NATIONAL OR INTERNATIONAL PUBLIC POLICY: THE PERFECT FIT FOR INTERNATIONAL ARBITRATION IN INDIA? - DRAWING INSPIRATION FROM THE FRENCH APPROACH

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ABSTRACT

This article critically examines the 'public policy of India' exception under Sections 34 and 48 of the Arbitration and Conciliation Act, 1996, highlighting its identical application to both domestic and foreign arbitral awards. While the statutory alignment reflects an attempt at consistency, it overlooks the nuanced distinction required between domestic and international arbitration frameworks. Drawing inspiration from the French approach, which differentiates public policy for domestic and international awards, the article advocates for replacing the "public policy of India" ground under Section 48 with "international public policy" for the enforcement of foreign awards.

The article traces the evolution of the 'public policy of India' exception and analyses its judicial interpretation over time. It argues that aligning India's arbitration law with international best practices by adopting "international public policy" will enhance India's appeal as a preferred seat for international arbitration. To ensure predictability and limited judicial interference, the article further recommends that the scope of "international public policy" for foreign awards be narrowly confined to issues such as fraud and corruption. The article proposes statutory amendments to Section 48 to incorporate

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'international public policy' similar to the French approach. The aim of this article is to highlight ways to improve the enforcement regime for foreign awards, thereby positioning India as a more arbitration-friendly jurisdiction and fostering greater confidence in its legal framework for international commercial disputes.

1. INTRODUCTION

In May 2024 during the inauguration of the Arbitration Bar of India (ABI)[1] in New Delhi, the Solicitor General of India remarked that "*we don't need to learn from any other country because it is my firm belief that arbitration as a concept has its origin in India*"[2]. This might be debatable, considering the amendments to the Arbitration & Conciliation Act, 1996 ('***Arbitration Act***') over the past decade, aimed at aligning India's arbitration laws with those of arbitration-friendly jurisdictions.

The Arbitration Act is the parent statute which contains the law relating to domestic arbitration[3], international commercial arbitrations and enforcement of foreign arbitral awards[4]. The Arbitration Act is broadly modelled on the lines of UNCITRAL Model Law on International Commercial Arbitration, and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ('***New York Convention***') as adopted by India subject to a few reservations.

Article V(2)(b) of the New York Convention provides that a Convention State may refuse enforcement of an award if the recognition or enforcement of the award would be contrary to the '*public policy of that country*'. The New York Convention does not define the term 'public policy' and leaves it open for states to adopt their standards of and notions of public policy in the enforcement of arbitral awards.[5]

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1. Ausaf Ayyub and Isra Mukhtar, 'Inaugural of the Arbitration Bar of India' (*Live Law*, 15 May 2024) <https://www.livelaw.in/events/arbitration-bar-of-india-inauguration-257923 > accessed 14 February 2025.
2. Abhimanyu Hazarika, 'Arbitration Born in India; We do not Need to Learn it from Others: Solicitor General Tushar Mehta' (*Bar and Bench*, 12 May 2024) <https://www.barandbench.com/news/arbitration-born-india-solicitor-general-tushar-mehta> accessed 14 February 2025.
3. Arbitration and Conciliation Act 1996 (26 of 1996) pt I.
4. Arbitration and Conciliation Act 1996 (26 of 1996) pt II.
5. Jean-Michel Marcoux, 'Transnational Public Policy as an International Practice in Investment Arbitration' (September 2019) 10(3) Journal of International Dispute Settlement 496-515; Cassimatis, Anthony E (2019) 'Public Policy under the New York

Section 34 (Part I) of the Arbitration Act, provides certain grounds for setting aside a domestic arbitral award and Section 48 (Part II) enumerates certain grounds to refuse recognition or enforcement of foreign arbitral award. In line with the New York Convention, conflict with the 'public policy of India' is one such ground, which is available to challenge a domestic award as well as refuse the enforcement of a foreign award. Section 34 (2)(b) and Section 48 (2)(b), therefore broadly mirror each other.

The dichotomy lies in the fact that statutorily the Arbitration Act does not differentiate between public policy for domestic and international arbitration awards. The public policy exception provided in Sections 34 and 48 of the Arbitration Act does not set out or explain how public policy exception is to be applied to domestic and separately to international arbitral awards. However, there have been some judicial precedents lately that have held that public policy is to be construed narrowly for international arbitral awards.[6]

This article argues in favour of statutorily differentiating the exception of public policy for domestic (Section 34) and international arbitral awards (Section 48). In doing so, the article analyses the evolution of the public policy exception in India as set out under the Arbitration Act (**Section 2**). This article will also discuss how France has adopted an international standard of public policy as provided in the French Code of Civil Procedure (**Section 3**). The article further discusses why there is a need to have different standards of public policy for domestic and international arbitral awards (**Section 4**). Lastly, the article proposes appropriate statutory amendments and solutions to formulate well-defined and separate standards of public policy to be applied to domestic and international arbitral awards (**Section 5** and **Section 6**).

