DEMYSTIFYING JUDICIAL INTERVENTION THROUGH PUBLIC POLICY EXCEPTION: ANALYSING ITS IMPACT ON ENFORCEABILITY OF FOREIGN ARBITRAL AWARD

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ABSTRACT

Internationally, courts follow different patterns in reviewing foreign arbitral awards which is quite in consonance with its social, economic, moral, political, and cultural dimensions. Consequently, there is an urgent need to strike a delicate balance, i.e., on the one hand, the need for freedom from the constraints of local law created for the States' public interests, and on the other hand, to prevent unjust or prejudiced awards in order to protect and maintain basic notions of justice and morality. In this perspective, the author of this paper delves into the inconsistency followed by courts while reviewing foreign awards on the ground of 'public policy exception'. This paper further argues that even though the Arbitration and Conciliation (Amendment) Act, 2015 has limited the scope and ambit of 'public policy exception', it still acts as a deterrent to the fair and speedy process of arbitration. The paper concludes that it is a considerable restraint on party autonomy, which is a fundamental principle underpinning international arbitration.

Keywords*: International Arbitration, Public-Policy, Arbitral Award, New York Convention, UNCITRAL*

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I. Introduction

UNIFORM STANDARD of judicial review is necessary for the development and extension of International Commercial Arbitration (*hereinafter* referred as 'ICA'). Lack of uniform standard of judicial review in enforcing of international arbitral award poses a fundamental threat to business enterprise across the world. The New York Convention, 1958 permits refusal to enforce the foreign arbitral awards only in exceptional circumstances.[1] Since, the scope of article V of the New York Convention is exhaustive it aims to consolidate the recognition as well as the enforcement of arbitral awards at the international level. Analogously, the pro-enforcement approach of the Convention is also represented by the finality and enforceability of foreign arbitral awards in the contracting States as stipulated in article III of Convention.

However, the most controversial aspect of the New York Convention is the exception to the enforcement of arbitral awards on the ground of 'public policy'.[2] Since, the term 'public policy' is subject to national interpretations which are expected to vary widely, this may frustrate the very purpose of New York Convention.[3] Due to its open-textured nature the courts in certain countries have even conducted merit review of arbitral awards. Such an approach not only undermines the arbitrator's authority to resolve the dispute in accordance with the free will of the parties, but may also lead to judicial overreach.

To understand the limitation that the 'public policy exception' presents to the enforcement process, this paper would first examine the different terms and approaches which are vital in understanding the enforcement of arbitral awards. In addition, the author discussed the discretionary nature of

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[2] Konstantina Kalaitsoglou, "Exploring the Concept of Arbitral Awards under the New York Convention" 5(1-2) *Journal of Strategic Contracting and Negotiation* 99-112 (2021). Katia Fach Gómez and Ana Mercedes Lopez Rodriguez (eds.), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International, The Netherlands, 2019).
[3] With regards to Indian position *see*, Arjit Oswal and Balaji Sai Krishnan, "Public Policy as a Ground to set aside Arbitral Award in India" 32(4) *Arbitration International* 651-658 (2016).

judicial review of arbitral awards adopted by courts around the world under the guise of article V of the Convention. Following that, this paper provides an exhaustive list of grounds for non-enforcement of the arbitral award as specified in article V of the Convention. This paper will also look at the possibility of merit review under the New York Convention, as well as the inconsistencies in merit review practices used by Courts internationally. Thereafter, this paper will also discuss differences in the pattern followed by States in implementing 'public policy exception'. Moreover, this paper provides an in-depth discussion pertaining to the Indian and international approaches in dealing with the 'public policy exception' qua the enforcement of the arbitral awards. Finally, a few suggestions has been put forth towards the possibility of improving the enforceability of arbitral awards internationally.

II. 'Recognition' and 'enforcement', 'annulment' and 'non-enforcement' in International Arbitration

The success of the arbitration system in the international arena depends upon the recognition and enforcement of the arbitral awards. In all cases, the enforcement of awards infers their recognition. Therefore, the two terms appear as if they are inevitably linked together. The New York Convention itself refers to "recognition and enforcement" of foreign arbitral award.[4] However, in the case of *Dallal* v. *Bank Mellat*[5] it was held that the award of the Iran-U.S. Claims Tribunal was not enforceable under the New York Convention but should nevertheless be recognised as a valid judgement of a competent tribunal. Thus, an award may be 'recognized' without being 'enforced'. The expression 'recognition' is generally described as a defensive process which acts as a shield against an attempt to raise a fresh proceeding on the same issues that have already been adjudicated upon and decided in an earlier arbitration proceeding.[6] On the contrary, 'enforcement' of an award is an offensive process, whereby the court has to ensure the enforcement of an award by recognizing its legal force and effect, and its execution by applying legal sanctions in case other

[4] Under arts. IV and V but art. IV speaks of "recognition or enforcement". The Geneva Convention of 1927 is more precise, when it speaks of "recognition or enforcement". Even, English Arbitration Act, section 101 and 102 followed the distinction.

[5] (1986) Q.B. 441(Queens Bench).

[6] Basically, it acts as *Res Judicata* that is, a matter in issue between the parties which in fact have already been decided. If the award does not dispose of all the issues raised in the new proceedings, but only some of them, it will need to be recognized for the purpose of issue estoppel, so as to prevent the issues with which it does deal from being raised again.

party fails or refuses to comply to it voluntarily.[7] Thus, the court will enforce the award because it has been validly recognized and made binding upon the parties to dispute. Therefore, although 'enforcement' goes a step further than 'recognition', both terms are still related to each other.

In order to understand the 'public policy exception' in the enforcement of an arbitral award, it is also necessary to address certain issues related to 'annulment'. This is due to the fact that 'public policy' is also a ground for 'annulment' under article 34(2)(b)(ii) of United Nations Commission on International Trade Law (*hereinafter* referred as UNCITRAL Model Law). Moreover, the New York Convention under article V(1)(e) also provides 'annulment' as a ground for non-enforcement of the arbitral awards.[8] At this stage, it is pertinent to point out the difference between 'annulment' and 'non-enforcement' which has been explained by Albert Jan van den Berg[9], who states that the setting aside of an arbitral award in the country of origin has a universal effect, whereas the refusal of enforcement does not have an effect on other jurisdictions:

> Refusal of enforcement has only a territorial effect (i.e., is mostly limited to the country in which the enforcement order is refused). A court in another country can arrive at an opposite decision by granting enforcement of the same decision in that country. In contrast, the setting aside of an arbitral award has an erga omnes effect. Once the award has been annulled in the country where the award was made, it is no longer eligible for recognition and enforcement in the contracting states. Setting aside thus provides a legal certainty.

