections on the Indian Arbitration Law,* Asia Law Review, Vol. 4, No. 2, See also Kurlekar & Pillai, *supra* note 344.

jurisprudence on arbitration and enforcement of arbitral awards in India.[535] It has been discussed above how the Supreme Court added patent illegality as a separate head under the public policy exception, which ultimately allowed the courts to review arbitral awards based on its merits, in the case of *Saw Pipes.*[536] The decision in this case became a jurisprudential precedence which was applied in several other cases resulting in excessive intervention by the Indian courts in enforcement proceedings. A better precedence was set in the case of *Shri Lal Mahal*[537] which was followed in the cases thereafter until in 2020 in the case of *NAFED*[538] where a completely opposite stand was taken by the Supreme Court of India. This proves that there is no reliable arbitration jurisprudence in India. The 2015 Amendment Act sought to develop a reliable jurisprudence for the Indian judiciary with respect to enforcement of arbitral awards and also to define a boundary of judicial intervention. These goals do not seem to have been achieved yet.

The legislative efforts become successful in conjunction with proper judicial interpretation. The cases discussed above depicts that irrespective of the legislative efforts of introducing amendments, the judiciary still has to find its way to adopt and establish a proper interpretation of these arbitration related laws.[539] Owing to erratic interpretation and application of the public policy exception by the Indian judiciary, it is evident that the judiciary is facing some amount of inertia in implementing the 2015 amendments of minimum intervention.[540] It depends on the judiciary to take pro-active role in adopting a minimalist approach to enforcement of arbitral awards and giving up the pro-intervention approach.[541]

5.6. Amending the New York Convention?

This thesis focuses on the Indian context of applying the public policy exception. It focuses on how the Indian judiciary has interpreted it in an erratic manner rather than focusing on a uniform stance. The focus is on the shortcomings of the interpretation by the Indian judiciary. Though the focus is not on the shortcomings of the New York Convention itself, there are

---

[535] Somesh Dutta, *How Realistic is India's Dream of becoming a Global Arbitration Hub?,* The Wire, 30 April, 2018, Available at: https://thewire.in/law/india-global-arbitration-hub-modi-government.
[536] *Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd.* (2003) 5 SCC 705.
[537] *Shri Lal Mahal Ltd. v. Progetto Grano Spa,* (2014) 2 SCC 433.
[538] *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.,* Civil Appeal No. 667 of 2012, delivered on April 22, 2020.
[539] Dutta, *supra* note 535.
[540] *Arbitration in India-Shaking off the Indian Inertia,* International Arbitration Asia, Available at: http://www.internationalarbitrationasia.com/arbitration_in_india_shaking_off_the_indian_inertia#_ftnref18.
[541] Ibid.

certain shortcomings in the Convention itself which leads to varied interpretation across the nations. It would be worthwhile to discuss if changes in the New York Convention itself will be able to solve the problem of not having uniform interpretation of the Convention. The New York Convention does have its shortcomings, but should that be a reason to replace the Convention with whole new convention or maybe just amend and revise the current New York Convention?

There are many scholars who believe that the New York Convention has become a bit outdated to deal with issues of this present age. It cannot be disputed that the New York Convention has been quite successful and has also been considered the one of the most ratified international conventions. However, there were some efforts taken during the New York Convention's 50th Anniversary to reflect on the fact whether the New York Convention could be replaced by another new international convention. Albert Jan van den Berg is a renowned arbitrator who is an advocate of bringing about such a change. Professor van den Berg raised the prospect of a revision of the Convention. He raised this issue during his keynote address at the ICCA Conference in Dublin in 2008. He also issued a draft. This revised text was known as the Miami Draft which highlighted the changes that should be introduced through the new convention.[542]

The Miami Draft proposed fundamental changes to the Convention. For example, Article 1 of the Convention states that the Convention applies to awards made in the territory of a state other than the state on which enforcement is sought. The test is purely territorial, and, according to Professor van den Berg, is incomplete because the Convention does not apply in the territory of state where award is made. The interpretation by domestic courts of the grounds for refusing enforcement can also be criticized, including with regard to the scope of interpretation of Article V(2)(b). Further, concern has been expressed regarding the permissive interpretation which has been placed by some domestic courts on the word "may" in Article V(1). Such an interpretation introduces a discretion on the enforcing court as to whether to refuse recognition and enforcement on the grounds listed in Article V.[543]

---

[542] Marike R.P. Paulsson, *The Miami Draft: The Good Twin of the NYC,* Kluwer Arbitration Blog, 7 October, 2010, Available at: http://arbitrationblog.kluwerarbitration.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/?doing_wp_cron=1592681992.0505280494689941406250.

[543] 60 Years of the New York Convention: A Triumph of Trans-national Legal Co-operation, or a Product of its time and in Need of Revision?, 27th July, 2018, Available at: https://www.herbertsmithfreehills.com/latest-thinking/60-years-of-the-new-york-convention-a-triumph-of-trans-national-legal-co-operation; See also Comparison Table NYC and Miami Draft, Available at: https://www.arbitration-icca.org/media/0/12996309460980/comparison_table_nyc_and_miami_draft.pdf.

