THE CHALLENGE IN THE ENFORCEMENT OF FOREIGN AWARDS IN TERMS OF PUBLIC POLICY

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ABSTRACT

This paper critically analyses the challenges inherent in the enforcement of foreign arbitral awards in India, with a particular focus on the complex exception of public policy. Governed by the Arbitration and Conciliation Act, 1996, Sections 36 and 48(2) delineate grounds for challenging arbitral awards, with public policy serving as a significant parameter. The 2015 amendment sought to bring Indian arbitration practices in line with international standards, explicitly detailing grounds for setting aside awards on public policy, including fraud, contravention of fundamental policy, and conflict with morality and justice. However, the judicial landscape has witnessed nuanced shifts over time. The landmark Renusagar case initially established a pro-arbitration stance, limiting the grounds for refusing enforcement to contraventions of fundamental policy, interests of India, or justice and morality. Subsequently, the SAW Pipes case broadened the scope by introducing the contentious concept of Arbitral Awards being reviewed on their merits, leading to increased judicial intervention. Recent decisions, including Vijay Karia v. Prysmian Cavi E Sistemi and Cruz City 1 Mauritius Holdings v. Unitech Limited, underscored the fact that a breach must be so fundamentally uncompromisable that it qualifies as a violation of public policy. The paper highlights the need for a delicate balance required between judicial intervention and preserving the autonomy of arbitral awards, intending to align Indian practices with international standards, such as those observed in jurisdictions like Hong Kong and Singapore.

1. INTRODUCTION

This paper attempts to analyse the challenges looming around the dynamic nature of the term *Public Policy* concerning the enforcement of Foreign Arbitral Awards in India.

The process of Arbitration is a prelude to Litigation, a method by which the parties strive to decide the conflict, so arisen, by following a rather flexible and efficient process. The process of arbitration concludes with the Arbitral Tribunal passing an arbitral award, which becomes a decree and can be executed the same way as it was passed by the Court. However, the enforcement of such an award can be challenged under the provisions of the Arbitration and Conciliation Act, 1996 (Hereinafter *Act of 1996).* The Act governs, both Domestic Awards and international awards which can be enforced or challenged in India.

Section 36 and Section 48(2) of the Act of 1996 provide for various grounds under which an arbitral award can be challenged. One such ground under which the enforcement of an award can be stayed is the ground of Public Policy.

The phrase Public Policy is dynamic and ever-evolving, as the concept of 'Public Policy' remains blurry in both international law and domestic law. The broad interpretation given to this term has opened floodgates for parties to invoke it as a ground for refusing and setting aside the Foreign Award.

Through this article, an attempt has been made to analyse the evolution of the phrase Public Policy through various precedents set by Courts in India, and the evolution of law, suiting the needs of businesses in India, especially foreign investors in India.

2. PUBLIC POLICY AND THE ENFORCEMENT OF ARBITRAL AWARDS

As per Section 44 of the Act of 1996, a Foreign Award means an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, that are considered as commercial under the law in force in India:

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

b) In one of such territories as the Central Government, being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette.[1]

A difference lies between the recognition and enforcement of awards, wherein an award may be recognised, without being enforced; but if it is enforced then it is necessarily recognised. Recognition alone may be asked for as a shield against re-agitation of issues with which the award deals. Where a court is asked to enforce an award, it must recognise not only the legal effect of the award but must use legal sanctions to ensure that it is carried out.[2]

For an award to have an immediate effect on the rights of the parties, it must be enforceable by the Indian courts. Section 48(2), of the Act of 1996 lays down the conditions upon which the enforcement of a foreign arbitral award may be refused if the Court finds-

a) The subject-matter of the difference is not capable of settlement by arbitration under the law of India; or

b) The enforcement of the award would be contrary to the Public Policy of India,

and that an award is in conflict with the Public Policy only if:

i. The making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81; or

ii. It is in contravention of the fundamental policy of Indian law; or

iii. It is in conflict with the most basic notions of morality or justice.[3]

To determine contravention to the fundamental policy of India, the award must not be reviewed on its merits.

The 2015 amendment of the Arbitration and Conciliation Act, 1996 clarified that an award can be set aside on the ground that it is against the Public Policy of India if –

(i) the award is vitiated by fraud or corruption;

1. The Arbitration and Conciliation Act 1996 (26 of 1996) s 44.
2. *Brace Transport Corpn of Monrovia v Orient Middle East Lines Ltd* 1995 Supp (2) SCC 280 [13].
3. The Arbitration and Conciliation Act 1996 s 48(2).

(ii) it is in contravention to the fundamental policy of Indian law;

(iii) it conflicts with basic notions of morality and justice.

Further, it was clarified that the grounds of "patent illegality" to challenge an award cannot be taken in international arbitration, and the same will be available only in domestic arbitrations.

The rationale behind the doctrine of Public Policy is that even though the parties have the autonomy to make a contract and can refer the dispute to arbitration, the autonomy of the parties and the arbitral award given by the tribunal can be set aside if it is in opposition to the public interest.