However, there is a disagreement over this matter among different schools of thought. The *territorial approach* suggests that the enforcement of an award may be denied if it has been annulled in the country of origin. In the case of *Malicorp Ltd* v. *Egypt*[10] the same approach was adopted and it was held that if an arbitral award is annulled in the seat of arbitration then it would

[7] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 449 (Sweet & Maxwell, United Kingdom, Student edn., 2003).
[8] Article V(1)(e) provides, "The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".
[9] Van den Berg, "Enforcement of arbitral awards annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009" 27(2) *Journal of International Arbitration* 179 – 198 (2010).
[10] (2015) EWHC 361 (High Court of Justice in London), Common law courts, especially courts in England follow this approach.

be unenforceable. On the contrary, *delocalization approach* suggests that the domestic courts should give an effect to the enforcement of an arbitral award irrespective of the fact that it has been annulled in the seat of arbitration. In the case of *PT Putrabali Adyamulia* v. *SA Rena Holdings*[11] the French Court held that the International Arbitral Award does not belong to any legal system; thus, its validity must be examined as per the applicable rules of the country where its recognition and enforcement are sought. On the other hand, the *liberal approach* suggests that the recognition of an award is to be refused if it has been set aside in the country of origin as per "international standard annulment".[12] Thus, there are a conflicting opinion as to whether an 'annulment' of an award would render such an award 'non-enforceable'. As a result, a lot depends on how the respective National Courts approach this issue.

III. Nature of judicial intervention on the ground of 'public policy exception'

Article V of the New York Convention deals with the recognition, enforceability, and exceptions to the enforcement of foreign arbitral awards. The use of the term 'may' instead of 'shall', 'will' or 'must' is to enable the Courts to use their discretionary power to either refuse or to enforce the awards. Consequently, each contracting party to the convention has an option not to refuse recognition and enforcement of the foreign arbitral award, even if even if one of the conditions specified in article V is satisfied.[13] In the case of *Parsons & Whittemore Overseas Co. Inc*. v. *Societe Generale de L'Industrie du Papier*[14] it was held by the United States Court of Appeal that the discretionary character of article V of the New York Convention illustrates an autonomy sphere of the Courts to exercise a certain level of personal judgement and assessment.[15]

Article V of the New York Convention neither provides for any clear standard definition nor any clear ambit of the grounds to challenge the enforcement of the arbitral awards. Resultantly, it has led to a vague and abstract standard of application.[16] This leaves the scope for the Courts to

[11] (2007) 32 YB Comm Arb 299.
[12] Jan Paulsson, "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)" 9 *ICC International Court of Arbitration Bulletin* (1998).
[13] Anton G. *Maurer, 'Public policy exception' Under The New York Convention: History, Interpretation, and Application* 53 (Huntington, New York, 2013).
[14] 508 F. 2d 205 (2nd Cir. 1974) (United States Circuit Court of Appeals, Second Circuit).
[15] The authority of court's discretionary power is derived from the given standards of the grounds for non-enforcement provided under article V of New York Arbitration Convention.
[16] Fifi Junita, "'Pro Enforcement Bias' under article V of New York Convention in International Commercial Arbitration: Comparative Overview" 5(2) *Indonesia Law Review* 142 (2015).

exercise judicial discretion in defining open-text words mentioned under article V, such as 'public policy'. However, the discretion given to the courts in refusing enforcement based on article V of the New York Convention does not necessarily result in non-enforcement of the foreign awards. If a foreign award seriously injures the fundamental justice and morality of the concerned State the court may be justified in exercising its discretionary power.[17]

Accordingly, in order to achieve justice and fairness it is imperative for the courts to exercise its discretion keeping in mind certain factors. In addition, a court may decline to exercise its discretion under article V of the New York Convention in non-enforcement of foreign award, even if doing so would create a procedural injustice or unjustifiably impair the binding force and finality of the arbitral award.[18] In case of *MGM Production Group, Inc*. v. *Aeroflot Russian Airlines*[19] the Court requires infringement of the most basic notion of morality and justice to justify non-enforcement based on the 'public policy exception'.

IV. Analyzing exhaustive scope of Article V of New York Convention

New York Convention does not permit judicially created ground for the non-enforcement of foreign arbitral award.[20] This approach also supports pro-enforcement policy adopted by New York Convention. It creates a perception in the minds of the parties that while arbitration acknowledges freedom of contract principles, at the same time, the exhaustive scope of article V puts a limitation on the party autonomy to contractually enlarge the grounds for challenging enforcement of arbitral awards.[21] Thus, the exhaustive list of grounds for non-enforcement provided under article V of the New York Convention raises two points- a) the parties do not have the authority to broaden the scope of judicial review beyond what is provided in article V, and b) it limits the scope of judicial intervention in the enforcement of the arbitral award.

[17] *Id.,* at 141.
[18] United Nations Conference on Trade and Development (UNCTAD), Dispute Settlement, International Centre for Settlement of Investment Disputes, Post-Awards Remedies and Procedures (United Nations: New York and Geneva, 2003).
[19] WL234871 2004 United States Circuit Court.
[20] *Supra* note 9. The phrase 'may be refused ...only if' under art. V of the NYC constitutes limitation enumeration of the grounds for refusal enforcement of arbitral awards. Accordingly, the enforcement court may not refuse enforcement on the basis of a ground that is not enshrined in New York Convention.
[21] *Supra* note 16 at 143.

The exhaustive list of the grounds under article V of the convention suggests that the enforcement of an arbitral award may be denied only in situations where there is a 'serious defect' in the enforcement of the arbitral award.[22] Accordingly, in the guise of the 'public policy exception' there can be no scope to enlarge the exceptions to the enforcement of foreign award. Therefore, non-enforcement of foreign arbitral award on the ground of violation of public policy may only be accepted in 'serious cases'.[23]

The United States' courts have also followed restrictive approach to the 'public policy exception'. In the case of *Libyan American Oil Company (LIAMCO)* v. *Socialist People's Libyan Arab Republic Jamahirya*[24] the U.S. District court held that mere infringement of state's public policy would not justify the non-enforcement based on the 'public policy exception'. In the case of *Industrial Risk Insurers* v. *M.A.N. Gutenhoffnungshutte GmbH*[25] it was held that the 'public policy' only refers to 'explicit public policy' that is well defined and dominant. Thus, the determination of 'public policy' should be based on legal precedents instead of a general consideration of supposed public interests.

