



Analysis of Public Policy and Enforcement of Domestic and Foreign Arbitral Awards in India

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Abstract

The Public Policy doctrine is an unruly horse in India, when it comes to the enforcement of domestic and foreign awards. The main objective behind choosing this topic was to shed light on how public policy has been used by the losing party, in delaying the enforcement of arbitral award, which hampers the whole objective of arbitration. Though one may argue that the 2015 Amendment Act has settled all the controversies regarding public policy and enforcement of arbitral award, the author is of the opinion that there are still some areas that are left unexplored by the Arbitration Amendment Act. The paper primarily focuses on the changing trend of public policy with respect to arbitration in India. In addition, the author has compared the doctrine of public policy in India with that of countries such as France, Russia, United Kingdom and U.S.A. The most important contribution of this research paper is that it analyses the validity of patent illegality in domestic arbitration.

Keywords: S.34 of Arbitration and Conciliation Act 1996, Amendment Act of 2015, Arbitral Award, Patent Illegality, Public Policy

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1. Introduction

The basic purpose for which arbitration was conceptualised was to bring about expeditious and cost effective settlement of disputes, and also to limit litigation by passing an award that is final and binding on both the parties. This research paper comprehensively analyses the challenges faced by India, in International arbitration, in the context of globalization, where foreign investment is increasing rapidly.¹ The concept of settling a dispute with the help of a third person has been prevalent in India, right from ancient and medieval times. If the parties were dissatisfied with the decision they could appeal to a court of law and then further appeal to the King. The modern law of arbitration evolved during the regime of East India Company, where suits were referred to courts for arbitration.²

The first Arbitration Act of India which was enacted in 1899, was based on the Arbitration Act of Britain, 1889. The Indian Arbitration Act was again promulgated in 1940 and finally the Arbitration and Conciliation Act, 1996 was enacted by the Indian Parliament, which was derived from the UNICTRAL model of International Arbitration. Section 30 of the Indian Arbitration Act of 1940 had broad categories of grounds for setting aside an award given by an arbitral tribunal. The Indian Parliament made endeavours to resolve their problem, and section 34(2) of Arbitration and Conciliation Act 1996, was enacted to restrict the grounds for setting aside an arbitral award. One of the grounds for setting aside an arbitral award is the "Doctrine of Public policy".³

The main reason behind this situation was the Supreme Court Judgement in *Venture Global v. Satyam Computer Services Ltd. & Anr*⁴

¹Arpan Gupta, A new dawn for India- reducing court intervention in enforcement of foreign awards, 2 IJAL , 1, 1-14 (2014).

²COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION by Pieter Sanders (Kluwer Law and Taxation Publishers, 2nd ed.)

³INTERNATIONAL ARBITRATION AND PUBLIC POLICY by Devin Bray (Juris Publishing, 3rded).

⁴*Venture Global v. Satyam Computer Services Ltd*, (2008) 4 SCC 190.

and *Bhatia International v. Bulk Trading*⁵ which laid down the reasoning for the exception of public policy as is mentioned in the Arbitration and Conciliation Act, 1996. Section 34 was interpreted to cover within its even domain, foreign arbitrations. However, the case of *BALCO v. Kaiser Aluminum*⁶ rectified the decision in the above cases, by stating that Part 1 of Indian Arbitration Act does not cover foreign arbitration. However, confusion still persisted regarding whether, under Section 48 of the Arbitration and Conciliation Act, 1996 the scope of the doctrine of public policy doctrine can be expanded as was stated in *Phulchand Exports Ltd v. OOO Patriot*.⁷ In the case of *Shri Lal Mahal Ltd v. Progetto Grano Spa*,⁸ the Supreme Court again narrowed public policy doctrine and reiterated the enforcement policy which was evidenced in *BALCO v. Kaiser Aluminum*.

Arbitration was meant to be used as a device to make resolution of disputes less technical and easy, and it was never meant as a device which remains unresponsive to the canons of fair play and justice. So if the arbitrator does not adhere to the principles of natural justice, there should be recourse available to the affected party.⁹ However, the argument that award given by arbitral tribunal should be vanquished by the courts if they extend beyond their scope, holds no ground as the Civil Procedure Code of India provides provision for revision and review. Adjudication and Arbitration are nothing but various methods for seeking justice. Therefore, if one method fails to provide justice, the other should be used. Both Adjudication and Arbitration should be viewed as complementary to each other, instead of wrestling for primacy over each other.¹⁰

⁵*Bhatia International v Bulk Trading S.A*, (2002) 4 SCC 105.