2. THE EVOLUTION OF PUBLIC POLICY IN INDIA

A. The Renusagar Era and the Three 'Narrow' Prongs of Public Policy

One of the first cases, where the Supreme Court of India interpreted the components of public policy was in *Renusagar*[7]. The term 'public

Convention — Bridges between Domestic and International Courts and Private and Public International Law' (2022) 31(1) National Law School of India Review art 2.

6. *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2024) 7 SCC 197 [33].
7. *Renusagar Power Co Ltd v General Electric Co* 1994 Supp (1) SCC 644 : AIR 1994 SC 860.

policy' was construed to be interpreted in a narrow sense. It was held that enforcement of a foreign award would be refused, only if the award is contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India, or; (iii) justice or morality. The Court held that a distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law, and a matter involving conflict of laws. The application of this doctrine in the field of conflict of laws is more limited, and the courts are slower to involve public policy in cases involving a foreign element, than when a purely municipal legal issue is involved.[8] In relation to the 'fundamental policy of Indian law', the Court held that (i) the award must invoke something more than merely a violation of Indian law to be refused enforcement; (ii) a violation of economic interests of India is contrary to public policy; (iii) it is the fundamental principle of law that orders of courts must be complied with and a disregard for such orders would be contrary to public policy[9].

The court adopted a pro-arbitration stance to align Indian law with international standards and practices and narrowed down the scope of 'public policy'. It also distinguished the scope of public policy in domestic awards from that of a foreign arbitral award. The Court while referring to the New York Convention, elaborated that the expression used in the provision, is the term 'public policy of a country' and not the words 'the law of the country'. Thus mere 'contravention of law' alone shall not attract the bar of public policy. The court's verdict in *Renusagar* was greatly appreciated in the Indian Jurisprudence and set the course for all future judgements and amendments.

B. Introduction of the Test of 'Patent Illegality'

The Supreme Court of India in *Saw Pipes*[10] widened the scope of public policy and laid down a new test of 'patent illegality'. To the disappointment of the international community, the Court added another ground under the head of public policy on which enforcement of an award could be refused. Following this decision, courts could examine the merits of the dispute in review and refuse to enforce an award if it was in complete contradiction to the fundamental laws of India. This extension, however, applied only to domestic arbitrations.

8. *Renusagar* (n 7) [51].
9. *Renusagar* (n 7) [65].
10. *ONGC Ltd v Saw Pipes Ltd* (2003) 5 SCC 705 [13].

In *Saw Pipes*, it was held that an award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in the public interest and is likely to adversely affect the administration of justice[11]. Thus, the patent illegality of the award was added as a ground under the scope of public policy. The court in *McDermott*[12] further elaborated that such patent illegality must go to the root of the matter and the public policy violation, should be so unfair and unreasonable as to shock the conscience of the court.

In *Phulchand Exports*[13] and *Satyam Computers*[14], the Supreme Court of India held that the test of 'patent illegality' as laid down in *Saw Pipes* would also apply to foreign arbitral awards under Section 48 of the Arbitration Act. One of the major impacts of these rulings was that parties to international commercial arbitrations were allowed to reopen their cases based on alleged contraventions of Indian law, thereby unreasonably extending the scope of judicial interference. Therefore, these judgements opened a floodgate of litigations under Section 34 of the Arbitration Act. The test increased the extent of court interference in the enforcement of arbitral awards by allowing the court to review the merits of the arbitral award.

C. The Aftermath of Saw Pipes

Later, a larger bench of the Supreme Court of India in *Shri Lal Mahal*[15] overruled the *Phulchand Exports* verdict. The bench limited the scope of judicial intervention in the enforcement of foreign awards by removing the ground of 'patent illegality', and thereby restored the position as laid down in *Renusagar*. The court further clarified that such ground was limited to Section 34 of the Act only in case of a domestic award. Thus, the ground of public policy is available in India both for a challenge to an India-seated arbitral award and to resist enforcement of a foreign award, except the ground of 'patent illegality' which would not be available as a ground to resist the enforcement of a foreign arbitral award.