The Miami Draft acts as a manual of best interpretive practices. The practices mentioned in the Draft intended to remedy the ambiguities of the New York Convention which has led to various interpretations by the domestic courts of the Contracting States. The purpose of the Miami Draft is the same as that of the New York Convention.[544] The Miami Draft did not become successful at the time when it was proposed. However, this question has been raised quite few times as to whether the Miami Draft should be given a second chance. It is important to analyze this because a lot of concern has been raised with respect to enacting a whole new convention. Though the New York Convention has its shortcomings, it has been in operation for quite a while now and has yielded results. Some scholars believe that it would be bad idea to totally discard the New York Convention since it has been given us results even after its shortcomings. There are 163 signatories to the New York Convention at this point. This is another reason for the Miami Draft to have failed because these many states would most likely not sign a new treaty. It would be difficult to make these many states to come to an agreement to make the enforcement process more efficient. There has been an increase in arbitrations based on investment protection treaties. In investment arbitrations, the states are mostly in the position of the defendant because of which they have developed a defendant mindset which ultimately compels them to resist the enforcement of arbitral awards. It is a concern as whether the states who find themselves as defendants would be willing to enhance the effectiveness of the enforcement procedure by revising or enacting a new convention. Some scholars are of the opinion that just because the language of the New York Convention is outdated does not mean that a new convention is required altogether. The unclear provisions can simply be fine-tuned to accommodate the changing legal environment of the current times. They are also of the opinion that the New York Convention should be left in its current state and no changes should be brought about in it. They believe that the Convention only sets the minimum standards and that the Contracting States are always free to be more liberal and also the fact that the Contracting States are free to determine the domestic legislation according to its own national interests. There is no prohibition of that in the New York Convention.

At the 60th Anniversary of the New York Convention there was yet another debate about its future. The concern as raised yet another time as to whether almost 160 countries would be willing to sign yet another treaty in case a replacement is made. It was concluded that a treaty which is 60 years old and that has been ratified in almost 160 states can no longer be replaced.

[544] Marike R.P. Paulsson, *The Miami Draft: The Good Twin of the NYC,* Kluwer Arbitration Blog, 7 October, 2010, Available at: http://arbitrationblog.kluwerarbitration.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/?doing_wp_cron=1592681992.0505280494689941406250.

During that time the conference reflected on what a replacement of the New York Convention would look like. A replacement that would lead the way towards a uniform application across the world. Marike R.P. Paulsson in his blog published on the Kluwer Arbitration Blog[545] proposed the idea of a dual convention which would dispose of the national setting aside regimes. This will leave the assessment under *lex arbitri* to courts of the seat only i.e., the courts versed in *lex arbitri*. In the new Convention he proposes that there will be a Primary Convention and a Secondary Convention. First lets discuss what the Primary Convention will do. The Primary Convention will be granting the successful party the right to seek a recognition title in the state where the award was granted. The court will not have to decide on any setting aside request. The court will decide if there has been any kind of violations (will examine *lex arbitri* to determine any sort of violations). This basically means that the court of the seat gets to decide and address questions that would arise under Article V(1) of the New York Convention. An interesting thing to note here is the fact that this will mean that domestic courts of other states are not asked to assess these factors under the *lex arbitri.* It is an important thing because the domestic courts of other states may not be familiar with the *lex arbitri* governing the arbitration agreement. The next thing proposed by him is that the courts of the seats will not be invoking local public policy to set aside the award. Resisting enforcement of arbitral awards is based on *lex arbitri* which is chosen by the parties. Party autonomy is the pillar of international arbitration and that of the New York Convention. This is how the multiple layers are removed since there will be no setting aside to stop enforcement.[546] The next part to examine here is the Secondary Convention. The proposal states that the Secondary Convention will be applicable in all the countries where the recognition and enforcement of foreign arbitral awards is sought. Court of enforcement will no longer be making use of Article V(1). The defenses mentioned in Article V(1) of the New York Convention will not be applied by the enforcing courts. The enforcing courts will be able to make use of the defenses mentioned in Article V(2) of the New York Convention. The enforcing courts will be free to apply the public policy exception when enforcing foreign arbitral awards.[547]

So this is the dual structure that has been proposed. It is not possible to say if this will ever be implemented, however, it can be conjectured that may be in future this dual structure of the

---

[545] Marike R.P. Paulsson, *The Future of the New York Convention in its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes,* August 15, 2018, Available at: http://arbitrationblog.kluwerarbitration.com/2018/08/15/the-future-of-the-new-york-convention/.

[546] Marike R.P. Paulsson, *The Future of the New York Convention in its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes,* August 15, 2018, Available at: http://arbitrationblog.kluwerarbitration.com/2018/08/15/the-future-of-the-new-york-convention/.

[547] Ibid.

convention may actually get adopted and implemented. It still remains a far-fetched thought. There is no promising signs of this happening now but ruling it out entirely would be kind of wrong. If this is actually ever adopted and implemented, it would be interesting to see if there are desired results because of this across the world bringing about uniformity in interpretation of the New York Convention.

Amending Article V(2)(b) of the New York Convention seems to be a viable solution to achieving uniformity in its application. Replacing the New York Convention does not seem to be a feasible option. The New York Convention has been working well in all these years. The only feasible option would to revise and amend some parts of the New York Convention to bring about some uniformity in the interpretation and application of the Convention. Article V(2)(b) of the Convention can be revised to include a specific definition of public policy or at least certain criteria that would amount to public policy violation. A definition or certain criteria could serve as a guide for the domestic courts of the Contracting States while refusing a foreign arbitral award on the grounds of public policy violation. Article V(2)(b) clearly states that there has to be a violation of the public policy of the enforcing state through the usage of the word 'that'.[548] This indicates that uniformity in this regard would be difficult to achieve since every state has different set of rules and standards. What the author would like to suggest here is that there can be attempt to introduce a standard of what public policy violation would constitute. Article V(2)(b) can be amended to add this standard of public policy. This can be added as a sub-clause (i) to Article V(2)(b). The sub-clause can lay down grounds which would amount to public policy violation. The grounds could be such that the Contracting States would agree upon and consider unacceptable. The following grounds could be included: if the award is tainted by fraud or corruption, illegal conduct, bribery, piracy or if the award is such which violates the notion of justice and morality.