⁶*BALCO v. Kaiser Aluminum*, (2012) 9 SCC 552.

⁷*Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300.

⁸*ShriLalMahal Ltd. v. ProgettoGrano Spa*, (2014) 2 SCC 433.

⁹Arpan Gupta, A new dawn for India- reducing court intervention in enforcement of foreign awards, 2 IJAL , 1, 1-14 (2014).

¹⁰RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS by Herbert Kronke (Kluwer Law International, 2nded.)

2. Brief History of Public Policy Doctrine in India

The Indian Contract Act, 1872 speaks about the relevance of public policy under section 23. The provision states that, if the object or consideration of the contract is not lawful, that is, if it is barred by law, or the nature of the contract is such that if it is made permissible, it will defeat the provision of law, or it involves fraud or injury to person or property of the person; or the court considers it opposed to public policy or immoral, the object or consideration of the agreement is considered to be unlawful. Any agreement whose consideration or object is unlawful is void under Indian Contracts Act.¹¹

The Arbitration and Conciliation Act, 1996 is an integrated, bigger version of Arbitration Act of 1940 which covers within its ambit the Foreign Award (Recognition and Enforcement) Act, 1961. The latter deals with international arbitral awards and the Arbitration (Protocol and Convention) Act, 1937 deals with domestic arbitration. The Arbitration Act of 1940 made no reference to public policy and therefore the Foreign Award (Recognition and Enforcement) Act, 1961 which was based on the New York convention, incorporated the provision dealing with "Public Policy". Provision 7(1)(b)(ii) of Recognition and Enforcement) Act, 1961, stated that " *An award given by International Arbitral Tribunal may not be given enforcement under this act if the court dealing with enforcement of award is of view that it is contrary to public policy of the country.*"¹² The same idea was followed in Arbitration and Conciliation Act, 1996 which consists of two parts. Part I of Arbitration and Conciliation Act, 1996 covers within its ambit all arbitration cases taking place in India. Part II of the Arbitration and Conciliation Act, 1996 covers within its ambit enforcement of award, which is given by International arbitral tribunals. If one looks at the 1996 Act, one can find that the word 'public policy' is stated twice in the Act. It is first stated under section 34 of this particular Act (Part I), which specifies that an award can be set

¹¹LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION by Alan Redfern (Sweet & Maxwell, 3rd ed.)

¹²Arpan Gupta, A new dawn for India- reducing court intervention in enforcement of foreign awards, 2 IJAL , 1, 1-14 (2014).

aside if it comes in conflict with public policy of India. Section 48 of the Act mentions that an award by an international arbitral tribunal can be set aside if it comes in to conflict with the public policy of India.¹³

Section 34 of Arbitration and Conciliation Act, 1996 which is based on section 34 of UNICTRAL MODEL LAWS states that:

- 1) If an individual wants to go against the award of tribunal it can be done only by making application for setting aside the award as per sub section 2 and 3.
- 2) Court will set aside award of arbitral tribunal only if the courts feels
 - The subject matter of the case is not arbitrable under Arbitration and Conciliation Act,1996.
 - The award given by arbitral tribunal comes in conflict with public policy of India.

Explanation - An award is contrary to public policy if it is induced by corruption or fraud or it violates section 75 and section 81 of this Act.

Section 48 of the Arbitration and Conciliation Act, 1996 is based on the New York Convention and it sets out the condition for enforcement of foreign arbitral award. Court will set aside award of foreign arbitral tribunal only if the courts feel:

- 1) The subject matter of the case is not arbitrable under the Arbitration and Conciliation Act,1996.
- 2) The award given by arbitral tribunal comes in conflict with public policy of India.

Explanation - An award is contrary to public policy if it is induced by corruption or fraud or it violates section 75 and section 81 of the Act.¹⁴

¹³COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION by Pieter Sanders (Kluwer Law and Taxation Publishers, 2nd ed.)