To set the course straight after *Saw Pipes* and *Phulchand Exports*, in 2014 the 246th Law Commission Report made certain recommendations to

11. *Saw Pipes* (n 10) [31].
12. *McDermott International Inc v Burn Standard Co Ltd* (2006) 11 SCC 181 [59].
13. *Phulchand Exports Ltd v OOO Patriot* (2011) 10 SCC 300 [16].
14. *Venture Global Engg v Satyam Computer Services Ltd* (2008) 4 SCC 190 [23].
15. *Shri Lal Mahal Ltd v Progetto Grano Spa* (2014) 2 SCC 433 [28], [29].

restrict the scope of public policy as a ground for challenging an arbitral award and to make a distinction between a domestic award and foreign arbitral award. Additionally, it recommended (i) addition of Section 34(2A) to the Act, to limit the ground of 'patent illegality' to purely domestic arbitral awards; and (ii) a suggestion to add that "an award shall not be set aside merely on the ground of erroneous application of the law or by re-appreciating evidence".[16]

The 246th Law Commission Report also proposed to statutorily include a definition of public policy based on the Supreme Court's decision in *Renusagar*. Going a step forward, it also suggested that the definition of public policy should not include within it '*the interests of India*' since the same was capable of interpretational misuse. Thus, it was proposed that the ambit of public policy for enforcement of foreign and domestic awards should be limited to fundamental policy of Indian law or basic notions of justice or morality.

D. The Conundrum Surrounding the 'Fundamental Policy of Indian Law'

One of the components of public policy that the court laid down in the *Renusagar* verdict was the 'fundamental policy of Indian law'. It held that the enforcement of an arbitral award would be said to be contrary to the public policy of India if it contradicts a 'fundamental policy of Indian Law'. The Supreme Court of India in two of its decisions laid down the interpretation as to what constitutes a fundamental policy of Indian Law, which offset the course of Indian arbitration law another step backwards.

In 2014, the Supreme Court in *Western Geco*[17] decided on the question of what would constitute the 'Fundamental policy of Indian Law' and held that it includes three fundamental juristic principles, namely:

(i) the duty to adopt a judicial approach, i.e., to not act in an arbitrary, capricious, or whimsical manner. Judicial approach requires courts to act in a fair, reasonable, and objective manner and its decision should not be actuated by any extraneous consideration.

16. Law Commission of India, *Amendments to the Arbitration & Conciliation Act, 1996*, Report No. 246, 55 published in August 2014.
17. *ONGC Ltd v Western Geco International Ltd* (2014) 9 SCC 263 : AIR 2015 SC 363 [35], [38], [39].

(ii) compliance with principles of natural justice, including audi alterum partem and application of mind to the facts and circumstances; and

(iii) 'Wednesbury principle' i.e., an award may be set aside if it is perverse and so irrational that no reasonable person would have arrived at the same.

Later in *Associate Builders*[18], the court gave an expansive definition to the term 'fundamental policy of Indian Law' to include: (i) contravention of a statute which is the national economic interest of India; (ii) disregarding orders of superior courts in India; (iii) disregarding the binding effect of the judgment of a superior court; and (iv) the principle of adopting a judicial approach, which demands that a decision be fair, reasonable and objective.

These judgments which propounded on the lines of *Saw Pipes* were severely criticised, and it was said that the improvements that the courts made on the ground of patent illegality were offset by these judgments[19]. To clarify the position, the Law Commission published a supplementary Report and recommended amendments to the Arbitration Act and added Explanation II to Section 34 (2)(b)(ii) regarding the test of contravention with the fundamental policy of Indian law and clarified that such a test shall not entail a review on the merits of the dispute.

E. The 246th Law Commission Supplementary Report

Considering the judgment in *Western Geco*, the Law Commission issued a Supplementary Report to the 246th Law Commission Report specifically on the topic of 'Public Policy' in February 2015. It recorded the 'chief reason' for its issuance as the inclusion of the Wednesbury principle of reasonableness within the phrase of 'fundamental policy of Indian law' in *Western Geco*. The Wednesbury principle of reasonableness permitted courts to look at an award to understand whether the conclusion would be one that "no reasonable person would have arrived at". This test permitted a review of an arbitral award on its merits. The Law Commission suggested that such a power to review an award on merits is contrary to the objectives of the Arbitration Act and international practice and would increase judicial interference with arbitral awards. It proposed that another explanation be added to Section 34 of the Act, i.e. *"For the avoidance of doubt the test as*

18. *Associate Builders v DDA* (2015) 3 SCC 49 [27], [34].
19. Hiroo H Advani, 'Public Policy' (2009) 21(2) National Law School of India Review 55-63 <https://www.jstor.org/stable/44283803>.

to whether there is a contravention with the fundamental policy of Indian law shall not entail a review on the merits of the dispute."[20]

Hence, the explanation added to the Arbitration Act because of this report limited the scope of interpretation as provided in *Western Geco.* To completely neutralise the effect of the *Western Geco* and *Associate Builders* and to give effect to the Law Commission reports, the Parliament introduced the 2015 amendments to the Arbitration Act.

