DEMYSTIFYING PUBLIC POLICY TO ENABLE ENFORCEMENT OF FOREIGN AWARDS – INDIAN PERSPECTIVE

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Abstract

This article attempts to demystify the uncertainty and unpredictability around public policy, and deduces situations in which the scope and ambit of public policy can be assertively ascertained. It further examines 'public policy' as a ground for grant or refusal of enforcement of a foreign award in India, that has one of the largest judicial caseload of international commercial disputes and international arbitration. While arriving at their deductions, the authors analyse the context in which public policy is placed under the New York Convention; Indian law and its adoption of the New York Convention; the meaning of public policy and its realm of operation in law for purposes of enforcement of foreign awards; and judicial interpretation of public policy by Indian courts. Based on the aforesaid analysis, they also identify practical situations in which public policy can be raised as a ground to resist or defend resistance to enforcement of foreign awards.

I. INTRODUCTION

"*Public policy is never argued at all but when other points fail*."

-Burrough J.

The aforesaid statement[1] depicts the elusive nature of 'public policy' in legal proceedings that draw upon its presence in statute, conventions and legal systems. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"] is a critical international convention that gives room for public policy considerations while assessing enforcement of a foreign arbitral award (foreign award). Article V(2)(b) of the New York Convention states:

> "(V)(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

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[1] Burrough J. in Richardson v. Mellish, (1824-34) All ER 258.

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."[2]

The present article examines 'public policy' as a ground for grant or refusal of enforcement of a foreign award in India. Its open-textured and variable nature has created much divergence in the international arbitration community on its meaning, applicability and limits. For some, public policy has played a savior of foreign awards; for others, it has set the arbitration proceedings and the outcome at naught. Most award creditors may have realized the fruits of their arbitration only after long arduous legal proceedings to establish non-contravention of public policy. This has created a cloud of uncertainty and unpredictability around public policy.

This paper attempts to demystify this uncertainty, and deduce situations in which the scope and ambit of public policy can be assertively ascertained. While arriving at these deductions, we will analyze the context in which public policy is placed under the New York Convention (II); Indian law and its adoption of the New York Convention (III); the meaning of public policy and its realm of operation in law for purposes of enforcement of foreign awards (IV); and judicial interpretation of public policy by Indian courts (V). In the end, based on the aforesaid analysis, we identify practical situations in which public policy can be raised as a ground to resist or defend resistance to enforcement of foreign awards (VI).

II. THE NEW YORK CONVENTION

The New York Convention was adopted by the United Nations and entered into force on 7 June 1959. At the date of this article, the Convention has 163 Contracting States.[3] The New York Convention is considered to be the cornerstone of the international arbitration system.[4]

Prior to the New York Convention, the Geneva Protocol of 1923 was signed between countries to enable recognition and enforcement of an award by the State in which it was made. Subsequently, the Geneva Convention of 1927 widened the scope of the Geneva Protocol of 1923 by providing recognition and enforcement of protocol awards within the territory of contracting States, and not merely the State in which the award was made.[5]

[2] Convention on the Recognition & Enforcement of Foreign Arbitral Awards, Article V (2), June 10, 1958, 330 UNTS 3.

[3] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3. https://www.newyorkconvention.org/countries.

[4] Renaud Sorieul, *Message from the Secretary of UNCITRAL*, New York Convention 1985 (2013) https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1.

[5] ALAN REDFERN & MARTIN HUNTER, LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 61-62 (2nd ed. 1991).

Under the Geneva Convention of 1927, a party seeking enforcement had to prove the conditions necessary for enforcement and was often obliged to seek a declaration in the countries where the arbitration took place to the effect that the award was enforceable in that country, before it could enforce the award in the courts at the place of enforcement,[6] which commonly referred to as the doctrine of double-exequatur. Article 1(e) of the Geneva Convention of 1927 required that, in order for recognition and enforcement to be granted, it had to be positively demonstrated that such "*recognition or enforcement of the award is not contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon*".[7] Owing to its broad language and burden of proof on the party *seeking* enforcement, the Geneva Convention of 1927 hindered speedy settlement of disputes through arbitration.