¹⁴Arpan Gupta, A new dawn for India- reducing court intervention in enforcement of foreign awards, 2 IJAL , 1, 1-14 (2012).

The first time the issue of whether public policy can be considered as an exception for enforcement of foreign awards was raised in the case of *Renusagar Power Electric co v. General Electric Co.*¹⁵ This case dealt with enforcement of an ICC award. This case took place before 1996 and hence it was decided under the Arbitration Act of 1961.

The Supreme Court in this particular case held that the term "public policy" as mentioned in Section 7(1)(b)(ii) of the Arbitration Act, 1961 meant the public policy as utilized by the Indian courts. Indian Court recognizes that "Public Policy refers to the matter which involves public good and interest". What is injurious and obnoxious to public and what is in public interest and public good has varied from time to time. The Indian Supreme Court stated that the expression "public policy" should be construed narrowly and therefore, in order to invoke exception of public policy, the award should be more than just violation of laws. If the criteria above are satisfied, it can be construed that the award given by the international arbitral tribunal would not be enforceable in India as enforcement of award is not possible if it is contrary to

- 1) The interests of India or
- 2) Justice or morality or
- 3) Fundamental Policy of India¹⁶

Another case in which public policy exception came into picture was with respect to *Oil and Natural Gas Corporation Saw Pipes Ltd*¹⁷ The issue which arose in this case was whether public policy can be ground for setting aside arbitral award in India, as the law of liquidated damages had been inefficiently applied by the arbitral tribunal. Despite the precedent of *Renusagar Power Electric co v. General Electric Co*¹⁸, the Supreme Court stated that any arbitral award which comes in conflict with statutory provisions in India is "patently illegal" and is in conflict with the public policy of the

¹⁵*Renusagar Power Plant Ltd. v. General Electric Co.*, AIR 1994 SC 860

¹⁶Arpan Gupta, A new dawn for India- reducing court intervention in enforcement of foreign awards, 2 IJAL , 1, 1-14 (2012).

¹⁷*ONGC v. Saw Pipes Ltd.*, AIR .2003 SC 2629.

¹⁸*Renusagar Power Plant Ltd. v. General Electric Co.*, AIR 1994 SC 860

country. The court in *Oil and Natural Gas Corporation Saw Pipes Ltd*, distinguished the case from that of *Renusagar Power Electric co v. General Electric Co*, on the basis that the issue raised in the latter case was regarding the execution of an award, whose finality was decided under Arbitration Act, 1961. However, in the case of *Saw Pipes Ltd*, the validity of the arbitral award was challenged. The Court accepted the argument that the award given by a foreign arbitral tribunal could be set aside by competent authority under relevant law, where it was enforced. It was also held in *Saw Pipes Ltd case* that the Indian courts being the primary court, would supervise domestic awards. In addition, the Court also held that if the expression "Public policy" is given a narrow meaning, then some of the sections mentioned in Arbitration Act, 1996 would become unusable.¹⁹

Hence, the Indian Supreme Court interpreted Section 34 (2) (b) (ii) of Arbitration and Conciliation Act, 1996 so that patent illegality could be incorporated as an additional ground. The Supreme Court, in *Saw Pipes Ltd*, mentioned the opinion given by Late Sr. Advocate Nani Palkhiwala who expressed that:

The Arbitration and Conciliation Act, 1996 has been brought on par with other countries' statutes, though I had a wish that Arbitration law of India has a section identical to Section 68 of the Arbitration Act in England, which gives autonomy to the court to rectify the legal error in award. I specifically support the argument that the courts may be permitted to interfere with an arbitral award given by arbitral tribunal which has some kind of irregularity that has caused substantial injustice. If the arbitral tribunal does not provide justice, it does not reflect the true meaning of alternative dispute settlement. Therefore if the arbitral award has culminated in substantial justice, a court is well within its boundary. Upholding the award can be

¹⁹Supra 13.

challenged if it is contrary to the Public policy of the country.²⁰

The court expressed that the incorporation of "patent illegality" was justified on the grounds that the Arbitration and Conciliation Act, 1996 should contain similar provision to Section 68 of the Arbitration Act in England. This additional ground also widened the scope of judicial intervention in setting aside the arbitral award by equating "error of law" to "Patent illegality".²¹