F. Amendment Act of 2015

The 2015 amendments overhauled the Arbitration Act completely and added an explanation to the public policy exception, which clarified that an award would be deemed to conflict with the public policy of India, only if:

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 (confidentiality) or Section 81 (admissibility of evidence); 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.

Additionally, the 2015 Amendment clarified that Indian Courts are not permitted to review the merits of a dispute when making an assessment regarding the setting aside of an award based on public policy. Ever since the Amendment, the Courts have avoided giving a wide interpretation of public policy or interfering with the merits of the case. In *Venture Global*[21] the court observed that '*the Award of an arbitral Tribunal can be set aside only on the grounds specified in Section 34 of the AAC Act and on no other ground. The Court cannot act as an Appellate Court to examine the legality of Award, nor it can examine the merits of claim by entering in factual arena like an Appellate Court.*'[22]

Further, the Supreme Court of India in *Ssangyong Engineering*[23] acknowledged that the amendment of 2015 had narrowed down the scope of public policy and clarified that under no circumstance any court would

20. Supplementary to Report No. 246 on Amendment to Arbitration & Conciliation Act, 1996, published in September 2015 < https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022081637.pdf> page 21.
21. *Venture Global Engg LLC v Tech Mahindra Ltd* (2018) 1 SCC 656, ¶121.
22. *Venture Global* (n 21) [127].
23. *Ssangyong Engg & Construction Co Ltd v NHAI* (2019) 15 SCC 131, ¶ 76.

interfere with an arbitral award on the ground of injustice or entail an entry into the merits of the dispute. The court also held that the ground of public policy and the most basic notions of justice would only be attracted in very exceptional circumstances when an award shocks the conscience of the Court. Thus, the court overruled the verdict in *Western Geco* and restored the grounds as elucidated in *Renusagar*[24].

G. The Flip – Flop Continues

The Arbitration & Conciliation (Amendment Act) 2021 introduced a fresh ground of 'fraud and corruption' to set aside the enforcement of an arbitral award. It provided for an unconditional stay to the enforcement of a foreign award in cases where such an award was induced by fraud or corruption.

The Supreme Court in *Vijay Karia*[25] recognised that, following the 2015 amendments, the grounds of '*public policy of India*' provided in Sections 34 and 48 are now identical. This means that in an international commercial arbitration held in India, the grounds for challenging an award based on '*public policy of India*' are the same as those for resisting the enforcement of a foreign award in India.[26] The court further held that it does not have any discretion to either refuse or not refuse enforcement of a foreign award if it is induced by fraud or corruption, or which violates the fundamental policy of Indian law, or basic notions of justice and morality[27]. The court reaffirmed the decision in *Renusagar* and held that the fundamental policy of Indian law must pertain to a breach of some legal principles or legislation which is so basic to Indian law that it is not susceptible to being compromised[28]. The court elucidated that 'fundamental policy' refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also in time-honoured, hallowed principles which are followed by the courts[29].

The court ultimately adopted a pro-arbitration and enforcement approach. It held that the grounds raised to resist the enforcement of the foreign award were, in essence, arguments about the fairness of the arbitral award's conclusion. This amounted to an impermissible review of the merits of the case, which is prohibited under Section 48 of the Arbitration Act. As

24. *Ssangyong* (n 23) [34].
25. *Vijay Karia v Prysmian Cavi E Sistemi SRL* (2020) 11 SCC 1.
26. *Vijay Karia* (n 25) ¶ 43.
27. *Vijay Karia* (n 25) ¶ 59.
28. *Vijay Karia* (n 25) ¶ 88.
29. *Vijay Karia* (n 25) ¶ 88.

a result, the court dismissed the petition and imposed a cost of INR 10 million on the appellants.

Later, the Supreme Court of India in a controversial decision in *Alimenta*[30] held a foreign arbitral award to be unenforceable under Section 48 of the Arbitration Act for being against the public policy of India. The court delved into the merits of the case, in violation of Explanation II of Section 48(2)(b) and decided on the terms of contracts between the parties whereas the only question was as to the enforcement of the award. The court observed that the principles governing public policy are capable of expansion or modification.[31] Although the court in *Alimenta* referred to previous Supreme Court decisions[32] that consistently held that the scope of inquiry under Sections 34 and 48 does not involve reviewing an arbitral award on its merits, it nevertheless reached a contrary conclusion. Interestingly, the court in *Alimenta* did not rely on or refer to *Vijay Karia*.

The uncertainties surrounding the interpretation of the 'public policy of India' exception by Indian courts persist. While a series of judicial precedents has leaned towards protecting foreign awards from excessive judicial interference, the statutory provisions for 'public policy of India' under Sections 34 and 48 of the Arbitration Act remain unchanged.