The New York Convention replaced the Geneva Convention of 1927. Among other provisions, Article V (2)(b) provided that recognition of an award may be refused on the basis of public policy. It omitted the reference to "*principles of law of the country in which it is sought to be relied upon*". This omission was acknowledged as highlighting the pro-enforcement bias of the New York Convention. Further, the New York Convention places the burden of proof on the party attempting to resist enforcement. Thus, the New York Convention seeks to provide a simpler and effective method for recognition and enforcement of foreign awards. Since its inception, the New York Convention's regime for recognition and enforcement has become deeply rooted in the legal systems of its Contracting States and has contributed to the status of international arbitration as common means of resolving commercial disputes today.[8]

III. ADOPTION OF THE NEW YORK CONVENTION BY INDIA

India was a signatory to the Geneva Protocol of 1923 and the Geneva Convention of 1927. With a view to implement the obligations under the said Protocol and Convention, the Arbitration (Protocol & Convention) Act, 1937 was enacted. India became a signatory to the New York Convention in 1958 and ratified it in 1960. The Foreign Awards (Recognition and Enforcement) Act, 1961 ["**Foreign Awards Act**"] was enacted to give effect to the New York Convention. The Foreign Awards Act was repealed to give way to the Arbitration & Conciliation Act, 1996 ["**A&C Act**"].

[6] Renusagar Power Co. Ltd v. General Electric Co., 1994 Supp (1) SCC 644.
[7] UNCITRAL SECRETARIAT GUIDE ON THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS 239 (2016) https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/2016_guide_on_the_convention.pdf
[8] *Id.* at 1.

Part II (Chapter I) of the A&C Act deals with the enforcement of New York Convention awards. Section 48(2) of the Act provides statutory expression to Article V(2) of the New York Convention which enables a signatory country to refuse enforcement of a foreign award, if it is in contravention of its public policy. The existing equivalent portions of Section 48 of the A&C Act (as it stands today) and Article V of the New York Convention envisaging the ground of public policy are set out in the table below:

New York Convention (Article V)	**A&C Act (Section 48)**
Article V(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: **(b)** The recognition or enforcement of the award would be contrary to the public policy of that country.[9]	**Section 48(2)** Enforcement of an arbitral award may also be refused if the Court finds that— **(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.][10]

Signatories to the New York Convention do not automatically become reciprocating countries in India – there is a requirement for the Central Government to notify reciprocating countries. An award passed in a notified reciprocating territory may be enforced in India as a 'foreign arbitral award' under

[9] *Supra* note 2, Article V.
[10] Arbitration and Conciliation Act, §48(2) (1996).

the A&C Act. So far, the Central Government has notified 48 countries as reciprocating territories for the purposes of the New York Convention.

IV. MEANING OF PUBLIC POLICY

Article V(2)(b) does not define public policy. It provides that a court may refuse to recognize or enforce an award if the award "*would be contrary to the public policy of that country"*.[11] The words 'that country' are indicative of public policy of the country where enforcement is sought. Thus, the public policy of that country must be applied by courts in assessing objections to enforcement. However, before delving into the public policy of India, it is important to understand the basic tenets of public policy.

A. Meaning and Possible Views

Public policy forms part of a wider range of tools, such as the mandatory rules of the forum that override private autonomy that allow a court to protect the integrity of the legal order to which it belongs. Although different jurisdictions define public policy differently, case law tends to refer to a public policy basis for refusing recognition and enforcement of an award under Article V(2)(b) of the New York Convention when the core values of a legal system have been deviated from. Invoking the public policy exception is a safety valve to be used in those exceptional circumstances when it would be impossible for a legal system to recognize an award and enforce it without abandoning the very fundaments on which it is based.[12]

Defining public policy, Sir William Holdsworth stated,

> "A body of law like the common law, which has grown up gradually with the growth of the nation, necessarily acquires some fixed principles, and if it is to maintain these principles it must be able, on the ground of public policy or some other like ground, to suppress practices which, under ever new disguises, seek to weaken or negative them."[13]

In *Gherulal Parakh* v. *Mahadeodas Maiya,* the Supreme Court of India favoured a narrow, non-evolving view of public policy and stated, "*though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days*."[14]

[11] *Supra* note 2, Article V(2)(b).
[12] *Supra* note 7, at 240.
[13] WILLIAM SEARLE HOLDSWORTH, HISTORY OF ENGLISH LAW 55 (Vol. III, 2013).
[14] Gherulal Parakh v. Mahadeodas Maiya, 1959 AIR 781.