3. Analysis of Public Policy Doctrine in India

The Indian Supreme Court in *Renusagar Power Electric co v. General Electric Co* stated that it would not amount to a transgression of Public Policy if there is mere violation of Indian Law.²² Consequently, the Indian Supreme Court in the case of *Oil and Natural Gas Corporation Saw Pipes Ltd* stated that public policy test is utilized when an award given by arbitral tribunal violates Indian statutory provision or condition of contract. Such an arbitral award can be categorized as patently illegal. This interpretation by Indian Supreme Court is used as a device by the losing party to delay final judgement of the case.²³ The interpretation of the term 'public policy' given by the Supreme Court of India in *Oil and Natural Gas Corporation Saw Pipes Ltd* differed from that of *Renusagar Power Electric co v. General Electric Co* on the basis that the latter case involved enforcement of a final award. However, the question raised before the Apex court in the former case was concerning arbitral award finality, which was questioned under Section 34 of the Arbitration and Conciliation Act, 1996.

This scenario however underwent a change after the Supreme Court Judgement in *Venture Global and Bhatia International*. In the case of *Bhatia International v. Bulk Trading S.A.* the court specifically

²⁰INTERNATIONAL ARBITRATION AND PUBLIC POLICY by Devin Bray (Juris Publishing, 3rded.)

²¹LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION by Alan Redfern (Sweet & Maxwell, 3rd ed.)

²²*Renusagar Power Plant Ltd. v. General Electric Co.*, AIR 1994 SC 860.

²³*ONGC v. Saw Pipes Ltd.*, AIR .2003 SC 2629.

deleted the difference between Part I & Part II of the Arbitration and Conciliation Act, 1996 expressing that the sections of Part I would apply uniformly to every arbitration proceeding. If arbitration takes place in India, the sections of Part I would be mandatorily applicable. However, in the cases of international commercial arbitrations that take place outside India, Part I sections would apply automatically, unless the parties to arbitration implicitly or explicitly, omit any or all of its provisions.²⁴ The Indian Supreme Court in the case of *Venture Global v. Satyam Computers* went ahead and applied the wider definition of public policy, for setting aside rather than enforcing an arbitral award given by foreign arbitral tribunal. In this particular case, a company named Satyam Computer Services Limited, created a joint venture known as Satyam Venture Engineering Services by entering into contract with Venture Global Engineering Ltd. A separate contract which was a shareholder agreement was formed between the parties to the main agreement, which consisted of an arbitration clause. The arbitration clause in the shareholder agreement stated that the contract would be governed by State law of Michigan. Satyam Computer Services Limited (SCS) alleged that Venture Global Engineering Ltd (VGE) had perpetrated an event of default and thus breached a condition under the share holder agreement. Therefore, they executed its option of buying Venture Global Engineering Ltd's joint venture shares at its original value. After the process of arbitration was concluded, the arbitrator ordered Venture Global Engineering Ltd to transfer the shares in favour of Satyam Computer Services and therefore, SCS filed before US District Court, Michigan for enforcement of award given by arbitrator. VGE argued that the award given by Arbitrator is not enforceable because it violates the FEMA Act of India.²⁵

After the case of *Bhatia International v. Bulk Trading S.A*, Part I of the Arbitration and Conciliation Act, 1996 was applicable to every arbitration proceeding. In the present case, the award which was in question was not a domestic award. However, the Indian Supreme Court stated that the award in question can be put aside because it

²⁴*Bhatia International v Bulk Trading S.A*, (2002) 4 SCC 105.

²⁵*Venture Global v. Satyam Computer Services Ltd*, (2008) 4 SCC 190.

falls under the exception of public policy as stated in provision 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. The Court went ahead and stated that this would not come in conflict with Section 48 of the Arbitration and Conciliation Act, 1996 or any other section provided in Part II of the Arbitration and Conciliation Act 1996. Moreover, the Supreme Court stated that as the parties and enforcement of award hold a close nexus with India, Satyam Computer Services Limited could not escape from Indian laws by taking the matter and award to international courts.²⁶ However, both the above mentioned judgements faced great criticism, and these judgements gave rise to situations where parties could raise the issue of public policy in Indian Courts as soon as a foreign award was issued. This was against the foundational principle of enforcement of awards and mutual recognition as provided in the New York Convention. Recognition of a foreign arbitration award is of utmost importance. Unless, at the end of the arbitration process, parties are sure that the award of arbitral tribunal would be enforced, the victory only remains a pyrrhic one. The only practical solution to this problem was that the parties to arbitration agreement unambiguously agree in their arbitration agreement that Part I of the Arbitration and Conciliation Act, 1996 would not be applicable. One of the foundational features in international arbitration is party autonomy and Indian courts are compelled to enforce this foundational feature as part of the parties' agreement.