V. Ascertaining possibility of merits review through 'public policy exception'

One of the most controversial point in the 'public policy' debate is whether the State courts can correct manifest errors of law or fact in the award passed by the tribunal. In the arbitration process, it is usually expected that the enforcing court shall review the award confined to the particular issue on which the award was challenged, rather than reviewing the award as a whole.[26] The term 'merits review' may be understood as the reopening or retrying the merits of an award, for instance

[22] Any exceeding power and legal error made by the arbitrator would not always justify non-enforcement. In *Lesotho Highlands* v. *Impreglio* (2005) UKHL 43 (House of Lords), the court held that mere error of law, *i.e.* error about the currency of the award, may not be justified as an excess of power.
[23] *Supra* note 16 at 145.
[24] 482 F. Supp. 1175 (1980) (United States District Court, District of Columbia).
[25] 141 F.3d 1434.
[26] Winnie Jo-Mei Ma, *Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons for and from Australia* 167 (Doctoral Thesis, Bond University, 2005), *available at:* https://pure.bond.edu.au/ws/portalfiles/portal/24840462/fulltext.pdf (last visited on June 23, 2022).

examining the arbitrator's interpretation and application of law.[27] Many scholars have agreed that the drafters of the New York Convention intended to constrain the enforcing Court from using article V to review an award on the basis of merits. In their opinion the exhaustive list of grounds to refuse the enforcement of an award is provided for in article V does not comprise a mistake of fact or law by the arbitrator.[28]

Similarly, Alan Redfern and Martin Hunter is of the opinion that the New York Convention does not permit any review on the merits of an award to which convention applies.[29] On the other hand, there are another set of thinkers who are of the opinion that the New York Convention under article V primarily focuses on the procedural rather than the substantive aspects.[30] Thus, in relation to article V(2)(b) of the New York Convention, the question in consideration for the court is not "whether the entire award violates the public policy" rather "whether the enforcement itself would produce a result that violates the public policy".[31]

Notably, the 'public policy exception' under article V(2)(b) primarily focuses on the enforcement of an arbitral award rather than the award itself. Hence, one may conclude that the 'public policy exception' in the New York Convention would not include a review of the facts or the law on which the arbitral award is based. In addition, the parties to the arbitration may validly agree to waive merits review of an award wherein there is an error of law in the arbitrator's award.[32] In the case of *L.B.* v. *State Property Fund of the Republic of Lithuania*,[33] this position was affirmed by

[27] Stephen L. Hayford, "Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards" 30 *Georgia Law Review* 731, 820 (1996). It follows that the enforcement court can examine only the dispositive aspect of an award, without reviewing the reasoning in the award, 515 the evidence considered by the arbitrator, the underlying facts, or any new evidence presented during the enforcement proceedings.

[28] Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* 269 (Kluwer Law International, Netherlands, 1981). It is a generally accepted interpretation of New York Convention that the Court before which the enforcement of the foreign award is sought may not review the merits of the award. The main reason is that the exhaustive list of grounds for refusal of enforcement enumerated in Article V does not include a mistake in fact or law by the arbitrator.

[29] Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* 461 (Sweet & Maxwell, United Kingdom, 2nd edn., 1991).

[30] Richard Garnett, "International Arbitration Law: Progress Towards Harmonization" 3 *Melbourne Journal of International Law* (2002).

[31] Winnie Jo-Mei and Halena His-Chai Chen, "Taming the Unruly Horse? The New York Convention's 'public policy exception' to the Enforcement of Arbitral Awards", in Chang-fa Lo, Nigel N. T. Li, and Tsai-yu Lin (eds.), *Legal Thoughts Between the East and the West in the Multilevel Legal Order,* 587 (Springer, Singapore, 2016).

[32] In the case of *CBI NZ Ltd* v. *Badger Chiyoda* (1989) 2 NZLR 669, the New Zealand Court of Appeal has held that public policy 'is not automatically against' such exclusion or ouster of the court's jurisdiction.

[33] Case no. 3 K-3-363/2014 (Luxembourg Court of Appeal).

the Supreme Court of Lithuania that the "domestic courts does not have the right to assess whether the arbitrators had correctly determined the factual circumstances of the case, conducted properly investigation, appreciated the evidence and properly applied norms of law". It is, however, difficult to consider whether the enforcement of an arbitral award would be contrary to the public policy without considering whether the award itself contrary to the public policy. It is therefore necessary for the courts to strike a balance between excessive or intrusive review, which prolongs the arbitral process resultantly affecting the party autonomy, and superficial or inadequate review which ignores the injustices of the arbitration process.[34]

The ongoing debate on the scope and the extent of the prohibition against merits review involves three pertinent questions[35]:

i. What could be the scope of the court's review- relief awarded or the underlying dispute and reasoning?
ii. When and to what extent can the court review the merits of an award?
iii. Should the scope and degree of judicial review differentiate between substantive and procedural public policies?

In order to answer the first question in hand, it is incumbent to understand that the judicial review is not only confined to the award's operative part (such as the relief awarded), but even extends to the award's "reasoning" or "the underlying substantive character of the parties' claims and arbitrators' decision".[36] On pertinent example would be that, while an award for the payment of money cannot, in and of itself, be against the public policy, it may be against the public policy due to some underlying fact or circumstance (such as payment as bribes)[37] Another situation may be one in which a contract that is purportedly illegal has been awarded. The court would need to review the arbitrator's reasoning to determine whether or not to reopen the decision in those situations wherein the arbitrator had made a decision after taking into account the illegality issue. However, in cases where the arbitrator's award remained silent regarding the issue of illegality,

[34] *Supra* note 31.
[35] *Ibid*.
[36] Gary B. Born, *International Commercial Arbitration* 3687 (Kluwer Law International, 2nd edn., 2014), Proponent of restrictive application.
[37] Reinmar Wolff (ed.), *New York Convention: A Commentary* 414 (Beck/Hart, 2012).

the court must take into account the pertinent details of the purportedly illegal contract to determine whether the award impacted by such an illegality would render it in violation of the public policy of the enforcing state.[38] This approach has been supported in the case of *L.B.* v. *State Property Fund of the Republic of Lithuania*,[39] wherein it was held that "this prohibition (on reviewing the merits) does not mean that the court should not become familiar with the contents of the decision and analyze its motives when trying to ascertain whether the grounds listed in New York Convention are present".

The second and third questions are intertwined with each other, it is commonly understood that the article V(2)(b) of New York Convention is "the only ground allowing for a substantive court review of the award, albeit limited to infringements of substantive public policy".[40] Even in the case of *Bitumat Ltd* v. *Multicom Ltd*[41] the German court held that merits review of a case is usually not possible but it may be done in cases concerning substantive public policy. Thus, the merits review is necessary when illegality or other substantive public policy are involved. However, the International Law Association (*hereinafter* referred as 'ILA') had taken a contrary stand, the ILA interim report suggests that the enforcement court need not to look beyond the award while ascertaining as to whether the enforcement of an award would infringe substantive public policy.[42]

In contrast, the enforcement court 'may need to carry out a wider enquiry' while dealing with the cases infringing procedural public policy.[43] The situation is further complicated by the fact that substantive-procedural distinction is not clear to understand in the international arbitration. Thus, any partial treatment of substantive and procedural public policies in relation to judicial review and determination of an arbitral award' enforceability may lead to unruliness and hence undesirable.