However, with time, the meaning of 'public policy' has evolved significantly over the years and across different jurisdictions. In *Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly*, the Court held, "*public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time*."[15]

Thus, public policy is either subject to a narrow view *i.e.*, fixed principles where courts cannot create new heads of public policy, or a broad view where courts can play a role in judicial law making. As evident below, a narrow view is adopted for the purposes of enforcement of foreign awards.

B. Applicable Public Policy for Purposes of Foreign Awards

Foreign awards operate at the level of private international law involving conflict of laws, as opposed to domestic awards. Thus, a distinction needs to be drawn while applying the rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.[16] Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than a purely local transactions.[17]

The particular rule of public policy may be of an overriding nature and therefore be a ground to resist enforcement, or it may be local in the sense that it represents some feature of internal policy. If it is the latter, it must be confined to cases governed by the domestic law and ought not be extended to a case governed by foreign law. In order to ascertain whether the rule is all-pervading or merely local, it must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions.[18]

The above also justified minimal judicial intervention in enforcement of foreign awards as distinguished from domestic awards. In the Supplementary Report to the 246th Law Commission Report, the Law Commission stated that the legitimacy of judicial intervention in the case of a purely

[15] Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156.
[16] DICEY & MORRIS, THE CONFLICT OF LAWS 92 (Vol. I, 11th ed. 1987).
[17] R.H. GRAVESON, CONFLICT OF LAWS 165 (7th ed. 1974).
[18] CHESHIRE AND NORTH, PRIVATE INTERNATIONAL LAW 129 (12th ed. 1992).

domestic award is far more than in cases where a court is examining the correctness of a foreign award or a domestic award in an international commercial arbitration.[19]

The above also finds international judicial support. In the United Kingdom, the Court of Appeal has held that "*public policy will only be engaged where the illegality reflects considerations of international public policy rather than purely domestic public policy*."[20] In France, an international arbitral award may be refused enforcement if it is contrary to 'international public policy'.[21] International public policy in France refers to "*the French conception of international public policy, that is the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature*".[22] In Italy, public policy is construed as international public policy, and not purely domestic public policy. Public policy may include the core fundamental values of the Italian Constitution and bar the recognition of conflicting foreign judgments.[23]

The fact that minimum judicial intervention is warranted in enforcement of foreign awards and domestic public policy is not applied supports a narrow view of public policy. In the United States, in the landmark case of *Parsons & Whittemore Overseas Co.* v. *Societe Generale De L'industrie Du Papier,*[24] the Court of Appeal discussed that the pro-enforcement bias implicit in the New York Convention is indicative of the narrow manner in which the public policy defense is to be construed. Courts in India have supported a narrow view of public policy as will be evident in Section V below.

C. Judicial Interpretation of Public Policy in India

Under the A&C Act, public policy stands as a ground both for setting aside awards made by India-seated arbitral tribunals under Section 34, and for resisting enforcement to foreign awards under Section 48. Despite the internationally recognized view that public policy vis-à-vis foreign awards must be applied narrowly at a private international law level, Indian case law witnessed an intermingling of the operative realms of public policy for domestic and foreign awards. Whilst this

[19] Law Commission of India, *Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996* (Aug. 2014).
[20] RBRG Trading (UK) Limited v. Sinocore International Co. Ltd., [2018] EWCA Civ 838.
[21] French Code of Civil Procedure, Article 1520 (1981).
[22] Pierre Pic & Asha Ranjan, *The Public Policy Exception in International Arbitration: A Snapshot From France*, 6 IJAL 197 (2017), *citing* Cour d'appel [CA] [regional court of appeal] Paris, June 14, 2001, SA Compagnie commercial André v. SA Tradigrain France, REV. ARB. 773 (2001).
[23] Massimo Benedettelli and Marco Torsello, *Challenging and Enforcing Arbitration Awards 2019, Italy*, Global Arbitration Review (May, 2021) https://globalarbitrationreview.com/jurisdiction/1005944/italy.
[24] Parsons & Whittemore Overseas Co. v. Societe Generale De L'industrie Du Papier, 508 F.2d 969.