This is particularly important now as the Arbitration Act is currently undergoing a significant revamp. In October 2024, the Government of India sought public comments on the Draft Arbitration and Conciliation (Amendment) Bill, 2024 ("**Draft Bill 2024**"), aimed at promoting institutional arbitration, minimising judicial interference, and ensuring the timely resolution of arbitration proceedings. While the Draft Bill 2024 addresses several critical aspects, it does not propose any changes to Section 48 of the Arbitration Act.

This highlights the need for a clearer understanding of 'public policy' for foreign awards. This could be achieved by way of appropriate statutory amendments to Section 48 of the Arbitration Act. Therefore, it would be helpful to draw inspiration from the French approach, which differentiates between domestic and international public policy.

30. *National Agricultural Cooperative Mktg Federation of India v Alimenta SA* (2020) 19 SCC 260.
31. *Alimenta* (n 30) ¶ 63.
32. *Alimenta* (n 30) ¶62-69.

3. THE FRENCH PERSPECTIVE ON PUBLIC POLICY

French arbitration law is recognised as one of the most arbitration-friendly legal systems in the world.[33] The current regime, reformed in 2011, is codified in Articles 1442 to 1527 of the French Code of Civil Procedure (‘***FCCP***’) and is bolstered by the French courts’ reliable, pro-arbitration case law. Its defining characteristics include a commitment to party autonomy and the robust enforceability of arbitral awards.

A specificity of French arbitration law is that it distinguishes between domestic and international arbitration, granting greater flexibility to the latter to address the complexities of cross-border disputes.

A. Distinction between Domestic and International Public Policy

French arbitration law distinguishes between domestic and international public policy through two separate sections of the FCCP, with certain expressly listed provisions applying to both.[34] The key criterion for determining whether arbitration is domestic or international is whether the dispute involves ‘international trade interests,’[35] irrespective of whether the award is rendered in France or abroad.

One of the key distinctions between the two regimes lies in their treatment of public policy, a difference explicitly set out in the text of the law. Article 1492 of the FCCP, which lists the grounds for annulment of domestic awards, provides that an award may be set aside if “*the award is contrary to public policy*”. In contrast, Article 1520, governing the annulment of international awards, provides that an award may be set aside if “*recognition or enforcement of the award is contrary to international public policy*”.[36]

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33. M Scherer, ‘Long-Awaited New French Arbitration Law Revealed’ (Kluwer Arbitration Blog, 15 January 2011) <https://arbitrationblog.kluwerarbitration.com/2011/01/15/long-awaited-new-french-arbitration-law-revealed/> accessed 14 February 2025. C J Hendel, M A Pérez Nogales, ‘Chapter 12: Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations’, in K Fach Gómez, A M López-Rodríguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 194; C Malinvaud & C Camboulive, ‘Paris’, in M Ostrove, C Salomon, et al (eds), *Choice of Venue in International Arbitration* (Oxford University Press 2014) 324.
34. French Code of Civil Procedure 1981, art 1506.
35. French Code of Civil Procedure 1981, art 1504.
36. The same distinction applies at the enforcement stage of arbitral awards: in domestic matters, enforcement cannot be granted if the award is “manifestly contrary to public policy” French Code of Civil Procedure 1981, art 1488, whereas, in international

Articles 1492 and 1520 of the FCCP highlight that domestic public policy is broader than international public policy: a domestic award can be annulled if it violates public policy, while an international award is only set aside if its recognition or enforcement breaches international public policy. This narrower focus means an award will stand if its outcome complies with international public policy, even if the arbitrators' reasoning does not.[37]

The distinction between the two notions has been refined by case law. French public policy, applicable in domestic matters, encompasses French *lois de police* (imperative laws), i.e., laws deemed crucial for safeguarding the political, social, or economic organisation of the State, in situations where the outcome of the award contravenes such mandatory laws. It includes procedural principles[38] (similar to those included in international public policy),[39] and substantial principles, such as respect for the authority of the general meeting of shareholders, rules governing credit, and provisions of the French Commercial Code related to bills of exchange and promissory notes.[40]

In contrast, the concept of international public policy, which is more narrowly construed, encompasses "*all the rules and values that the French legal system cannot ignore, even in international matters*"[41]. These grounds are limited to cases where integrating the award into the French legal order would be blatantly unacceptable. They include procedural principles such as equality of the parties in arbitration and respect for the rights of the defence, as well as the prohibition of fraud, and substantive principles such as competition law, insolvency law principles, sanctions stemming

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matters, enforcement is denied if the award is "manifestly contrary to international public policy" (art 1514 of the FCCP).

37. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De l'arbitrage* (2023) 919. For example, if arbitrators fail to recognise that a contract is illicit but still invalidate it on other grounds, such as a defect in consent, the ultimate result — declaring the contract void — aligns with international public policy, and the award should remain enforceable, *see* C Greenberg, 'A La Recherche Du Juste Équilibre Entre Contrôle De La Conformité De La Sentence à l'ordre Public De Fond, Efficacité De La Sentence Et Ordre Public Procédural', (2023) 4 Revue de l'arbitrage 2023 1039.
38. D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 [Grounds for setting aside and for appeal of an enforcement order]' in L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para 21.
39. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 915.
40. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 915.
41. Paris, 14 June 2001, Rev. arb. 2001, p. 773.

from United Nations resolutions, or as detailed below, the prohibition of corruption and money laundering.[42]

B. The French Courts' Control of International Public Policy: The Transition From a Minimalist to A Maximalist Approach

Until recently, French arbitration law maintained a non-interventionist and pro-arbitration stance, limiting judicial review of arbitral awards to extreme cases; this was termed as a 'minimalist approach'. The French courts set out this standard in the *Thalès*[43] and *Cytec*[44] cases, where they ruled that a violation of international public policy must be "*flagrant, effective, and concrete*". This restricted review to cases where the breach was evident and discernible from the award itself, with little to no examination of facts or evidence beyond the arbitrators' findings.

This approach, characterised by minimal judicial review of arbitral awards, meant that courts rarely annulled awards for violations of international public policy.[45] It faced criticism for its limitation to a mere appearance-based review of the award's compliance with public policy and failing to adequately address breaches of fundamental values within the French legal system.[46]

Driven by the paramount importance of combating corruption and money laundering,[47] French case law has shifted toward a broader scope of judicial review, initially limited to these specific issues.[48] In this context,

42. M De Boisséson, J Madesclair & C Fouchard, *Le Droit Français De L'arbitrage* (2023) 916-917; D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 (Grounds for Setting Aside and for Appeal of an Enforcement Order)' *in* L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para. 22.
43. Paris, 18 November 2004, *Thalès*, JDI 2005, p 357.
44. Cass. Civ. 1, 4 June 2008, no. 06-15.320.
45. D Bensaude, 'French Code of Civil Procedure (Book IV), Article 1520 (Grounds for Setting Aside and for Appeal of an Enforcement Order)' in L A Mistelis (ed), *Concise International Arbitration*, 2nd edn, 2015, 1175, para 22.
46. *See*, on this topic, C Seraglini, *in* J Béguin, J Ortscheidt and C Seraglini, Chronique Droit de l'Arbitrage, *La Semaine Juridique Edition Générale* No. 28-29, 9 July 2008, I 164, para 8; J Ortscheid, Note under Cass. Civ. 1, 4 June 2008, No. 06-15.320, *La Semaine Juridique Edition Générale* No. 25, 18 June 2008, 430.
47. *See* L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation', 3 May 2022, 15 La Gazette du Palais 11.
48. This expanded over time to encompass broader matters, including state rights over natural resources and national defense secrecy: see E. Loquin, Note under Paris Court of Appeal, 28 May 2019, no. 16/11182, *Alstom Transport*, in *Journal du droit international (Clunet)* no. 2, April-June 2020, 10, p. 694.

courts adopted an expanded review in cases involving corruption and money laundering. Notably, in *Indagro*, the courts ruled that violations of international public policy could be raised for the first time during annulment proceedings.[49]

This new "maximalist" approach was confirmed and expanded in the landmark *Belokon* decision, upheld by the *Cour de Cassation* in 2022.[50] The Paris Court of appeal ruled, in a case involving allegations of money laundering, that it was not restricted to the evidence presented before the arbitrators, nor bound by their findings, assessments, or legal characterisations. Instead, the court relied on "serious, specific, and consistent evidence" to conclude that enforcing the award would enable a party to benefit from the proceeds of money laundering, thereby violating international public policy. This new standard aligned with the internationally used "red flags" methodology for addressing corruption and similar allegations, enabling proof through indirect indicators when direct evidence is difficult to obtain.[51]

The Court of Cassation confirmed this decision, upholding the shift from the standard of a flagrant, effective, and concrete breach, to a mere "characterised" breach. While the Court of Cassation emphasised that this did not amount to re-judging the merits, this approach marked a significant departure from the previous standard. This new standard was reaffirmed in further decisions, such as *Sorelec*,[52] where the Court of Cassation upheld the court of appeal's examination of all evidence supporting corruption allegations, irrespective of the fact that such evidence had not been earlier submitted before the arbitral tribunal, and *Santullo*[53], where an award was annulled on grounds of corruption following an in-depth review.