[38] In the case of *Nelson* v. *Nelson* (1995) 184 CLR 538, it was held by the Australian court in the context of enforceability of illegal contracts that "'to inquire into the circumstances in which the illegality occurred is not at odds with the court's approach to public policy'.
[39] Case no. 3 K-3-363/2014. however, the Lithuanian court also cautioned against changing the factual circumstances determined by the arbitral tribunal to other circumstances as well as against reclassifying such circumstances.
[40] *Supra* note 37 at 403.
[41] September 30, 1999 (CLOUT Case No. 371).
[42] ILA Interim Report, 2003.
[43] *Ibid*.

In respect to the final issue regarding judicial review and any further inquiry, the ILA Resolution Recommendation 3(c) is an exception to the 'no merits review' principle as it provides 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 reassessment of the facts.

The ILA in its final report further explains, subject to a strong *prima facie* argument of public policy infringement, the enforcement court should be entitled to review the underlying evidence. Interestingly, this ILA recommendation appears to limit merits review only to the claims regarding violating of 'public policy rules', which is one of the three categories of international public policy recognized by the ILA.[44] This may be problematic, since the three categories of international public policy may overlap. Therefore, differentiating treatment based on distinct yet overlapping public policy categories could lead to a more unruly application of the 'public policy exception'. The Lithuanian Supreme Court tries to answer the ongoing controversy by suggesting that:

> If a violation of public policy cannot be comprehensively assessed merely by familiarizing oneself with the content of the arbitral tribunal's award and this violation is caused by circumstances not analyzed by the arbitral tribunal or evidence not examined by it, the court…..may, in reaching a decision, include in its assessment facts that were not assessed by the arbitral tribunal, and investigate evidence that was not examined by it (for example, by trying to determine illegal acts of the parties or arbitrators that amount to a violation of public policy).

Hence, on the basis of *Lithuanian case*, it is proposed that all the 'public policy' categories which falls under the purview of the 'public policy exception' to the enforcement of the arbitral awards

[44] ILA resolution on public policy as a bar to enforcement of international arbitral award 2002, under recommendation 1(d) provide three categories of international public policy (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned (ii) rules designed to serve the essential political, social or economic interests of the State, these being known as "lois de police" or "public policy rules" and (iii) the duty of the State to respect its obligation towards other States or international organizations.

should go through a thorough judicial inquiry, be it reevaluation of fact or issue or even the so called merits review.

VI. Inconsistencies in International practices

According to the report of the International Bar Association (*hereinafter* referred as 'IBA'),[45] most of the countries across the globe tend to narrowly construe violation of public policy as a ground for denying the enforcement of a foreign arbitral award. It is submitted that the violation of public policy must be of a certain nature or level to deny enforcement of the foreign award. The level required for violation of the public policy varies from State to State, such as article 56(1)(b)(ii) of the Portuguese Arbitration Law, provides that violation should be "clear", in Nigeria the violation should be "concrete", in Mexico it should be "evident" or "patent", under article 814 of the Lebanese Code of Civil Procedure violation should be "blatant", under section 55(2) of the Swedish Arbitration Act violation should be "manifest", in Poland the violation of public policy requirement is "obvious and manifest", in Turkey the level of required violation of public policy is of a "flagrant" nature, in Germany the violation should be of a "severe" nature, in Austria it must be "intolerable", in Switzerland the violation should be "unbearable" and lastly in Italy the violation of public policy should be "repugnant to the legal order".

In most of the jurisdictions across the globe the courts have stressed upon the requirement that the verification of the compatibility with the public policy should be restricted to the result or operative part of the award only.[46] The courts suggest that the merits of the dispute should not be reviewed while taking into consideration the 'public policy exception'. However, in Poland, though it is accepted the review of a foreign award on the ground of 'public policy exception' should be narrow and limited, a certain examination of the content of the award is not prohibited. Therefore, in Poland, a manifest and radical inconsistency between the arbitral decision and the facts submitted

[45] IBA Subcommittee on recognition and enforcement of arbitral award (October 2015), *available at*: http://www.ibanet.org/Document/Default.aspx?DocumentUid=C1AB4FF4-DA96-49D0-9AD0-AE20773AE07E (last visited on June 23, 2022).
[46] *Id*., at 12, countries like France, Italy, Finland, Germany, Chile, Paraguay etc. support this view.

to the arbitrator may be considered as a ground to set aside the arbitral award on the basis of the public policy violation.[47]

VII. Courts of different jurisdictions and 'public policy exception'

Some of the mostly followed paradigms by the national courts while implementing the 'public policy exception' to set aside the enforcement of the foreign arbitral award are – a) social and economic life, b) basic notions of justice and morality, c) fundamental principles of law, d) international public policy.

a) ***Social and economic life***: this states that no mode of ADR, including arbitration, may intrude upon or interfere with any public interest.[48] In this approach, public policy includes all reactions of state regarding the problems and concerns of the society and the economy.[49] Russia has adopted this approach, wherein the Supreme Court of the Russian Federation in a 1998 decision defined the term "public policy" in Russian law as[50] "the basics of the social formation of the Russian State". Yet in another case[51] the definition was expanded to incorporate wide variety of issues under the notion of public policy. The Russian Court had considered and taken into account everything starting from the "misapplication of the law" to the "impact of social and economic situation" of the neighborhood.[52] Further, China had also adopted this approach in its legal system as under article 213(3) of Civil Procedure of 2008 which provides that the enforcement of the arbitral award may be refused if it infringes "the social and public interest" of the Republic of China.[53] Apart from this, the terms "socio-public interests" or "social public interests" are included

[47] *Ibid*.
[48] Farshad Ghodoosi, *International Dispute Resolution and the 'public policy exception'* 64 (Routledge, Abingdon, 2016).
[49] *Ibid*.
[50] Anton G. *Maurer, 'public policy exception' Under The New York Convention: History, Interpretation, and Application* 210 (Huntington, New York, 2013).
[51] In a case before Arbitrazh Court of the Moscow District, where it was held that enforcement of arbitral awards infringes Russian public policy when it result in acts a) that are directly prohibited by law or harm the sovereignty or the security of the state, b) that affects the interests of a large social group, c) that are incompatible with principles of constructing the economic, political and legal system of the State, d) that are against the basic principles of the civil State, such as the equality of the its members, the inviolability of property and freedom of contract.
[52] In 2003, the Arbitrazh Court refused to enforced an ICC Award on the public policy ground because it would "negatively impact on the social and economic situation in Nizhny Novgorod".
[53] Clarisse von Wunschheim, *Enforcement of Commercial Arbitral Awards in China*: *Business Laws of China* 282-283 (West Group Publishing, Minnesota, 2011).

in other legislations of China.[54] However, the situation has remained blurred regarding the applicability of the public policy defense to set aside the enforcement of a foreign arbitral award in China, some judges of the Supreme People's Court (hereinafter referred as 'SPC') have provided political interpretation to the standard of public policy while others have narrowed down its scope.[55] Other the non-exhaustive list of countries such as Belgium, Brazil, Egypt, Greece, Italy, Mexico, Portugal, turkey have also adopted the pattern of social and economic values pattern in their legal system to set aside foreign awards.[56]

b) ***Basic notions of justice and morality***: this approach concerns with the idea of protecting justice and morality, which can be understood by resorting to the constitution or bill or rights, due process, and society's morals.[57] The scope of this approach has remained ambiguous and controversial due to its wide ambit. The U.S. has followed this approach in arbitration very early in the case of *Underhill* v. *Van Cortlandt*[58] wherein it was held by Court that for the Correction of the Errors the judges are duty bound to keep an eagle-eye on the proceedings and the conduct of the arbitrators, and the acts of parties in order to see that everything had been conducted fairly, impartially and honestly. Similarly, this approach has been followed by Canada, wherein it defines public policy as "fundamentally offensive to the Canadian principles of justice and fairness".