3. THE CONUNDRUM RELATED TO PUBLIC POLICY

The Alternative Dispute Resolution method of Arbitration is to keep away from the Courts, however, the courts have taken it upon themselves to determine and interpret the lacuna in law that exists, as to what can and what cannot construe Public Policy. The looming issue arises from the lack of a workable definition of Public Policy in both international and domestic law, and the gap is being bridged by precedents set out by courts.

The Apex Court has time and again passed favourable judgments, to make India the preferred destination for arbitration, which is a testament that the concept and challenges presented by Public Policy can only be understood through analysing various judgments.

The decision of the Supreme Court in *Renusagar Power Co Ltd v General Electric Co*,[4] which is considered to be the first landmark decision in the Arbitration space brought a pro-arbitration stance in India, in tandem with International opinion, as the Hon'ble Supreme Court tried to strike a balance between the application of Public Policy and domestic laws concerning Foreign Arbitral Awards. The Hon'ble Court propounded a narrow approach for defining Public Policy and held that such an enforcement would only be refused if the award is in contravention to (a) the Fundamental policy of Indian Law, (b) the Interests of India, or; (c) Justice or morality. Further, the Apex Court, held that a distinction has to be drawn when the tenants of Public Policy are applied in a matter governed by domestic law and a matter involving a "Conflict of laws".

4. *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644.

The Apex Court's approach in the case left many to believe, that India is moving towards a pro-arbitration regime, where courts are refusing to review arbitral awards on merit, at the stage of enforcement. However, the opinion formed in *Renusagar*[5] was then changed by the dictum in the *Oil & Natural Gas Corpn Ltd v SAW Pipes Ltd*.[6]

The Apex Court was met at a crossroads, to decide whether the concept of "*Patent Illegality"* under Section 34 of the Act of 1996 could be applied to refuse enforcement of a Foreign Arbitral Award. The judgment resulted in the addition of the principle of *"Patent Illegality*" as a ground for non-enforcement of an arbitral award which blurred the distinction between the ambit of domestic and international arbitrations in terms of public policy. The Court defined patent illegality by stating *"Illegality must go to the root of the matter and if the illegality is trivial it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."*[7]

The judgment in *SAW Pipes Ltd*[8] was contradictory to what was held in *Renusagar,*[9] as a broadened interpretation was given to the phrase Public Policy, resulting in arbitral awards being reviewed on their merits. While *Renusagar*[10] promulgated three tenets to the phrase of Public Policy, the decision in *SAW Pipes Ltd,*[11] went further ahead to add a fourth tenet which struck at the root of the matter.

The decision in *SAW Pipes Ltd,*[12] instead of filling the lacuna in law, resulted in subduing the very core of arbitration as it opened floodgates for the intervention of the Courts in Arbitration proceedings. The Hon'ble Court further in *Phulchand Exports Ltd v O.O.O. Patriot*[13] held that, there is no logical distinction between foreign and Domestic awards to hold different standards of Public Policy for them and that the interpretation held under the *SAW Pipes Ltd*[14] case would also apply to Foreign Awards as well.

5. ibid.
6. *Oil & Natural Gas Corpn Ltd v Saw Pipes Ltd* (2003) 5 SCC 705.
7. *Oil & Natural Gas* (n 6) para 31.
8. *Oil & Natural Gas* (n 6).
9. *Renusagar Power* (n 4).
10. *Renusagar Power* (n 4).
11. *Oil & Natural Gas* (n 6).
12. *Oil & Natural Gas* (n 6).
13. *Phulchand Exports Ltd v O.O.O. Patriot* (2011) 10 SCC 300.
14. *Oil & Natural Gas* (n 6).

However, it was in *Shri Lal Mahal Ltd v Progetto Grano Spa* [15] that the Hon'ble Supreme Court overruled its decision in *Phulchand*[16] and held that the "Patent illegality" would not be a ground for refusal of enforcement of a Foreign Award under Section 48 of the Act of 1996, and such ground would only be limited within the purview of Section 34 of the Act of 1996.

While, the Arbitration Regime in India met with criticism for its approach towards the refusal of Foreign Arbitral Awards, the Division Bench in *Associate Builders v DDA,*[17] addressed the challenges faced in the enforcement of foreign arbitral awards in a more structured way. The Supreme Court laid down three juristic principles for testing the awards against the backdrop of the Fundamental Policy of India and that an award would only be set aside if it shocks the conscience of the court. The three juristic principles included *(a) Judicial Approach, (b) Natural Justice, and (c) Absence of Perversity or irrationality.*

It was held that if an arbitrator reasonably interprets a contractual term, it cannot be used as a basis for setting aside the award and that the interpretation of contractual terms is primarily the arbitrator's responsibility. Judicial intervention is only warranted if the arbitrator's interpretation is so unreasonable that no fair or reasonable person could have made it.

Though the dictum in *Associate Builders*[18] interpreted the term Public Policy broadly, however, the judgment was passed with a regressive approach as the Apex Court, interpreted Sections 48 and 34 of the Act of 1996 conjointly, and failed to establish a distinction between the two provisions, which though were separate as the former covered the scope of Foreign Awards and latter Domestic Awards.