It is important to note that the New York Convention cannot be amended because only of the Contracting States is facing problems of applying it uniformly. Only when there is proof that this non-uniformity of interpretation and application exists in a number of Contracting States, that the amendment can be considered. If a comparison is made on how the public policy exception is interpreted in the BRICS[549] countries, it will suggest that there exists an irregularity among these nations. The Supreme Court of Brazil has adopted a restrictive or

[548] Article V(2)(b), The New York Convention, 1958.
[549] Grouping acronym which refers to the countries of Brazil, Russia, India, China and South Africa.

narrow interpretation of public policy.[550] If the cases are analyzed from the Brazilian courts, it will indicate how the judiciary has adopted an approach of minimum intervention.[551] Russian courts had portrayed a tendency to adopt a broad interpretation of the public policy exception. This also led the Russian courts to review the arbitral awards on merits.[552] Alexandra Shtromberg in her thesis states that there is no clear definition pf public policy in the statutory laws of Russia. It is because of this reason that there is no uniformity in the interpretation and application of the same. Some courts in Russia also refuse enforcement of foreign arbitral awards if they violate certain legal provisions of Russian legislations.[553] The Indian judiciary's stand has already been discussed in details in thesis. The next BRICS country is China. Shu Zhang in her thesis has extensively described the situation in China. She has concluded in her thesis that China's performance in defining and applying public policy in the judicial review of international commercial arbitral awards is not satisfactory. A lack of experience in dealing with the public policy exception has given rise to insufficient and problematic judicial analysis and decisions.[554] Chaman Lal Bansal and Shalini Aggarwal have concluded in their article that the South African courts have desisted from enlarging the scope of review of foreign arbitral awards under the lens of public policy.[555] This comparison clearly depicts that there is no uniformity among countries when it comes to the public policy exception under the New York Convention. According to the International Bar Association's report on public policy, there are states that have given a much broader interpretation to public policy. These countries include Indonesia, Kenya, Nigeria, India and Pakistan.[556] The report also indicates how differently civil law jurisdictions and common law jurisdictions define public policy. According to the report civil law jurisdictions have non-exhaustive and illustrative definitions, whereas on the other hand common law jurisdictions tend to have more explicit fundamental values of public policy

---

[550] Chaman Lal Bansal & Shalini Aggarwal, *Public Policy Paradox in Enforcement of Foreign Arbitral Awards in BRICS Countries: A Comparative Analysis of Legislative and Judicial Approach,* International Journal of Law and Management, Volume 59 Issue 6, Available at: https://www.emerald.com/insight/content/doi/10.1108/IJLMA-09-2016-0079/full/html.

[551] *Thales v. Fonseca Almeida,* Rapporteur: Min, Arnaldo, Esteves Lima, Judgment: May 28, 2009 published in Official Gazette on June 25, 2009.

[552] Judgment of FAC for Volga Vyatsky (17-2-2003); See also *Stena RoRo AB v. Baltic Zavod,* Case No. A 56-60007/2008 decided on April 24, 2009.

[553] Alexandra Shtromberg, *Substantive Public Policy Concept in Enforcement of Foreign Arbitral Awards in Russia,* Published 18 April, 2017.

[554] Shu Zhang, *The Public Policy Exception in the Judicial Review of International Commercial Arbitral Awards: Lessons from and for China,* Published in 2015.

[555] Bansal & Aggarwal, *supra* note 550; See also *Lufono Mphaphulli and Associates (Pty) Ltd. v. Nigel Andrew and Bopanang Construction,* CCT 97/07/ZACC 6(2009).

[556] International Bar Association Subcommittee on Recognition and Enforcement of Arbitral Awards, Report on the Public Policy Exception in the New York Convention, at 1 (Oct. 2015), https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.asp.

in their definitions.[557] There was an attempt to define an international standard of public policy in the report, however, it was concluded that it is impossible to precisely define the term public policy. However, this attempt was made in the 2015 and not by a body of the UN. A similar effort should be made at this point by a more authoritative international organization so as to make sure that the Contracting States would adopt it in a similar manner how many states amended their arbitration laws to adopt the UNCITRAL Model Law.

In this chapter, the author has suggested probable solutions to remedy the non-enforcement of foreign arbitral awards and to reduce the judicial intervention in arbitration process. The following are the solutions:

1. It is recommended that the Indian judiciary should adopt a narrow interpretation of the term 'public policy' rather than a broader interpretation.
2. It is recommended that the Indian judiciary should avoid reviewing arbitral awards on its merits and the reasoning of the arbitrator.
3. The third recommendation is something that has to be taken up by the international community to bring about some uniformity in the interpretation of the term 'public policy'. An initiative at the international level is required so as to set certain guidelines for the states to follow when they refuse the enforcement of arbitral awards on the ground of violation of public policy.
4. The notion of public policy needs a reorientation in India as to how it is interpreted and applied in domestic and foreign arbitral awards. The author has suggested three different ways in which this can be achieved:
    - Consolidating one interpretation of public policy for both domestic and foreign arbitral awards
    - Separate regimes for the enforcement of domestic and foreign arbitral awards
    - Narrow interpretation for domestic award too instead of adopting a broader interpretation
5. Defining boundaries of judicial intervention and creating a jurisprudential certainty with respect to enforcement of foreign arbitral awards in India
6. Amending Article V(2)(b) could be one option to achieve some sort of uniformity since the problem of non-uniformity exists in other countries as well. Some may suggest making a new treaty on enforcement of foreign arbitral awards, however, this does not seem feasible at the moment. The reasons for this has been mentioned in the section

[557] Ibid.

above. However, there can be certain amendments made to the Convention to bring about some uniformity as far as public policy exception is concerned. It still remains a far-fetched dream at the moment.

CONCLUSION

It can be concluded that the concept of public policy is amorphous. It is because of this public policy escapes a very clear definition. The vagueness of public policy has persisted for years and it still seems to persist. This vagueness has resulted in the unpredictability of interpretation and application public policy exception during enforcement proceedings in the Contracting States. If the public policy exception is interpreted too broadly then the enforcement of arbitral awards become less predictable and more tied to the enforcement state's domestic laws whereas on the other hand, if the public policy exception is interpreted narrowly then the enforcement of arbitral awards will become more predictable.