In the year 2002, International Law Association (ILA) Committee expressed in its Interim Report that:

The exception of public policy for enforcement of an award is an acknowledgement of state rights and rights of its judiciary to execute control over the process of arbitration. If a situation of tension arose, the courts and legislature must resolve between them and to balance on the one hand, expectation of State's authority to not enforce awards which are in violation of domestic values and laws; and, on the other side, the wish to venerate the foreign awards finality. In order to resolve this situation of tension,

²⁶ Ibid.

some Courts and legislature have decided that a narrow meaning of the expression public policy should be utilized while dealing with foreign awards in comparison to domestic awards. This narrow definition is often termed as international public policy.

Therefore, the ILA suggested that international public policy should be viewed in restrictive and narrower manner. International public policy should contain (i) rules devised with an aim to serve the essential social, economical and politic interest of the State, which are also known as "lois de police" (ii) Fundamental concepts, relating to morality or justice that the State aims to protect even if they are not directly involved and (iii) the State duty to venerate its responsibility towards international organization and other states.²⁷

However, the Judgement given by Supreme Court of India in case of *Phulchand Exports Ltd v OOO Patriot*²⁸ raised the same issue once again. In this particular case, the award given by a foreign arbitral tribunal in support of a Russian company was challenged by an Indian company on grounds of public policy provided by the Arbitration and Conciliation Act, 1996. This situation arose when the Russian company applied for enforcement of award given by foreign arbitral tribunal under provision 48 of Part II of the Arbitration and Conciliation Act, 1996. The Indian company argued that award given by foreign arbitral is patently illegal and therefore it is in conflict with public policy of the country. The issue before the court was whether public policy should be interpreted widely as done in *Oil and Natural Gas Corporation Saw Pipes Ltd.*²⁹ The court stated that interpretation of public policy under section 48 (2) (b) and section 34 the Arbitration and Conciliation Act, 1996 are identical. It further stated that a foreign arbitral award can be set aside if it is "patently illegal". However, after reviewing merits of

²⁷COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION by Pieter Sanders (Kluwer Law and Taxation Publishers, 2nd ed.)

²⁸ *Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300.

²⁹ *ONGC v. Saw Pipes Ltd.*, AIR .2003 SC 2629.

the case extensively, the court found that award was not “patently illegal.”³⁰

In the case of *BALCO v Kaiser Aluminium*³¹, the Bhatia International case was overruled by the Indian Supreme court on the ground that the Arbitration and Conciliation Act, 1996 lay emphasis on the principle of territory and therefore, Part I of Arbitration and Conciliation Act, 1996 would not be applied if the arbitration has a foreign seat. Hence, an arbitration award which was not seated in India can no longer be challenged on the ground that it violates section 34 of Arbitration and Conciliation Act, 1996. This decision was of utmost importance as it helped foreign parties restore their confidence to invest in India. However, even after the Judgement of Supreme court in *BALCO v Kaiser Aluminium*,³² the question as to whether a foreign arbitral award can be denied on the basis of patent illegality as held in the *Phulchand Exports* case remained unsolved. However, this question was addressed in *Shri Lal Mahal v Progetto Grana SpA*³³.

In this particular case, a foreign arbitral tribunal passed an award passed under Grain and Feed Trade Association Rules, which was upheld by U.K. courts and its enforcement was sought in India. The defendants argued in Indian courts that the particular award is patently illegal and in violation of the country’s public policy, and therefore the award should not be enforced. The Indian Supreme Court stated that the term ‘public policy’ as provided under section 48 of Arbitration and Conciliation Act, 1996 does not specify the ground of patent illegality. In addition, such basis is restricted to section 34 of Arbitration and Conciliation Act, 1996 which mainly deals with setting aside of an order. The Court stated that the public policy doctrine is comparatively restricted in cases which involve foreign matter such as seat of arbitration outside India or conflict of laws etc. The court also observed that the term ‘public policy of India’ provided under Section 34 of Arbitration and Conciliation Act, 1996 was required to be interpreted as per the

³⁰*Phulchand Exports Ltd. v. O.O.O. Patriot*, (2011) 10 SCC 300.