In the case of *Beals* v. *Saldanha*[59] it was held by the Canadian Supreme Court in relation to conflict of laws, that the foreign law should not be applied if it is contrary to the fundamental morality of the Canadian legal system. Further, in the case of *Yugraneft Corporation* v. *Rexx Management Corporation*[60] it was held by Queen's Bench of Alberta in Canada that the basic purpose of imposing public policy on foreign award is to prohibit the enforcement of an award which offends

[54] Article 58 of Arbitration Law of PRC provides, "A party may apply for setting aside an arbitration award to the intermediate people's court in the place where the arbitration commission is located if he can produce evidence which proves that the arbitration award involves one of the following circumstances: If the people's court determines that the arbitration award violates the public interest, it shall rule to set aside the award". Similarly, the Act of the People's Republic of China on Application of Law for Foreign- Related Civil Relations under Article 5 provides "If the application of foreign laws will damage the social public interests of the People's Republic of China, the laws of the People's Republic of China shall apply".
[55] *Supra* note 48, at 65.
[56] *Supra* note 45, at 6.
[57] *Supra* note 48, at 66.
[58] 2 J. C. R. 339 (Court of Appeals of the State of New York).
[59] (2003) S.C.J. No. 77.
[60] (2010) 1 S.C.R. 649.

the local principles of justice and fairness in a fundamental manner. Furthermore, New Zealand has incorporated this view in its Arbitration Act of 1996, which is based on the UNCITRAL Model Law on ICA. Under this Act it is provided that an award would be contrary to the public policy if there is "a breach of the rules of natural justice which have occurred (i) during the arbitral proceedings, or (ii) in connection with the making of an award". In Singapore, in the case of *Aloe Vera of America* v. *Asianic Food*[61] it was held that the public policy represents "the most basic notions of morality and justice".

c) ***Fundamental principles of law***: for an issue to fall under the public policy category, it must have a solid foundation in the State laws, regulations, and precedents.[62] This approach constructs the public policy doctrine consistent with the existing laws to primarily focus on the "enforcement" of the awards instead of their objectives or legal merits.[63] In Austria, in the case of *Buyer* v. *Seller (Serbia and Montenegro)*[64] it was held by the Supreme Court in 2005, that the standard of review regarding the 'public policy exception' to set aside the enforcement of an arbitral award depends on whether the award "is irreconcilable with the fundamental principles of the Austrian legal system".

Some other jurisdictions have also adopted the same approach to set aside the foreign award such as in Indonesia the court tends to deny the enforcement on the ground of the 'public policy exception', in which one of the grounds is "the violation of prevailing laws and regulations in Indonesia".[65] Similarly, in India a court may refuse to enforce a foreign award on the ground of public policy if such an enforcement would be against the "fundamental policy of the Indian law". In Kenya, the enforcement of a foreign award may be denied if it "inconsistent with the Constitution or the other laws of Kenya, whether written or unwritten".[66]

d) ***International public policy***: Some of the countries around the globe have adopted the "international public policy" into their legal system in order to set aside the foreign arbitral award

[61] (2006) 3 SLR(R) 174.
[62] *Supra* note 48 at 69.
[63] *Ibid*.
[64] Oberster Gerichtshof (Supreme Court), Case no.: 30b221/04b.
[65] *Supra* note 45.
[66] *Ibid*. In the case of *Christ for all Nations* v. *Apollo Insurance* (2002) EA 366.

on the ground of the 'public policy exception'. The primary aim of this approach was to restrict the unnecessary intervention of domestic public policy in the sphere of international arbitration. France had adopted such an approach, in its French Code of Civil Procedure, under article 1502(5) where a court decision to set aside the enforcement of the foreign award may be based on a few grounds, one of such ground is "the recognition or enforcement is contrary to the international public policy". This is in contrast to article 1488 of the same code in relation to the domestic award which provides that "no enforcement order may be granted where an award is manifestly contrary to the public policy".

Similarly, in Lebanon this approach has been followed by the courts, wherein it was held that the international public policy is "formed of a set of rules of important nature that are applied in so many countries thus giving them an international character".[67] The Court of Appeals of Milan in Italy have adopted the similar approach to set aside the foreign award, they define International public policy as a "body of universal principles shared by nations of similar civilization, aiming at the protection of the fundamental human rights, often embodied in international declaration or conventions.[68] In Spain, this approach has been adopted with clear definition by limiting international public policy to its constitution and basic procedural irregularities in the arbitral proceeding.[69]

VIII. Divergent in approach adopted by the Courts internationally

The New York Convention does not define the meaning of 'public policy', however, the primary goal is to uphold the finality of the arbitral award to the maximum extent.[70] Many countries across the globe have restricted the grounds of public policy in order to favour the arbitration as a desirable mode of dispute resolution. The Courts in England have faithfully and consistently adopted the pro-enforcement approach under New York Convention.[71] Further, they have adopted

[67] *Ibid*.
[68] *Supra* note 48 at 71.
[69] *Ibid*.
[70] *Supra* note 50 at 53.
[71] Nigel Blackaby, Constantine Partasides, *et. al.*, *Redfern and Hunter on International Arbitration* 656 (Oxford Publishing, Oxford, 2009).

a restrictive interpretation qua the 'public policy exception' by accepting the principle of International public policy in deciding the enforcement of a foreign award.[72]

The similar approach has been resorted to by the Courts of France wherein there is a requirement of the violation of the international public policy instead of domestic public policy for the non-enforcement of a foreign award.[73] In order to justify the non-enforcement of a foreign award the violation of the public policy must be 'flagrant, effective and real'.[74] In the United States, only in extreme cases the foreign award may be set aside on the ground of public policy consideration.[75] The Supreme Court of Korea has also adopted a narrow interpretation to the term of 'public policy exception', wherein it was held that "only when the concrete outcome of recognizing such an award is contrary to the good morality and other social order of Korea, will its recognition and enforcement be refused".[76]

The Indian Parliament passed the Foreign Awards (Recognition and Enforcement) Act, 1961 to enforce the New York Convention which was ratified by India on July 13, 1960. However, in India, there has been conflict of opinions amongst different courts regarding the scope of judicial review on the ground of 'public policy exception'.[77] The scope of 'public policy exception' for

[72] In *Westacre Investment Inc* v. *Jugoimport – SDRP Holding Co Ltd* (1999) 3 All ER 864, the Appeal Court held that the contract involving buying of influence would only be contrary to English domestic public policy if the contract will contravene the domestic public policy of the country where it is to be performed. Further, it was held that unless contract contained universally condemned activities, or corruption or fraud in international commerce, it would not attract 'public policy exception' to contracts which are not performed in England Similarly, in the case of In *Soleimany* v. *Soleimany* (1998) 3 WLR 811, the Court of Appeal declined to enforce an award on public policy grounds holding that the enforcement of the award would tarnish the honour of the English judicial system. Enforcement was refused because the alleged public policy bordered on criminality. (Smuggling of carpets was illegal in Iran).