was largely undesirable, judicial interpretation has enriched the content of public policy both in the realm of domestic and foreign awards. The trajectory of judicial interpretation is briefly traced below.

i. Renusagar: Public Policy for Foreign Awards

In 1993, the Supreme Court of India ["**SCI**"] had an opportunity to determine the contours of public policy in the landmark case of *Renusagar Power Co. Ltd* v. *General Electric Co.*[25] ["**Renusagar**"], involving enforcement of a foreign award under the Foreign Awards Act.[26] Applying a narrow view of public policy, the Court held that since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act, 1961 must necessarily be construed in the sense the doctrine of public policy as applied in the field of private international law. Applying the said criteria, it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[27]

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".[28]

ii. Saw Pipes: Patent Illegality for Domestic Awards

Subsequent to the judgment in *Renusagar*, the SCI interpreted the meaning of 'public policy' In in the case of *ONGC Ltd.* v. *Saw Pipes Ltd*.[29] (now overruled) ["**Saw Pipes**"]. This case involved challenge to domestic arbitral awards rendered in India on the ground of public policy under Section 34 of the A&C Act. In addition to the meaning of public policy provided in *Renusagar* (which was in relation to foreign awards), the SCI introduced the concept of 'patent illegality' for setting aside domestic awards under the head of public policy. Patent illegality, to some extent, involved a review of the *merits* of the underlying dispute. Defining patent illegality, it held that

> "Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so

[25] *Supra* note 6
[26] Foreign Awards (Recognition and Enforcement) Act, §7(1)(b)(ii) (1961).
[27] *Supra* note 6, at 66.
[28] *Supra* note 6, at 76, 85.
[29] ONGC v. Saw Pipes (2003) 5 SCC 705.

> 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."[30]

The SCI followed the dicta of *Saw Pipes* in the case of *Venture Global Engineering* v. *Satyam Computer Services Ltd. & Anr.* (now overruled).[31]

iii. Phulchand: Patent illegality extended to Foreign Awards

In the case of *Phulchand Exports Ltd.* v. *O.O.O Patriot* (now overruled) ["**Phulchand**"], the SCI extended the ground of 'patent illegality' devised in *Saw Pipes* for setting aside domestic awards in India, to resistance of enforcement of foreign awards in India. [32] The judgment of the SCI in *Phulchand* set a disturbing precedent as it widened the ambit of public policy *vis-a-vis* foreign awards - no longer keeping it narrow and minimal as in *Renusagar*.

iv. Lal Mahal: Revert to Renusagar for Foreign Awards

In *Shri Lal Mahal Ltd.* v. *Progetto Grano SPA*, ["**Lal Mahal**"] the SCI overruled its decision in *Phulchand* and held that a foreign award may be refused enforcement under Section 48(2)(b) *only* if such enforcement would be contrary to: (i) the fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality, [33] thereby returning to the position laid down by *Renusagar*. It refused to apply the ground of patent illegality while assessing foreign awards.

v. 246th Law Commission Report: Patent Illegality Restricted

In August 2014, the 246th Law Commission Report ["**246th LCR**"] provided significant inputs in relation to the definition of public policy. It acknowledged that *Saw Pipes* had unintended consequences on international commercial arbitrations and the enforcement of foreign arbitral awards, which was corrected by the SCI in *Lal Mahal.* Additionally, it recommended "(i) addition of Section 34(2A) to the A&C Act, in order 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".[34]

The 246th LCR also proposed to statutorily include a definition to public policy based on the SCI's dicta in *Renusagar*. Going a step forward, the 246th LCR suggested that the definition of public policy should not include within it 'the interests of India' since the same was capable of interpretational

[30] *Id.*, at 31.
[31] Venture Global v. Engineering v. Satyam Computer Services Ltd. & Anr., (2008) 4 SCC 190.
[32] Phulchand Exports Ltd. v. O.O.O Patriot, (2011) 10 SCC 300.
[33] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[34] *Supra* note 19.