This shift from minimalist review has been praised by some as essential for effectively combating corruption and money laundering, given their

49. Paris, 27 September 2016, No. 15/12614, confirmed by Cass. Civ. 1, 13 September 2017, nos. 16-25.657 and 16-26.445, *Indagro*.
50. Paris, 21 February 2017, no. 15/01650, confirmed by Cass. Civ. 1, 23 mars 2022, no. 17-17-981, *Belokon*. See also L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation' (3 May 2022) 15 La Gazette du Palais 11.
51. See L Larribère, 'La Conception « Maximaliste » Du Contrôle De L'ordre Public International Devant La Cour De Cassation' (3 May 2022) 15 La Gazette du Palais 11.
52. Cass. Civ. 1, 7 September 2022, No. 20-22.118, *Sorelec*, upholding Paris, 17 November 2020, No. 18/02568.
53. Paris, 5 April 2022, No. 20/03242, *Santullo*.

concealed nature, while others have criticised this maximalist approach for increasing judicial interference in arbitral awards, bordering on a review of their merits, which may undermine the efficiency of arbitration.[54] Despite these fears, recent French case law demonstrates an effort to balance the effective protection of international public policy with avoiding a review of arbitral awards on the merits. In *Pharaon*, the Court of Appeal reiterated that the review of international public policy does not aim to ensure the arbitral tribunal correctly applied legal rules, even public policy rules. It emphasised that an alleged violation of a foreign mandatory rule by the tribunal does not necessarily mean the award contravenes the French conception of international public policy.[55]

In *Monster Energy*, the Court of Appeal denied enforcement of an award for breaching international public policy, citing the arbitrators' reliance on Californian law instead of applying French mandatory law prohibiting exclusive import rights agreements in overseas territories.[56] The Court of Cassation overturned this decision,[57] emphasising that enforcement can only be denied if the outcome of the award—not the arbitrators' reasoning—clearly and concretely violates international public policy. This approach preserves arbitration's efficiency while ensuring that decisions violating France's fundamental values or enabling parties to benefit from prohibited conduct are excluded from its legal system, aligning with the broader goal of maintaining arbitration's legitimacy.[58]

4. NEED FOR DIFFERENT STANDARDS OF PUBLIC POLICY FOR DOMESTIC AND INTERNATIONAL ARBITRAL AWARDS

The notion of public policy is an inherently amorphous concept, lacking a precise definition and subject to variations across different jurisdictions and periods. Transnational public policy can be understood as "*a reflection of global consensus- deriving from the convergence of national laws,*

54. C Debourg, Note under Cass. Civ. 1, 7 September 2022, no. 20-22.118, *Sorelec*, in *Journal du droit international (Clunet)* no.vol 4 (October-December 2023, 22) 1334, 1339; A Cottin, W Brillat Capello, '2022 Year in Review: Arbitration-Related Developments in France' (Kluwer Arbitration Blog, 7 February 2023) <https://arbitrationblog.kluwerarbitration.com/2023/02/07/2022-year-in-review-arbitration-related-developments-in-france/> accessed 14 February 2025.
55. Paris, 13 September 2022, No. 21/02217, *Pharaon*.
56. Paris, 19 October 2021, No. 18/01254, *Monster Energy*.
57. Cass. Civ. 1, 17 May 2023, No. 21-24.106, *Monster Energy*.
58. See C Greenberg, 'A La Recherche Du Juste Équilibre Entre Contrôle De La Conformité De La Sentence à L'ordre Public De Fond, Efficacité De La Sentence et Ordre Public Procédural, (2023) 4 Revue de l'arbitrage 1040.

international conventions, arbitral case law and scholarly commentary- on fundamental economic, legal, moral, political, and social values".[59]

The 2015 amendments to the Arbitration Act introduced an inclusive definition of public policy aimed at curbing judicial interference with arbitral awards. Despite these efforts, courts continue to intervene, often citing public policy as grounds for annulment or refusal to enforce arbitral awards.

The introduction of the 'fundamental policy of Indian law' within the amended definition has added to the confusion and vagueness surrounding the application of public policy. This confusion is particularly problematic given that public policy should ideally differ for domestic and international awards. Section 34 of the Arbitration Act, which pertains to domestic awards, can reasonably accommodate a broader definition of public policy. However, for international commercial awards, India's adherence to the New York Convention necessitates a more restrictive interpretation to maintain consistency with international standards.