[73] *Supra* note 294. In the case of in *SNF SAS SA* v. *Dutch Company Cytec Industries BV (Cytec)*, BV (2007) XXXII YCA 282, Court of Appeal, Paris, First Chamber, 23 March 2006, it was held that court only had extrinsic control in determining the violation of international public policy. The court further held on this basis that there was no need for merits review of award.

[74] *Societe Thales Air Defense* v. *GIE Euromissile*, Rev. Arb. No 1 (2004).

[75] Farshad Ghodoosi, *International Dispute Resolution and the Public Policy Exception* 729 (Routledge, New York, 2016). In the case of *Europcar Italia, S.P.A.* v. *Maiellano Tours, Inc*. 156 F. 3d 310, 315, the U.S. Court held that meaning of public policy for non-enforcement of foreign award would be acceptable only in the cases where enforcement would violate the basic notions of morality and justice.

[76] *Adviso NV (Netherlands Antilles)* v. *Korea Overseas Construction Corp.* XXI YBCA 612 (1996), the policy of non-intervention and pro-enforcement to enforceability of foreign awards are also adopted by Singapore Appeal Court. In the recent case of *BLC* v. *BLB*, (2013) SGHC 196, the Supreme Court of Appeal reversed the Singapore High Court's decision to set aside foreign arbitral award on the ground of violation of natural justice.

[77] In the case of *Renusagar Power Electric co*. v. *General Electric Co.,* AIR 1994 SC 860, while adopting narrow interpretation to the term 'public policy' court held that "in order to attract (the) bar of public policy the enforcement of the award must invoke something more than the violation of the law of India". The Supreme Court, therefore, came

review of an arbitral award has been widened by judiciary in a case where 'patent illegality' ground has been incorporated.[78] The terms 'patently illegal' or 'blatant illegality' or 'error on the face of the record' has a limited definitions, which may be understood as either an error of law that goes to the root of the matter or a violation of the constitution or contrary to the statutory provision or inconsistent with the common law.[79] Inserting 'patent illegality' as an additional ground under 'public policy' has been described as a lethal blow in the development of the arbitration system in India after enacting the new Act in 1996.[80] These judgments[81] went against the spirit of New York Convention which emphasizes upon principle of mutual recognition and enforcement of the arbitral awards. It led to a situation where as soon as foreign award was rendered, the parties often strategically challenged the award in the Indian courts on the ground of violation of the public

to the conclusion that a court's enquiry, when deciding upon whether an award falls under 'public policy exception' "does not enable a party to the said proceedings to impeach the award on merits".

[78] *Supra* note 77 at 22. Thus, in the case of *Oil and Natural Gas Corporation* v. *Saw Pipes Ltd* (2003) 5 SCC 705, it was held by the court that narrow interpretation might be appropriate in case related to an execution of an award which had attained finality, a wider interpretation was required for the annulment of domestic awards, where the only available recourse was section 34. Further, it was also held by Supreme Court that restrictive meaning to the term 'public policy' would result in rendering some of the provisions under the 1996 Act inapplicable. The court referred section 28 of the Act, which provides for the rules applicable to the substance of the dispute. Section 28(1) refers to the substantive law to be applied in domestic arbitrations and ICAs. Section 28(3), which applies to both domestic and international arbitrations, provides that: "In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction." On this basis, the court held that an award contrary to the substantive law to be applied to the dispute, the Act or the terms of the contract could be patently illegal. Further, In Renusagar, the Court construed the scope of public policy in the light of enforcement of a foreign award as against Oil and Natural Gas Corporation (ONGC), which is construed with respect to domestic awards. The need to differentiate international and domestic arbitration while dealing an issue on the ground of 'public policy' was very much felt by Law commission report (Law Commission of India, Report on the Arbitration and Conciliation (Amendment) Bill, 2001, Report No 176 (2001)) and Arbitration and Conciliation (Amendment) Bill, 2003 (Section 34A of the Arbitration and Conciliation (Amendment) Bill 2003 (India)).

[79] O P Malhotra and Indu Malhotra, *Law and Practice of Indian Arbitration and Conciliation* 1175 (Lexis Nexis, Delhi, 2006).

[80] *Saw Pipes* broadened the scope of public policy by enhancing the possibility of a near limitless judicial review, contrary to the 1996 Act's objective of minimal court interference mentioned in the Statement of Objects and Reasons for the Arbitration and Conciliation Bill, 1995 (India).

[81] To add more problem, in the case of in *Bhatia International* v. *Bulk Trading SA* (2002) 2 SCR 411, the Supreme Court of India extended the application of part I of the Arbitration and Conciliation Act, 1996 to the International arbitrations unless the parties had expressly or impliedly excluded part I by the agreement between them. In the case of *Hindustan Zinc Ltd* v. *Friends Coal Carbonization* (2006) 4 SCC 445, Supreme Court of India held that if an award which is contrary to the specific terms of the contract is patently illegal, it can be set aside on the ground of public policy. In *Mcdermott International Inc* v. *Burn Standard Co. Ltd*. (2006) 11 SCC 181, the court expressly noted that it was only for a higher bench to reconsider the correctness of the Saw pipes decision and that till this was done the decision was binding upon it. In the *Delhi Development Authority* v. *RS Sharma and Company* (2008) 13 SCC 80., the court under the patent illegality doctrine, consider themselves right to interfere with the facts as determined by the arbitral tribunal. In *Venture Global Engineering* v. *Satyam Computer Services Ltd*, AIR 2008 SC 1061, Supreme Court even went further and extended the application of the ratio of Bhatia International to an application for setting aside a foreign award under the 'public policy exception' in section 34(2)(b)(ii) of the Act. Further, it was held by the court that this would not be inconsistent with section 48 of the 1996 Act, or any other provision of Part II of the 1996 Act.

policy.[82] The only practical solution to this situation was that the parties continuously agreed in their arbitration agreement to remove the applicability of Part I of the Act. Further, the honorable Supreme Court even considered the term 'setting aside' mentioned under section 34 of Part I and 'enforcement' under section 48 as identical.[83]

The constitution bench of Supreme Court of India[84] corrected its previous stance, whereby it restricted the application of Part I on a foreign seated award, however, the issue regarding the applicability of 'patent illegality' on foreign awards was finally put to rest in the case of *Shree Lal Mahal* v. *Progetto Grano*[85]. In order to negate any future conflict on the scope of public policy regarding the domestic and foreign awards, the legislature came up with an amendment to Arbitration and Conciliation Act, 1996.[86] However, a month following 246th report, in September

[82] Arpan Kumar Gupta, "A New Dawn for India- Reducing Court Intervention in Enforcement of Foreign Awards" 2(2) *Indian Journal of Arbitration Law* 9 (2014).