In this thesis, I have considered the challenges to the enforcement of foreign arbitral awards under public policy exception as mentioned in the New York Convention in the Indian context and whether India has truly delivered in its obligations under Article V(2)(b) of the New York Convention. Landmark judgments by the Indian judiciary have been analyzed in this context starting from the case of *Renusagar*[558] to *Sri Lal Mahal*[559] and *Saw Pipes*[560] to *Western Geco*[561]. It is evident from the decisions in these cases, the Indian judiciary has taken very contrasting approaches to public policy exception.

Public policy exception is considered as an important weapon in the hands of the domestic courts of the Contracting States to the New York Convention, that intend to interfere with the arbitral process. It has been discussed that the reason why public policy exception has been causing problems in the Contracting States is the fact that public policy differs from state to state and there is clearly no universal agreement as to what its contents should entail. The defense of public policy is considered as an unruly horse and there can be ways to tame this unruly horse. Viable solutions have been provided in the last chapter.

The main focus of this thesis has been on the manner in which the Indian judiciary has interpreted the public policy as a ground for refusal of recognition and enforcement of foreign arbitral awards. India has been considered as an unfriendly location for arbitration in the international sphere. International commercial transactions have increased in the recent past and India contributes a lot to international business. It is because of this reason that the Indian government has been trying hard to make India an arbitration friendly nation. The governing

[558] AIR 1994 SC 860.
[559] (2014) 2 SCC 433.
[560] (2003) 5 SCC 705.
[561] (2014) 9 SCC 263.

arbitration law in India is the Indian Arbitration and Conciliation Act, 1996. This has been amended twice, in the year 2015 and in the year 2019. In the 2015 Amendment, the Indian legislature made an attempt to provide a clear picture of what public policy in India entails. However, the problem that persists is that of how the judiciary interprets and applies it in cases. Judicial interpretation still remains unpredictable. Even though it can be stated that there is a clear picture of the defense of public policy owing to the 2015 Amendment, it cannot be considered as a guarantee that there will be consistency in the interpretation in the near future. It can only be hoped that the Indian judiciary will stick to the narrow approach to the public policy exception as has been held in the case of *Renusagar*[562] and *Sri Lal Mahal*[563], two of the most landmark judgments as far as public policy exception is concerned.

In my research I have analyzed how the Indian judiciary responds to the application of the public policy exception when dealing with the recognition and enforcement of foreign arbitral awards. The discussion focuses on the evolution of international commercial arbitration and the general concept of public policy in international arbitration practice and how the Indian arbitration laws have developed over time in line with the international legal standards. This thesis further provides some solutions for the Indian judiciary to follow when dealing the recognition and enforcement of foreign arbitral awards. What can be concluded from this research is that in India the definition and application of public policy exception in dealing with recognition and enforcement of foreign arbitral awards has not been quite satisfactory. As stated above, even after the 2015 Amendments it cannot be stated for sure that the Indian judiciary would not be shifting its stance on the public policy exception. The difficulty of uniform application of the public policy exception arises from the fact that the Contracting States have been struggling to find a balance between two opposing aims. The two opposing aims being: (a) protecting national interests on one hand and (b) facilitating international commerce by making sure that the state is not subjecting the foreign arbitral awards to domestic interests on the other. The Indian legal system has made efforts of following the international legal trends in the way they interpret and apply the public policy exception. It has been stated above that the Indian government is quite motivated to make India an arbitration friendly country which why they make sure that the international obligations under the New York Convention and other bilateral or multilateral agreements are complied with. It is because of this reason that the Indian Arbitration and Conciliation Act of 1996 has been amended twice

[562] AIR 1994 SC 860.
[563] (2014) 2 SCC 433.

and in 2015 there has been an attempt to come up with a clearer and more definite definition of public policy. With the introduction of the 2015 Amendment regarding the definition of public policy, it can be stated that the India has strove to attain international acceptance with respect to the review of arbitral awards. Through the 2015 Amendments Indian legislature did seek to correct its past mistake of adopting a wider approach to the public policy exception. The question that still persists is whether India has become a hub for arbitration as was desired? The answer to this question is still not affirmative. India still has a long way to go before it can be considered as an arbitration hub. What India needs is to do is to introduce gigantic measures to emerge as a hub. It needs to introduce measures that portray that the Indian legal system supports a pro-arbitration culture. In 2019, the Arbitration and Conciliation (Amendment) Bill, 2019 and the New Delhi International Arbitration Centre Bill, 2019 were introduced in a step to making India a hub for international arbitration. A country does not become a hub for arbitration overnight. We have to patiently wait for the results of these positive initiatives taken by the Indian government.

REFERENCES

Books:

1. C.H. Beck, Hart, Nomos, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards- Commentary,* Wolff (ed.), 2012.
2. Herbert Kronke, Patricia Nacimiento, Dirk Otto and Nicola Christine Port, *Recognition and Enforcement of Foreign Arbitral Awards- A global commentary on the New York Convention,* Kluwer Law International BV, The Netherlands, 2010.
3. Alan Redferm and Martin Hunter, *law and Practice of International Commercial Arbitration,* 4th ed. 2004.
4. Albert Jan van den Berg, *International Commercial Arbitration: Important Contemporary Questions,* Kluwer International, 2003.
5. Christoph Liebscher, *The Healthy Award: Challenge in International Commercial Arbitration,* Kluwer Law International, 2003.
6. Malcolm N. Shaw, *International Law,* 8th Edition, Cambridge University Press.
7. James Crawford, *Brownlie's Principles of Public International Law,* 8th Edition, Oxford University Press.
8. Dr. Peter Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* Third Edition, 2010, Sweet & Maxwell.