³¹*BALCO v. Kaiser Aluminum*, (2012) 9 SCC 552.

³² *Ibid*

³³CIVIL APPEAL NO. 5085 OF 2013

court's jurisdiction before the award becomes conclusive and executable. In addition, Indian Supreme Court stated that Section 48 of Arbitration and Conciliation Act, 1996 does not cover reviewing the award for merits at the enforcement stage. Accordingly, the Indian Supreme Court held that Section 48 of Arbitration and Conciliation Act, 1996 is restricted to fundamental policy of India, justice and morality.³⁴

4. Amendment Act, 2015

According to the new amendment, a foreign award can only be set aside on the following grounds:

- 1) It is contrary to the Indian Public Policy
- 2) The award is tainted by corruption or fraud
- 3) It is in conflict with the essential policy of Indian law
- 4) It is in conflict with the essential idea of justice and morality

The Amendment Act, 2015 has elucidated the point of law that a foreign arbitral award cannot be challenged on additional ground of patent illegality as mentioned under section 34. This ground can be taken only in domestic arbitrations. In addition, as per the Amendment, patent illegality can only be ground for challenging a domestic award if the illegality is apparent on the face of the award. However, erroneous application of law or re-appreciation of evidence is no ground under the concept of patent illegality.³⁵

5. Doctrine of Public Policy in other countries

Though there is pending uncertainty when it comes to "Public Policy" and "Enforcement of foreign awards", it has been observed that, in countries like France and U.S.A and other developed arbitral jurisdictions, courts have taken up a narrow view on the interpretation of the expression "Public Policy". This is mainly because developed arbitral jurisdictions have pro-enforcement

³⁴ *ShriLalMahal Ltd. v. ProgettoGrano Spa*, (2014) 2 SCC 433

³⁵ Arbitration and Conciliation Act 1996, S (34).

attitude when it comes to enforcement of arbitral awards, which according to them, is a main element of public policy.

5.1 U.S.A

U.S courts, for a long time, have adopted a conservative method to decide the interferences of public policy with international arbitration. The land mark case of *Scherk v Alberto-Culver Co*³⁶ illustrates the pro enforcement attitude taken by U.S. courts in interpreting the expression “public policy”. U.S Supreme Court in this particular case stated that, if we invalidate an agreement which was signed in this particular case it would illustrate a parochial concept that court should resolve all dispute by utilizing law of the country. If such a parochial concept is used then the country will lose on its commerce and trade in international waters and world market.³⁷ The other case in which U.S. court adopted narrow interpretation of public policy is *Parsons & Whittemore v. Société Générale*.³⁸ In this case enforcement of an award by Egyptian corporation was challenged by a U.S. Company. The court stated that the New York Convention provides pro enforcement bias unequivocally and additionally states that a foreign arbitral award can be refused enforcement on the grounds of public policy, that is, if the award is in conflict with the concept of justice and morality of the State. The Court also stated that if we interpret public policy as a parochial concept which is used to protect national interest, it would dilute the New York Convention’s applicability.³⁹

Again, in the case of *International Navigation Ltd. v Waterside Ocean Navigation Co Inc*⁴⁰, the U.S court stated that the defence of public policy must be read in the light of the New York Convention’s overriding objective. The Court in this particular case made reference to the *Scherk v Alberto-Culver Co* and stated that the main objective of New York Convention was to consolidate the standards of enforcement of foreign arbitral awards. The Court also

³⁶417 U.S. 506 (1974)

³⁷*Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

³⁸508 F.2d 969 (2d Cir. 1974)

³⁹*Parsons & Whittemore v. Société Générale*, 508 F.2d 969 (1974).