It was the 246th Law Commission Report,[19] that suggested reinstatement of the dictum followed in *Renusagar,*[20] and consequently, the Commission Report titled "Public Policy- Developments Post Report No. 246,"[21] criticised the broad approach of the judiciary and advised them to interpret the Act of 1996 in line with international practices to encourage the

15. *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433.
16. *Phulchand Exports* (n 13).
17. *Associate Builders v DDA* (2015) 3 SCC 49.
18. ibid.
19. Law Commission of India, *Amendments to the Arbitration and Conciliation Act 1996* (Report No 246, 2014).
20. *Renusagar Power* (n 4).
21. Law Commission of India Report (n 19).

possibility of international arbitration in India. The Legislature then passed the 2015 Amendment Act[22] incorporating changes to the law, and that contravention of the fundamental policy of Indian law would not warrant a review on merits.

The 2015 amendment,[23] added Explanation 2 to Section 48, stating "*Explanation 2: For the avoidance of doubt, the test as to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."*[24]

Recently, the Apex Court while explaining whether a breach of Foreign Exchange Management Act, 1999 (FEMA) provisions would result in setting aside an arbitral award, in the recent *Vijay Karia v Prysmian Cavi E Sistemi SRL*[25] highlighted that a violation of the fundamental policy of Indian law must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised. These would be the core values of India's Public Policy as a nation, reflected not only in statutes but also time-honoured, hallowed principles that are followed by the Courts. The Hon'ble Supreme Court held that a breach under Foreign Exchange Management Act (FEMA)[26] can never be held to be a violation of the fundamental policy of Indian law, as it is a curable breach.

The Court noted that legislative policy dictated that, insofar as Foreign Awards were concerned, parties could only have one substantive attempt at challenging such enforcement at the time of putting forward their objections under Section 48 of the Act of 1996.[27] If such an attempt failed, the Supreme Court ought to be very cautious in interfering with such orders enforcing foreign awards, especially in terms of the limited ambit of Article 136 of the Constitution of India.[28]

Similarly, an award was challenged for being violative of FEMA[29] by being contrary to public policy in *Cruz City 1 Mauritius Holdings v Unitech Ltd*[30]

22. The Arbitration and Conciliation (Amendment) Act 2015 (3 of 2016) s 48.
23. ibid.
24. ibid.
25. *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.
26. The Foreign Exchange Management Act 1999 (42 of 1999).
27. The Arbitration and Conciliation Act 1996 s 48.
28. The Constitution of India 1950 art 136.
29. The Foreign Exchange Management Act,1999.
30. *Cruz City 1 Mauritius Holdings v Unitech Ltd.* 2017 SCC OnLine Del 7810.

and the High Court of Delhi addressing the issue held that the width of defence of Public Policy is narrow and cannot be equated to offending any particular provision or statute and contravention of a provision of law is insufficient to invoke the defence of public policy when it comes to the enforcement of a Foreign Award. The expression fundamental Policy of Indian law refers to the principles and the legislative policy on which Indian Statutes and laws are founded.

Explaining the expression "fundamental policy", under Public Policy the Court held that it connotes the basic and substantial rationale, values, and principles that form the bedrock of laws in our country.

4. CONCLUSION AND SUGGESTIONS

Public Policy is considered to be an unruly horse as no workable definition has been promulgated. The Courts, to tame the horse have time and again widened the principle to understand if an award is unjust. Although the judiciary faces criticism for its increased oversight and interference in reviewing cases, which strikes at the core of the process of Arbitration, the judicial interpretation has offered sufficient guidance to understand the ever-evolving concept of Public Policy.

Despite several challenges over the years, the threshold laid down in the *Renusagar case*[31] is still considered the yardstick for understanding the ambit of Public Policy under Section 48 (2) of the Act of 1996. It is pertinent to mention that any violation should be of the most fundamental values, which serve as the foundation for the laws of the Country, and not merely a statutory violation. Further, issues revolving around curable defects such as FEMA[32] violations do not strike at the conscience of the Court, and thus cannot be granted umbrella protection under the guise of Public Policy.

Countries like Hong Kong and Singapore, at present, are the most preferable seats for Arbitration in the Asian region. In Singapore, a rather narrow interpretation has been provided for Public Policy and the law enumerates that enforcement of an arbitral award can only be challenged if it shocks the conscience or is against the notion of morality to set aside an arbitral award.[33]

31. *Renusagar Power* (n 4).
32. The Foreign Exchange Management Act 1999.
33. John K Arthur, '*Setting Aside or Non-Enforcement of Arbitral Awards in International Arbitration on the Public Policy Ground— A Regional Perspective*' (2017) Aus ADR Bullet 115.

The challenges presented by Public Policy under Section 48 of the Arbitration and Conciliation Act 1996 are yet to be definitively resolved. However, considering fundamental legal and moral principles that are recognised in all civilised countries, the approach of the legislature and judiciary can help to plan a unified framework for deciding on the enforcement of foreign arbitral awards.

Moving forward, a restrictive approach should be taken by the enforcing Courts while deciding challenges to Arbitral Awards under Section 48(2)(b) of the Act of 1996, as Public Policy remains the best last resort for losing party to delay or even completely absolve them of their liabilities.