Literature and Internet Sources:

1. Draguiev, Deyan, State Responsibility for Non-Enforcement of Arbitral Awards (December 31, 2014). World Arbitration and Mediation Review 2014 Vol. 8, No. 4 . Available at SSRN: https://ssrn.com/abstract=2573230
2. Bernardo Sepúlveda-Amor, Merryl Lawry-White, State responsibility and the enforcement of arbitral awards, *Arbitration International*, Volume 33, Issue 1, March 2017, Pages 35–61, https://doi.org/10.1093/arbint/aiw006
3. Roberto Echandi *Proceedings of the Annual Meeting (American Society of International Law)*, Vol. 106, Confronting Complexity (2012), pp. 118-122
4. Sameer Sattar, ENFORCEMENT OF ARBITRAL AWARDS AND PUBLIC POLICY: SAME CONCEPT, DIFFERENT APPROACH?
5. Nivedita Chandrakanth Shenoy, Public Policy Under Article V(2)(B) Of The New York Convention: Is There A Transnational Standard?
6. Arthad Kurlekar, Gauri Pillai, To be or not to be: the oscillating support of Indian courts to arbitration awards challenged under the public policy exception, *Arbitration International*, Volume 32, Issue 1, March 2016, Pages 179–198, https://doi.org/10.1093/arbint/aiv066
7. Andrey Ryabinin, *Procedural Public Policy in Regard to the Enforcement and Recognition of Foreign Arbitral Awards,* Central European University, March 30, 2009.
8. Vyapak Desai, Moazzam Khan and Payel Chatterjee, *Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India*
9. Arpan Kr. Gupta, *A New Dawn for India- Reducing Court Intervention in Enforcement of Foreign Awards,* Indian Journal of Arbitration Law, Volume II: Issue 2
10. Mahajan, Pallavi, The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India (September 7, 2015). Available at SSRN: https://ssrn.com/abstract=3449565 or http://dx.doi.org/10.2139/ssrn.3449565
11. Lukashuk, I. I. "The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law." The American Journal of International Law 83, no. 3 (1989): 513-18. Accessed May 12, 2020. doi:10.2307/2203309.
12. Marike R.P. Paulsson, *The Future of the New York Convention in its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes,* August 15,

2018, Available at: http://arbitrationblog.kluwerarbitration.com/2018/08/15/the-future-of-the-new-york-convention/.

13. Marike R.P. Paulsson, *The Miami Draft: The Good Twin of the NYC,* Kluwer Arbitration Blog, 7 October, 2010, Available at: http://arbitrationblog.kluwerarbitration.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/?doing_wp_cron=1592681992.0505280494689941406250.
14. 60 Years of the New York Convention: A Triumph of Trans-national Legal Co-operation, or a Product of its time and in Need of Revision?, 27th July, 2018, Available at: https://www.herbertsmithfreehills.com/latest-thinking/60-years-of-the-new-york-convention-a-triumph-of-trans-national-legal-co-operation.
15. Margaret Moses, *Public Policy: National, International and Transnational,* Kluwer Arbitration Blog, Available at: http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/.
16. Okezie Chukwumerije, *Choice of Law in International Commercial Arbitration* (1994) 204.
17. Joel Junker, *'The Public Policy Defense to Recognition and Enforcement of Foreign Arbitral Awards'* (1977) California Western International Law Journal 228, 250.
18. Loukas Mistelis, '*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, 248.
19. Stephen Ostrowski and Yuval Shany '*Chromalloy: United States Law and International Arbitration at the Crossroads'* (1998) 73 New York University Law Review 1650, 1657-1658;
20. Richard Garnett, *'International Arbitration Law: Progress Towards Harmonisation'* [2002] 3 Melbourne Journal of International Law 400, 404.
21. Albert Jan van den Berg, *New York Convention of 1958: Refusals of Enforcement,* ICC International Court of Arbitration Bulletin- Vol. 18/No. 2 – 2007.
22. Wasiq Abass Dar, *Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards,* European Journal of Comparative Law and Governance 2 (2015) 316-350.
23. William W. Park and Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration,* 58 Hastings Law Review 251 (2006), Available at:

https://www.arbitrationicca.org/media/4/99181769719243/media012584292944710park_treaty_obligations.pdf.

24. Malgosia Fitzmaurice, *The Identification and Character of Treaties and Treaty Obligations between States in International Law.*
25. J. Gaya, *'Judicial ambush of arbitration in India'*, (2004) Law Quarterly Review 571.
26. M Kapur, *'Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law'*, Contemp. Asia Arb. J (2009) Vol. 2(2) 325.
27. Krishna Sarma, Momota Oinam, Angshuman Kaushik, *Development and Practice of Arbitration in India- Has it Evolved as an Effective Legal Institution,* CDDRL Working Papers, Number 103, October 2009. Available at: https://fsi-live.s3.us-west-1.amazonaws.com/s3fs-public/No_103_Sarma_India_Arbitration_India_509.pdf.
28. Parvez, Shahid, *Development of Arbitration Law in India* (November 9, 2009). Available at SSRN: https://ssrn.com/abstract=1502812 or http://dx.doi.org/10.2139/ssrn.1502812; See also See also India: Evolution of Arbitration in India, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india.
29. Bibek Debroy & Suparna Jain, *Strenghtening Arbitration and its Enforcement in India-Resolve in India,* Available at: https://niti.gov.in/writereaddata/files/document_publication/Arbitration.pdf;
30. India: Evolution of Arbitration in India, Available at: https://www.mondaq.com/india/arbitration-dispute-resolution/537190/evolution-of-arbitration-in-india.
31. Sumit Kumar, *Historical Growth of Arbitration Law in India,* IJITKM 0973-4414, Volume-10, Number-2, Jan-June 2017, Available at: http://csjournals.com/IJITKM/PDF%2010-2/21.%20Sumit.pdf.
32. Kumar A., Upadhyay R., Jegadeesh A., Chheda Y. (2017) Interpretation and Application of the New York Convention in India. In: Bermann G. (eds) Recognition and Enforcement of Foreign Arbitral Awards. Ius Comparatum - Global Studies in Comparative Law, vol 23. Springer.
33. Pedro J. Martinez Fraga, The American Influence On International Commercial Arbitration, Doctrinal Developments And Discovery Methods (2009), At 6.
34. Paul Obo Idornigie, *'Anchoring Commercial Arbitration on Fundamental Principles'* (2004) 23 The Arbitrator & Mediator 65, 75