[83] It is pertinent to note here that, though the language of sections 34 and 48 are identical, the crucial difference between the two remedies- 'setting aside' and 'non-enforcement'- should not be confounded. Enforcement is a stage which comes only after an award has attained its finality and section 34 deals with a stage in arbitration where the award made by an arbitral tribunal is yet to become final. Thus, under Section 34 the domestic court has every authority, as guardians of justice, to inquire in to more basic questions such as the legality of the award. In the case of *Penn Racquet Sports* v. *Mayor International Ltd*., 2011 (122) DRJ 117 (India), Delhi High court adopted restrictive approach given in Renusagar case and held that a mere violation of Indian law would not be considered as an infringement of public policy of India. The Delhi High court ruled that the term 'public policy' in relation to the enforcement of foreign award provided under section 48 of the 1996 Act is to be construed more restrictively than setting aside of award under section 34. However, in the case *of Phulchand Exports Ltd* v. *OOO Patriot* (2011) 10 SCC 300, question before the Supreme Court was whether under section 48(2) of the Arbitration and Conciliation Act, 1996, the term 'public policy' would include a wider meaning as provided in the case of Saw Pipes? It was held by the court that there is no difference in interpreting term 'public policy' for setting aside arbitral award under section 34 and enforcement of a foreign award under section 48 of the 1996 Act. The Supreme Court of India accepted 'patent illegality' as a ground for non-enforcement of foreign arbitral award under section 48(2)(b) of the 1996 Act.

[84] *Bharat Aluminium Company Ltd*. v. *Kaiser Aluminium Technical Service Inc* (2012) 9 SCC 552 (constitutional bench). BALCO overruled judgment of Bhatia International case and held that Part I would no longer be applicable to an arbitration not seated in India, hence, foreign seated arbitration will not be challenged under section 34 of 1996 Act. However, BALCO case does not deal with issue regarding acceptability of 'patent illegality' as a ground of non-enforcement of foreign arbitral award under section 48 of the 1996 Act.

[85] (2014) 2 SCC 433 (3 judge bench decision). The court also overruled *Phulchand Exports* case on the basis it does not lay down the correct law and held that narrow approach to be adopted to the term 'public policy' as provided in *Renusagar case* for the enforcement of foreign award under section 48(2)(b) of 1996 Act, as both sections (section 34 and 48 of 1996 Act) connotes different meaning to the term 'public policy'.

[86] 246th Report of the Law Commission of India, submit that: that a mere violation of the laws of India would not be a violation of the 'public policy exception' in cases of ICAs held in India. On this recommendation, the explanatory note added to section 34 of the 1996 Act by the 2015 Amendment Act now clarifies that an award is contrary to the public policy of India in only three cases – i) if it was induced or affected by fraud or corruption, ii) if it contravened the fundamental policy of Indian law or iii) if it was in conflict with the most basic notions of morality or justice. Patent illegality is therefore no longer a ground under which an international commercial award in India can be set aside. The 2015 Amendment Act has therefore had the effect of bringing the definition of public policy in line with the definition originally propounded by the Supreme Court in *Renusagar case*, minus the reference to the interest of India 'which was deliberately omitted because it was held to be vague and capable of interpretational misuse.

2014 in a case before Supreme Court of India the term 'fundamental policy of Indian law' (the first head of public policy as stated in *Renusagar* case) extended to include perversity and irrationality.[87] Further, it was held that perversity and irrationality to be tested on the touchstone of the Wednesbury principle of reasonableness. This prompted Supreme Court to define the 'principle of perversity' to mean that a decision would necessarily be perverse "where a finding is based on no evidence", or " where an arbitral tribunal takes into account something irrelevant to the decision it arrives at its decision" or "where it ignores a vital evidence in arriving at its decision".[88]

In order to deal with this extended notion, the Law Commission of India again resubmitted a *Supplementary Report*[89] on the recommendations and suggestions which has already been made in its 246th Report.[90] In its Supplementary Report the commission suggested a further amendment to the draft which is as follows "for the avoidance of doubt the test is whether there is a contravention with the fundamental policy of the Indian law which shall not entail a review on the merits of the dispute".[91] Thus, the confusion was finally put to rest, and as ICA in India is concerned the Indian Courts can no longer review the merits of a decision on the basis of 'patent illegality'.

[87] *ONGC* v. *Western Geco* (2014) SCC 263. In this case, the court considered that the fact that the arbitral tribunal had failed to consider a glaring fact and had not applied the same test for holding the appellant liable for delay to respondent and for respondent 's failure to take timely action in right earnest, violated the fundamental policy of Indian law and, therefore, the public policy of India. The Court went one step further and instead of merely setting aside the award, it chose to modify the award by correcting the purported error. This approach taken by the Court is interesting given that under the 1996 Act, Courts may only intervene where expressly provided by the Act and the 1996 Act does not permit Courts to alter arbitral awards.

[88] *Associate Builders* v. *Delhi Development Authority* (2015) 3 SCC 49. Thus, for factual errors to be relevant to the setting aside of an award, the Court had to find that the arbitrator 's approach was arbitrary or capricious: when a court is applying the public policy test to an arbitration award, it does not act as a court of appeal and consequently errors of fact cannot be corrected. A possible view by the arbitrator on the facts has necessarily to pass muster as the arbitrator is the ultimate master of the quantity and quality of evidence to be relied upon when he delivers his award. Thus, an award based on little evidence or on evidence which does not measure up in quality to a trained legal mind would not be held to be invalid on this score. Once it is found that the arbitrator's approach is not arbitrary or capricious, then he is the last word on the facts.

[89] Supplementary report on February 6, 2015.

[90] The precise inclusion of the *Wednesbury* principle of reasonableness within the phrase 'fundamental policy of Indian law'. This amendment only applies to ICAs seated in India. Arbitration and Conciliation (Amendment) Act, 2015, under section 34(2)(b)(ii) explanation (2A) provide that for domestic arbitrations, the ground of patent illegality has been preserved with the express proviso that "an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciation of evidence".

[91] This recommendation was adopted by the 2015 Amendment Act under explanation 2 of section 34 (2)(b)(ii).