⁴⁰737 F.2d 150, 154 (2d Cir. 1984)

made a reference to *Parsons & Whittemore v. Société Générale* and stated that a foreign arbitral award can be refused enforcement on the grounds of public policy, if it is in conflict with the concept of justice and morality of the State. If one takes a close look at these three decisions taken by US courts, it can be clearly seen that the U.S. court has adopted a narrow view in relation to defence of public policy. In addition, these cases state clearly that domestic court interference in international arbitrational matters should be minimum and the expression “public policy” must be given a narrow interpretation as per the New York Convention.⁴¹

Hence it is clear from the above mentioned cases that the interpretation of public policy taken by U.S. is unambiguous and clear. In the US, the main objective of promoting international business relations and international arbitration, consistently outweigh defence of public policy in relation to foreign award enforcement.

5.2 Russia

The landmark case in Russia, regarding interpretation of public policy is *United World v. Krasny Yakor*.⁴² In this particular case, United World was granted huge damages against Krasny Yakor, which was a State owned corporation. The court initially granted enforcement of award. However, the enforcement was later denied because the award, if granted, would lead to bankruptcy of Krasny Yakor, which would have a negative impact on economic and social stability of the city Nizhi. The Court stated that the company is of strategic importance to State security and safety and therefore, the award was denied on the grounds of public policy.⁴³

⁴¹*International Navigation Ltd. v Waterside Ocean Navigation Co Inc*, 737 F. 2d 150 (1984).

⁴²Sudhi Ranjan Bagri, *Doctrine Of Public Policy And Enforcement Of Arbitral Award*, I PLEADERS (Jan. 29, 2017, 10:04 AM), <https://blog.iplayers.in/doctrine-public-policy-enforcement-arbitral-awards>. Avoid internet sources

⁴³ Ibid.

However, a totally new approach regarding interpretation of public policy was taken in *O&Y Investments Ltd. v. OAO Bummash*.⁴⁴ In this case, the arbitration clause was invoked against Bummash. In order to avoid any chances of enforcement of awards, Bummash applied to court for invalidation of the contract which contained the arbitration clause on grounds of public policy. The Court in this particular case, stated that since the agreement was in violation of Joint Stock company law, it is contrary to public policy and hence, invalid. Even after this decision, the arbitral tribunal in Netherlands gave a judgment in favour of O&Y Investments, which then tried to enforce the award given by Netherland arbitral tribunal in Russia. However, Russian Court again upheld its decision that since the agreement was in violation of Joint Stock company law, it is contrary to public policy and hence invalid.⁴⁵

The Court stated that if such a foreign arbitral award is enforced, it would amount to the presence of a judicial act of the same power in Russian Territory. Enforcing a foreign award which is in conflict with the federal law of Russia would be deemed to be invalid as all judicial acts of Russia are to be abided by strictly. This principle is a mandatory part of Russian public policy and anything in contrary to it cannot be granted.

5.3 France

The expression “public policy” in France is influenced by the judgment of *Swiss China Time Ltd. v Benetton International*⁴⁶, which was in turn influenced by the European Court of Justice. Jurisprudence developed by the European Court of Justice has had a tremendous impact on French Court’s interpretation of the expression “public policy” and foreign arbitral award enforcement. In this particular case, the European Court of Justice, while dealing with an issue of setting aside an arbitral award submitted by

⁴⁴ Sudhi Ranjan Bagri, *Doctrine Of Public Policy And Enforcement Of Arbitral Award*, I PLEADERS (Jan. 29, 2017, 10:04 AM), [https:// blog.iplayers.in/doctrine-public-policy-enforcement-arbitral-awards](https://blog.iplayers.in/doctrine-public-policy-enforcement-arbitral-awards). Avoid internet sources

⁴⁵ Ibid.