35. Justice David Byrne, *'The Evolution of Commercial Arbitration in Victoria'* (1995) 11 The Arbitrator 168, 174-175.
36. O Ozumba, *'Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?'*, available at www.dundee.ac.uk.
37. Anton Maurer, *The Public Policy Exception under the New York Convention: History, Interpretation and Application* (Juris, 2012).
38. Hossein Fazilatfar, *Transnational Public Policy: Does it Function from Arbitrability to Enforcement?*, 3 CITY U. H.K. L. REV. 289, 292 (2012).
39. Jacob Dolinger, *World Public Policy: Real International Public Policy in the Conflict of Laws,* 17 TEX. INT'L L.J. 167, 172 (1982);
40. Alex Mills , *The Dimensions of Public Policy in Private International Law,* Published in (2008) 4 Journal of Private International Law 201,
41. HONG, Adeline. *The Public Policy and Mandatory Rules of Third Countries in International Contracts*. (2006). Journal of Private International Law. 2, (1), 27-70. Research Collection School Of Law. Available at: https://ink.library.smu.edu.sg/sol_research/881.
42. David J.A. Cairns, Transnational Public Policy and the Internal Law of State Parties, TDM (Apr. 27, 2007), https://www.transnational-dispute-management.com;
43. Julian D.M. Lew, *Transnational Public Policy: Its Application and Effect by International Arbitration Tribunals,* 2018, ISBN: 978-84-17385-07-1.
44. See also Gary B. Born, The New York Convention: A Self-Executing Treaty, 40 MICH. J. INT'L L. 115 (2018). Available at: https://repository.law.umich.edu/mjil/vol40/iss1/4.
45. Elie Kleiman and Claire Pauly, *Arbitrability and Public Policy Challenges,* Available at: https://globalarbitrationreview.com/chapter/1178487/arbitrability-and-public-policy-challenges.
46. Matthew Gearing, *The Public Policy Exception: Is the Unruly Horse Being Tamed in the Most Unlikely of Places?*, KLUWER ARB. BLOG (Mar. 17, 2011), http://arbitrationblog.kluwerarbi tration.com/2011/03/17/the-public-policy-exception-is-the-unruly-horse-being-tamed-in-the- most-unlikely-of-places-4/.
47. Bartlomiej Orawiec, *The Public Policy Exception Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The UK Perspective),* Comparative Law Review, 21, 2016, Available at: https://apcz.umk.pl/czasopisma/index.php/CLR/article/viewFile/CLR.2016.003/10960

48. Lim, C. L., Geneva Still Inspires? An Appellate Mechanism for Investment Treaty Arbitration (January 5, 2019). Paradise Lost or Found? The Post-WTO International Legal Order (Utopian & Dystopian Possibilities), University of Tokyo Workshop. Available at SSRN: https://ssrn.com/abstract=3310738 or http://dx.doi.org/10.2139/ssrn.3310738
49. Strong, S.I., Monism and Dualism in International Commercial Arbitration: Overcoming Barriers to Consistent Application of Principles of Public International Law (December 15, 2012). "Basic Concepts of Public International Law: Monism and Dualism," edited by Marko Novakovic, Forthcoming; University of Missouri School of Law Legal Studies Research Paper No. 2012-39. Available at SSRN: https://ssrn.com/abstract=2189905.
50. Volz, Jane L. and Haydock, Roger S. (1996) "Foreign Arbitral Awards: Enforcing the Award against the Recalcitrant Loser," William Mitchell Law Review: Vol. 21: Iss. 3, Article 22, Available at: http://open.mitchellhamline.edu/wmlr/vol21/iss3/22.
51. Fraser, H.S. (1926). A Sketch on the History of International Arbitration. Cornell Law Review Volume 11, Issue 2. 190-193.
52. Contini, Paolo. *"International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards",* The American Journal of Comparative Law 8, no. 3 (1959): 283-309. Accessed May 12, 2020. doi:10.2307/837713.
53. Jones, Sabra A., *"Historical Development of Commercial Arbitration in the United States",* (1928). Minnesota Law Review. 2296, Available at: https://scholarship.law.umn.edu/mlr/2296;
54. Sir Lynden Macassey, *International Commercial Arbitration- Its Origin, Development and Importance,* American Bar Association Journal, Vol. 24, No. 7 (July 1938).
55. Earl S. Wolaver, *The Historical Background of Commercial Arbitration,* December, 1934, Available at: https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=8693&context=penn_law_review.
56. Georg Schwarzenberger, *Present-Day Relevance of the Jay Treaty Arbitrations*, 53 Notre Dame L. Rev. 715 (1978), Available at: http://scholarship.law.nd.edu/ndlr/vol53/iss4/3;