Nonetheless, there are conflicting rulings of the honorable Apex Court in the case of *Vijay Karia* v. *Prysmian Cavi E Sistemi SRL*[92] and *National Agricultural Cooperative Marketing Federation of India (NAFED)* v. *Alimenta S.A*[93] (*hereinafter* referred as '*NAFED* case') regarding the enforcement of the foreign awards under the 'public policy exception'. The Supreme Court in the case of *Vijay Kaira* emphasized upon the need of minimum judicial interference in allowing the enforcement of the foreign arbitral award. The issue before the Court was whether the violation of the FEMA rules for the implementation of the foreign award should be counted as a contravention of the public policy of India? The Apex Court held that any contravention as regards the provision of an enactment would not ordinarily be synonymous with the contravention of the fundamental policy of the Indian law. In fact, the foreign awards are usually based on foreign laws, which may not be in conformity with the domestic laws of the country wherein the enforcement is sought.

India is a signatory to the New York Convention which aims to ensure the enforcement of the awards notwithstanding their non-conformity to the national laws. Therefore, objections to the enforcement of the arbitral awards on the ground of public policy must offend the fundamental policy of a member state, which policy cannot be expected to be compromised. Thus, this case reinforced the time-honored conceptions of fundamental policy and minimum judicial interference as laid down in numerous previous decisions of the Indian Court. However, the Supreme Court in *NAFED* case ruled that the contract between the two parties being a contingent contract under section 32 of the Indian Contract Act, 1872, which would remain unenforceable due to the lack of permission from the government.

It was further held that owing to the government order *NAFED* was justified in not exporting the balance commodity as agreed in the contract, the execution of which would have resulted in a violation of the Export Control Order. Therefore, the Apex Court held that due to the restrictions imposed by the government, the obligation was converted into an impossible task, and performance of the same would have led to the contravention of the requisite public policy of India. Thus, in this case, the governmental restrictions and guidelines governing exports of the country were associated with the public policy of the country. It is noteworthy that the approach

[92] 2020 SCC Online SC 177.
[93] (2020) 19 SCC 260.

of the judiciary has been targeted towards limiting the ambit of the 'public policy exception', especially after the 2015 Amendment. Therefore, it is evident that there exists an urgent need for judicial consistency in dealing with the 'public policy exception' for the enforcement of foreign arbitral awards.

Apart from India, there are some countries where public policy seems to be given a much broader scope by the national courts such as Indonesia where court tends to categorize violation of public policy in three categories: a) a violation of prevailing laws and regulations in Indonesia, b) a danger to the national interest of Indonesia, including its economy, and c) a violation of the Indonesian sovereignty.[94] In Kenya, an award would be considered in violation of public policy if it is either: a) inconsistent with the constitution or other laws of Kenya, whether written or unwritten, b) inimical to the national interests of Kenya, or c) contrary to justice or morality.[95]

In Nigeria, the scope of public policy has been defined as "community sense and common conscience extended and applied throughout the State to matters of public morals, health, safety, welfare and the like.[96] Similarly, Pakistan[97] has also adopted wider connotation to the term 'public policy'. Thus, these definitions given by the national courts provide ample discretion to the judiciary to intervene in the enforcement of foreign arbitral award. Some suggestion to improve the enforceability in ICA would be:

i. A supervisory body should create unified rules for arbitrators. The rules drafted by the supervisory body should govern arbitration practices, and arbitrators should be held accountable to this body. The supervisory body should take disciplinary action against arbitrators who violate the unified rules or engage in misconduct. Furthermore, the

[94] *Supra* note 45.
[95] *Christ for All Nations* v. *Apollo Insurance* (2002) EA 366 (High Court of Kenya).
[96] *Dale power Systems PLC* v. *Witt & Busch,* 2007 5 CLRN 1 (Supreme Court of Nigeria).
[97] *Nan Fung Textiles Ltd*. v. *Sadig Traders Ltd*, High Court (1982) PLD Karachi 619 (Karachi High Court). Courts have defined public policy in the context of enforcement of foreign awards as follows: "objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups first, objects which are illegal by common law or by legislation; secondly, objects injurious to good Government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life; and fifthly, objects economically against the public interest".

supervising body must ensure neutrality and impartiality towards arbitrators while enforcing its standards.[98]

ii. Finality and enforceability in the arbitration process are primarily dependent on the support provided by the National Court. As a result, National Courts should impose exemplary costs in cases where parties file frivolous petitions on the basis of a 'public policy exception' in order to delay enforcement, thereby interfering with the arbitration process.

iii. In order to reduce parochialism and chauvinism in arbitration it is imperative to narrow down the scope of judicial review of the foreign arbitral award on limited grounds only. A broader scope of judicial review may result in inconsistency qua the enforcement of the international arbitral award. Hence, a broader approach would be in violation of article III of the New York Convention.

iv. The idea of fee shifting (which can be both pro-plaintiff and pro-defendant)[99] used in United States and the United Kingdom may be introduced in the arbitration to reduce number of reckless challenges to the arbitral award.

v. If only a part of an award i.e. (the offending part) would violate the public policy of the enforcing state and thus affect the enforcement, then the enforcing court while applying the blue pencil rule may enforce the remainder part of the award i.e. (the non-offending part), provided the cumulative conditions are fulfilled *i.e.*, a) the offending part must be severable from the non-offending part and b) such partial enforcement would not cause any substantial injustice.[100]

IX. Conclusion

The malleable nature of public policy will always remain open to diverse judicial interpretation. The requirement of limited judicial review in dealing with the ‘public policy exception’ is imperative from business point of view, especially in a developing country like India who aspires

[98] Garima Budhiraja and Tania Sebastian, “Critical Appraisal of ‘Patent Illegality’ as a Ground for Setting Aside an Arbitral Award in India”, 24 *Bond Law Review* 177 (2012).
[99] In the pro-plaintiff fee shifting model the winning plaintiff is compensated by the losing defendant for the reasonable litigation fee incurred but the winning defendant is not so compensated. In pro-defendant fee shifting the winning defendant is compensated for the cost of litigation while the plaintiff is not.
[100] *Supra* note 26.

for foreign investment and growth. The query regarding the contravention of public policy by an arbitral award should not be judged by reviewing the award in its entirety, rather, by deliberating upon whether enforcement itself would produce a result which may violates public policy. Merits review of an arbitral award would undermine certain benefits of speed, efficiency and finality in the arbitration. A fine balance needs to be struck taking into consideration the national as well as the commercial aspects while interpreting term public policy. The recent IBA report on 'public policy exception' has suggested that many countries have opted for a narrow interpretation by requiring certain level of inconsistency to hold it contradictory to the term 'public policy'. Thus, there is need of attitudinal amendments by the judiciary, the legislature and all other stakeholders for the proper enforceability of an arbitral award and to prevent 'public policy' from becoming an unruly horse.[101]

[101] Jahnavi Sindhu, "Public Policy and Indian Arbitration: Can the judiciary and the legislature rein in the 'unruly horse", 58(4) *Journal of Indian Law Institute* 430 (2016).