Recently the Supreme Court of India's judgment in *Avitel*[60] is a landmark decision that supports a narrow construction of public policy for international awards. In this decision, the Court emphasised that public policy, in the context of international arbitration, should be interpreted restrictively.[61] The Court held that for an award to be set aside on public policy grounds, the violation must be of a fundamental and most basic notion of justice and morality. This decision aligns with the principles of the New York Convention, which India is a signatory to, reinforcing the need for minimal judicial intervention in international arbitral awards. The Supreme Court of India in Avitel was guided by the French conception of public policy and how it differentiates between domestic and international arbitral awards:

> *18. At this point, we may also note that Courts in some countries have recognized that when applying their own public policy to Convention Awards, they should give it an international and not a domestic dimension. The Arbitration legislation in France,*

59. Lamm, C B, Pham, H T, et al, *Fraud and Corruption in International Arbitration*, in Fernandez-Ballester, M A and Lozano, D A (eds), Liber Amicorum Bernardo Cremades (Wolters Kluwer España, La Ley 2010) 707; Transnational Public Policy, Jus Mundi, Wiki Notes, 14 May 2024.
60. *Avitel Post Studioz Ltd v HSBC PI Holdings (Mauritius) Ltd* (2024) 7 SCC 197.
61. *Avitel* (n 60) [27], [34].

> *for instance, makes an explicit distinction between national and international public policy, limiting refusal of enforcement only to the latter ground [...]*

Given the clarity provided in *Avitel*, it is imperative to statutorily recognise this restrictive interpretation of public policy for international awards to prevent further judicial overreach and maintain India's credibility in the global arbitration landscape.[62] The notion of public policy for international arbitral awards should be truly international and limited to aspects where there is a broad global consensus. This consensus typically centers around fundamental issues such as fraud and corruption. India has taken a firm stance against fraud and corruption, as evidenced by the Arbitration & Conciliation (Amendment) Ordinance 2020. This ordinance introduced provisions allowing for the stay of an arbitral award if it was induced or affected by fraud or corruption.

To ensure consistency and foster a more arbitration-friendly environment, India's approach to public policy should align with international standards, similar to the French conception of public policy. In France, the scope of public policy concerning international arbitral awards is narrowly construed, focusing primarily on the characterised violation of international public policy which includes serious breaches such as fraud and corruption.

By adopting a similarly restrictive approach, India can enhance its credibility and attractiveness as a venue for international arbitration, ensuring that judicial interference is minimised and only invoked in cases of characterised and significant violations of international public policy. This would not only harmonise India's arbitration framework with global practices but also uphold the integrity and enforceability of international arbitral awards in line with the objectives of the New York Convention. The statutory clarification would help resolve ambiguities and ensure that India's arbitration framework aligns with international practices, fostering a more arbitration-friendly environment.

5. PROPOSED AMENDMENT

In light of the aforementioned, the article proposes the following amendments to the Arbitration Act:

62. Abhisar Vidyarthi, Sikander Hyaat Khan, 'India: A Late Opening to the Notion of International Public Policy?' (December 2022) 38(4) Arbitration International 249-261.

A. Amendment to Section 48 (Part Ii of the Arbitration Act)

i *Current Provision:*

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

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, 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 with the fundamental policy of Indian law; or (iii) it is in conflict with the most basic notions of morality or justice.

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.]

ii *Proposed Amended Provision:*

(2) Enforcement of an arbitral award may also be refused if the Court finds that— (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of India; or (b) the recognition or enforcement of the award would be contrary to international public policy.

Explanation 1.—For the avoidance of any doubt, it is clarified that an award is in conflict with the international public policy of India, only if the making of the award was induced or affected by fraud or corruption.

Explanation 2.—For the avoidance of doubt, the test as to whether there is a contravention with international public policy shall not entail a review on the merits of the dispute.]

Section 34 of the Arbitration Act which sets out grounds for annulment of a domestic award should remain intact without any amendments (which mirrors the above Section 48 current provision).

6. CONCLUSION

The proposed amendment to Section 48 of the Arbitration Act would ensure that courts apply a different standard of public policy to international awards compared to domestic awards. The proposed amendment would limit the scope of public policy to issues of fraud and corruption, thereby preventing extensive judicial interference with international awards. It is important to omit the term 'fundamental policy of Indian law', as it currently serves as a broad and often ambiguous ground for resisting enforcement of international arbitral awards. By narrowing the focus to widely recognised issues like fraud and corruption, the proposed amendment will align India's arbitration framework more closely with global standards, promoting a more consistent and predictable enforcement process.

The proposed removal of '*most basic notions of morality and justice*' from the provision aims to streamline and clarify the application of international public policy. It is widely accepted that these fundamental concepts are inherently part of international public policy, making their explicit mention redundant. It would be best to entrust the judiciary to incorporate these notions within the broader scope of international public policy. This would prevent unnecessary verbosity and potential overreach. Thus, the proposed amendment would not only simplify the legal framework but also ensure that the enforcement of international arbitral awards in India remains aligned with international best practices similar to other arbitration-friendly jurisdictions like France.