57. Katja S Ziegler, *Jay Treaty (1794),* Available at: https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e50.
58. Mentschikoff, S. (1961), *Commercial Arbitration*, Columbia Law Review, Volume 61, Issue 5, 855.
59. Roebuck, Derek. "Sources for the History of Arbitration: A Bibliographical Introduction", Arbitration International 14, no. 3 (1998); 237-343.
60. Emerson, Frank D. (1970), History of Arbitration Practice and Law, Cleveland State Law Review, Vol. 19, Issue 1. 155-156.
61. Roebuck, D., & Fumichon, B.D. (2004). Roman Arbitration. Oxford: Holo Books, The Arbitration Press. (From the observations of Professor Roebuck and Professor Fumichon it can clearly be derived that the arbitration of commercial disputes was present in the Roman Empire).
62. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, *infra* in this issue of THE REVIEW, at 297, 298-301.
63. See also Lord Mustill, *The History of International Commercial Arbitration-A Sketch-Chapter 1,* The Leading Arbitrators' Guide to International Arbitration–2nd Edition, March 2008, Available at: https://arbitrationlaw.com/library/history-international-commercial-arbitration-sketch-chapter-1.
64. Leon Trakman, *Domestic Courts Declining to Recognize and Enforce Foreign Arbitral Awards: A Comparative Reflection,* The Chinses Journal of Comparative Law (2018) Vol. 6 No. 2, pp. 174-227.
65. Maurice Kenton and Peter Hirst, *Advantages of International Commercial Arbitration,* 30 July 2015, Available at: https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration.
66. Michael F. Hoellering, *Managing International Commercial Arbitration: The Institution's Role*, DISP. RESOL.J.,June 1994, at 12, 12.
67. Robert D. Fischer & Roger S. Haydock, *International Commercial Disputes: Drafting an Enforceable Arbitration Agreement*, 21 WM. MITCHELL L. REV. 941 app. at 975 (1995).
68. Eyffinger, A. A, *Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference*, Neth Int Law Rev 54, 197–228 (2007). https://doi.org/10.1017/S0165070X07001970.

69. Lin, Tsai-yu, Making It a Treaty Obligation: Enforcement of Mediated Settlement Agreements Under the ARMO (March 30, 2018). Asian Journal of WTO & International Health Law and Policy, Vol. 13, No. 1, pp. 119-134, March 2018. Available at SSRN: https://ssrn.com/abstract=3153339.
70. Simmons, Beth. (2010). Treaty Compliance and Violation. Annual Review of Political Science. 13. 10.1146/annurev.polisci.12.040907.132713.
71. Somesh Dutta, *How Realistic is India's Dream of becoming a Global Arbitration Hub?,* The Wire, 30 April, 2018, Available at: https://thewire.in/law/india-global-arbitration-hub-modi-government.
72. Jaya VS, *Finality and Enforcement of Foreign Arbitral Awards: Reflections on the Indian Arbitration Law,* Asia Law Review, Vol. 4, No. 2.
73. Parmentier, Pieter, International Commercial Arbitration v International Investment Arbitration: Similar Game but Somehow Different Rules (March 1, 2018). Available at SSRN: https://ssrn.com/abstract=3200648 or http://dx.doi.org/10.2139/ssrn.3200648.
74. Stephan Wilske, Martin Raible & Lars Market, International Investment Treaty Arbitration and International Commercial Arbitration - Conceptual Difference or Only a Status Thing, 1 Contemp. Asia Arb. J. 213 (2008).
75. Karl-Heinz Bockstiegel, *Commercial and Investment Arbitration: How Different are they Today? The Lalive Lecture 2012,* Arbitration International, The Journal of the London Court of International Arbitration, Volume 28 Number 4, 2012.
76. Rohit Shankar, *The Unruly Horse of Indian Arbitration: The evolution of Public Policy under sections 34 and 48 of the Arbitration and Conciliation Act 1996,* HNLU Student Bar Journal, Available at: http://sbj.hnlu.ac.in/the-unruly-horse-of-indian-arbitration-the-evolution-of-public-policy-under-sections-34-and-48-of-the-arbitration-and-conciliation-act-1996/.
77. Sharma, Raghav, Sanctity of Foreign Arbitral Awards: Recent Developments in India (December 10, 2008). (2009) 75 Arbitration 148-157. Available at SSRN: https://ssrn.com/abstract=1336928.
78. Dr. S.I. Strong, Enforcement of Arbitral Awards Against Foreign States or State Agencies, 26 Nw. J. Int'l L. & Bus. 335 (2006).
79. Maurice Kenton & Peter Hirst, *Advantages of International Commercial Arbitration,* 30 July 2015, Available at: https://www.mondaq.com/uk/international-trade-investment/416416/advantages-of-international-commercial-arbitration.

80. Bernardo Sepulveda-Amor and Meeryl Lawry-White, *State Responsibility and the Enforcement of Arbitral Awards,* Arbitration International, 2017.
81. Bryan Cave Leighton Paisner, *Recognition and Enforcement of of Awards: UK Supreme Court allows appeal against order of security,* Blog Expert Legal Insights, Lexology, 2 March, 2017, Available at: https://www.lexology.com/library/detail.aspx?g=5d316d77-4ad6-4b11-a00f-ac2d750a98e4.
82. Troy Harris, *The Public Policy Exception to Enforcement of International Arbitration Awards Under the New York Convention,* 2007, 24(1) Journal of International Arbitration.
83. 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,* Available at: http://www.austlii.edu.au/au/journals/AUIntLawJl/2011/8.pdf.
84. Fazilatfar, Hossein, Transnational Public Policy: Does it Function from Arbitrability to Enforcement? (December 1, 2011). 3 (2) City U. Hong Kong L. R. (2012) . Available at SSRN: https://ssrn.com/abstract=2397315.
85. Louis Kossuth, *Transnational (or Truly International) Public Policy and International Arbitration,* Pieter Sanders (ed), Comparative Arbitration Practice and Public Policy in Arbitration, ICCA Congress Series, 1986 New York Volume 3, Kluwer Law International, pp. 258-318, Available at: https://www.lalive.law/data/publications/58_-_Transnational_(or_Truly_International)_Public_Policy_and_International_Arbitration__in_Comparative_Arbitration_Practice_and_Public_Policy_in_Arbitration_1986.pdf.
86. Shaheen Parikh et. al, *Arbitration in India- A Story of Growth and Opportunity,* Cyril Amarchand Mangaldas, 2019, Available at: http://www.cyrilshroff.com/wp-content/uploads/2019/06/Arbitration-in-India-–-A-Story-of-Growth-and-Opportunity.pdf.
87. Tariq Khan and Muneeb Rashid Malik, *History and Development of Arbitration Law in India,* 30 April, 2020, Bar and Bench, Available at: https://www.barandbench.com/columns/history-and-development-of-arbitration-law-in-india.