⁴⁶ European Court Reports 1999 I-03055

Holland, stated that 'An efficient arbitration proceeding is one in which the scope of refuse and review is restricted and arbitral award is set aside only in exceptional and rare cases'. In addition, the Court quoted Professor Schlosser's view, who stated that in European context, violation of public policy refers to non-conformity to morality and justice of society, and nothing else.⁴⁷

Following this stream of thought, the French courts have adopted a restricted view of the expression "Public Policy". In the landmark case of *Gallay v Fabricated Metals*⁴⁸, the court in Parisset, set aside an award because it came in conflict with European competition policy. Also, in certain other cases, courts of France have restricted the scope of the expression "Public policy". The best illustration of this restriction is the case of *Thalès v Euromissile*.⁴⁹ In this case, Euromissiles ought to recover damages from Thales for breach of an agreement. Initially, Thales did not object to the award, but later when Euromissile enforced the award against Thales, the latter argued that the award was contrary to competition policy of Europe. They claimed that there was a violation of public policy and hence, the award is liable to be set aside. However, the Court relied on the judgment in *Swiss China Time Ltd. v Benetton International* and rejected the contention of Thales by taking a restrictive view of the expression 'public policy'. The Court stated that the expression 'public policy' is violated only when there is threat to law and order of France, or if it violates a fundamental rule of law.⁵⁰

5.4 England

In England, the law concerning interpretation of expression 'public policy' is similar to that in France and U.S.A. In England, courts have been diligently observing pro enforcement bias, as provided by the New York Convention. The English courts have adopted a

⁴⁷ INTERNATIONAL ARBITRATION AND PUBLIC POLICY by Devin Bray (Juris Publishing, 3rded.).

⁴⁸ 2001(4) REV. ARB. 805

⁴⁹ LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION by Alan Redfern (Sweet & Maxwell, 3rd ed.)

⁵⁰ Ibid.

restrictive view of the expression 'public policy' while dealing with enforcement of arbitral awards. In the land mark case of *Soleimany v. Soleimany*,⁵¹ the English courts refused enforcement of arbitral awards on ground of 'public policy' because the award was connected to an illegal act of smuggling carpets from Iran. In another landmark case *Westacre Investments Inc. v. Jugoimport*⁵², the English court rejected the argument of not enforcing an award because it involved allegations of bribery of officials of Kuwait. In addition, the Court stated that the substantive law governing the agreement was Swiss law and that they would venerate the decision of arbitral tribunal. The court also stated that a proper balance should be made between consideration of 'public policy' that disproves illegality and the policy which gives effect to the finality of an arbitral award.

6. Recommendations

The Arbitration Amendment Act, 2015 has settled the conundrum regarding public policy and enforcement of foreign and domestic awards. All the prior judgments were kept in mind while drafting the Amendment. However, an area regarding public policy was left untouched in this Amendment. It excludes the applicability of the ground of patent illegality on the foreign award, however, it does not answer why patent illegality should be kept as ground for setting aside an arbitral award under section 34. The *Oil and Natural Gas Corporation Saw Pipes Ltd* case was the one that introduced the concept of patent illegality in Indian arbitration. It is a judgement that is often criticized, because the Supreme Court, in this particular case, differed from the set precedent of the *Renusagar* case and laid down the precedent about giving narrow interpretation to the definition of public policy. The author is of the view that patent illegality should not be a ground under section 34, as minimum court intervention is a fundamental aspect of arbitration. In addition, this interpretation by Indian Supreme Court is used as a device by the losing party to delay final judgment of the case. Hence, keeping patent illegality as a ground

⁵¹ *Soleimany v. Soleimany, Soleimany v Soleimany*(1998) 3 WLR 811 (C.A.).

⁵² *Westacre Investments Inc. v. Jugoimport*, (2000) QB 288(C.A.).

under section 34 can open the flood gate of litigation, hampering the objective of arbitration.

In addition, the author is of the opinion that proper education and training should be given to judges and arbitrators, so that they can apprehend the importance of the issue and utilize their discretion reasonably, before reaching a judgment. Arbitrators and judges should be made conscious of the fact that law of arbitration is self-sufficient. Its basic objective is to achieve quick dispute redressal. Therefore, unwanted court intervention can hamper the proceedings of the arbitration.

7. Conclusion

In the present era, public policy is used as a weapon by Indian courts to interfere in international arbitration matters. This is because there are no fixed parameters for the expression 'public policy' and it differs from state to state. Therefore, its interpretation has been wavering. It is true that public policy is similar to an unruly horse, but countries like U.S.A, France and U.K have remained successful in taming this, as explained in the preceding paragraphs. If India follows this correct approach and takes inspiration from France, U.S.A and England, it will soon become the most favourable arbitration seat in South East Asia. This can be demonstrated by a change in the government's approach towards arbitral disputes.