Legislation:

1. 1958- Convention on the Recognition and Enforcement of Foreign Arbitral Awards- The New York Convention
2. 1985- UNCITRAL Model Law on International Commercial Arbitration [Amended in 2006]
3. The Vienna Convention on the Law of Treaties, 1969
4. International Law Commission Articles on State Responsibility for Internationally Wrongful Acts of 2001 (ILC Articles)
5. Indian Arbitration and Conciliation Act, 1996 [Amended in 2015 and 2019]

요약

국제사법재판소규정 제 38 조 1 항 (a) 조문에서 언급되어 있듯이 국제조약은 국제법의 중요한 법원(法源)으로 인식되고 있다. 국가의 주권을 보호하고 국가 법률에서의 적용력을 높이기 위하여 국제조약은 예외 조문이 포함되고 있다. 조약은 국제사법에서 적용되고 있을 뿐만 아니라 국제공법에서도 적용되고 있다. 국제조약에서의 이러한 예외 조문들은 좁은 의미에서 해석되고 있다. 이러한 해석방식은 전 세계 대부분 국가로부터 받아들여져 있다. 공공정책의 예외는 국제조약에서 찾아볼 수 있는 조문 중 하나이다. 이것은 명시적이거나 비명시적으로 국제조약에 포함될 수 있다. 이러한 예외는 특정된 사례에서만 적용될 수 있다고 인식되어 있다. 이러한 예외는 국제조약을 준수하지 아니하는 예외로 간주할 수 없다. 국가들이 서로 국제조약을 체결할 때, 국가 전체를 주체로 하여 조약의무를 이행하는 것으로 기대된다. 이것은 체결국은 신의칙으로 계약의무를 이행하는 계약준수의 원칙을 기반으로 한다.

뉴욕협약은 체결국 수량이 많은 다자간협약이다. 이 협약을 체결한 협약국은 서로간의 섭외중재판결을 승인하고 이행하는 의무가 있다. 공공정책 예외 조항은 뉴욕협약의 제 5 조 2 항(b)에서 명시적으로 언급되어 있고 UNCITRAL 표준국제 상사중재법중에서도 봉안되어 있다 . 이러한 예외는 협약속에서 명시적으로 해석되어 있지 않았기때문에 다양한 방식으로 해석될 수 있다. 공공정책 예외 조항을 규정한 양국의 투자조약과 자유무역협정이 점점 많아지고 있다. 공공정책 예외 조항은 외국 중재판정을 인정하거나 거부하는, 또한 집행하는 근거중 하나이다. 중재판정의 결과는 그것의 영향을 많이 받는다. 중재판정을 이행하는 의무를 가진 국가의 공공정책 예외에 대한 해석에 따라 공공정책 예외 조항은 중재판정을 이행하는 장애물로 될 수 있다. 대부분 경우에 집행국가는 공공정책 예외 조항을 근거로 하여 집행을 거부하고 궁극적으로 국제법 및 조약법의 의무를 회피하게 된다. 공공정책 예외의 인용이 중재판정의 이행에 대해 장애가 되는 경우가 많다. 본문에서 이러한 문제를 품고 있는 국가는 인도이다. 인도 법원은 경상적으로 공공정책 예외의 규정으로 외국으로부터의 이행청구를 거부하였고 또한 공공정책 예외 조항을 부적절하게 해석하여 비판을 받고 있다. 본문은 뉴욕 협약에 따른 조약 의무의 관련성은 무엇인가에 대해 검토하고 논술하는 것으로 시작된다. 이어서 국내 법원이 외국 중재판정의 이행을 거부하는 것이

국제법 의무의 위반으로 간주되는 사례들에 초점을 맞추었다. 다음 인도 법무부가 지난 몇년동안 뉴욕협약에 따른 공공 정책 예외를 어떻게 해석하고 적용했는지, 협약에 따른 의무를 어겼는지에 대해 논술하였다. 많은 경우에 예외 조항은 국가가 외국 중재판정을 이행하지 않은 이유로 되었고 이는 뉴욕협약의 취지에 위배되는 것으로 본다. 본문은 국내법원에서 한 공공정책의 해석을 기타 각국의 공공정책 예외의 해석으로 통일시키는 것은 어렵다고 본다. 위 주장으로부터 본문은 공공정책 해석에 대한 인도최고법원의 돌격적인 태도변화를 분석하였다. 더 나아가서 본문은 이러한 돌격적인 태도변화가 인도에 미치는 국제법 범위내 계약 이행의무 위반으로 인한 국가책임을 분석하였다. 본문은 국내 법률규정의 흠집이나 누낙으로 인해 섭외중재판정이 집행하기 어렵거나 집행하는데 실패한 경우 및 인도의 뉴욕협약 이행의무의 실제 이행여부를 초점으로 하여, 중재판정을 집행하는 효력을 강화하기 위하여 국가는 국내 법률조문에서 명확히 규정하여야 한다는 결론을 내리게 되였다.

핵심어: 국제조약, 조약의무, 계약준수의 원칙, 뉴욕협약, 공공정책의 예외, 인도

학번: 2018-25293