misuse. Thus, it was proposed that the ambit of public policy for enforcement of foreign awards should be limited to fundamental policy of Indian law; or basic notions of justice or morality.[35]

vi. "Western Geco": Wednesbury Principle of Reasonableness included for Domestic Awards

Before the recommendations of the 246th LCR were incorporated into the A&C Act, the SCI expanded the scope of public policy in *ONGC* v. *Western Geco International Ltd.* in a case involving challenge to domestic awards. The Court held that 'fundamental policy of law' included three fundamental juristic principles, namely, (i) duty to adopt 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; (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. The SCI held that a court could set aside a domestic award under the umbrella of fundamental policy of Indian law if the award is perverse or irrationality such as to fall foul of the touchstone of the aforesaid principles.[36]

vii. Associate Builders: Public Policy Consolidated

Public policy was further consolidated in *Associate Builders* v. *Delhi Development Authority,* while assessing a challenge to domestic award. It set out the following elements of 'public policy' which are set out and summarized below:[37]

a) *Fundamental Policy of Indian Law:* This includes (a) contravention of the provisions of the Foreign Exchange Regulation Act, 1973 as it is a statute enacted for the national economic interest; (b) disregarding orders of superior courts in India; (c) disregarding the binding effect of the judgment of a superior court; and (d) the principle of adopting a judicial approach, which demands that a decision be fair, reasonable and objective. An arbitrary or whimsical decision would not be a determination that is fair, reasonable or objective; contravention of the principle of *audi alteram partem* principle also contained in Sections 18 and 34(2)(a)(iii) of the A&C Act; a decision which is so perverse or so irrational that no reasonable person would have arrived at the same. A decision could be deemed perverse if: (i) the finding is based on no evidence, or (ii) an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or (iii) ignores vital evidence in arriving at its decision.

[35] *Id.*
[36] ONGC v. Western Geco International Ltd. (2014) 9 SCC 263.
[37] Associate Builders v. Delhi Development Authority (2015) 3 SCC 49.

b) *Contrary to the interest of India:* This ground relates to India as a member of the world community in its relations with foreign powers.

c) *Against justice:* An award is against justice when it shocks the conscience of the court. For example, an arbitral award which awards a relief without any reason or justification.

d) *Against morality:* Morality includes within it 'sexual morality' so far as Section 23 of the Indian Contract Act, 1872 is concerned. If it is to go beyond sexual morality, it would cover agreements which are not illegal per se but would not be enforced given the prevailing morals of the day. Interference on this ground would also be only if it is something which shocks the court's conscience.

e) *Patent illegality:* This includes contravention of the substantive law of India, which would result in an illegality which goes to the root of the matter and cannot be of a trivial nature; contravention of the A&C Act itself; contravention of Section 28(3) of the A&C Act, which is the 'Rules applicable to the substance of the dispute'. If two views are possible, court can't substitute its view for the view of arbitrator. [38]

viii. Supplementary Report of the 246th Law Commission

In light of decision 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" by the SCI in *Western Geco.* The Wednesbury principle of reasonableness permitted courts to look at an award to understand whether the conclusion would be one which "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 A&C Act and international practice, and would increase judicial interference in awards. It proposed that another explanation be added to Section 34 of the A&C Act, *viz.,* "*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."*[39]

ix. Arbitration and Conciliation [Amendment] Act, 2015

In light of the proposed amendments, the A&C Act was amended through the Arbitration and Conciliation [Amendment] Act, 2015. As prescribed by the Law Commission Report, the ground of

[38] *Id.*

[39] Law Commission of India, Supplementary to Report No. 246 on Amendments to Arbitration and Conciliation Act, 1996, *"Public Policy", Developments post-Report No. 246* (Feb 2015).

'patent illegality' is now restricted only to domestic arbitrations by way of insertion of Section 34(2A). Patent illegality is not available as a ground for international commercial arbitrations. Additionally, Section 48 of the A&C Act was amended to include the following explanations:

> "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."[40]

x. Ssangyong Engineering: S.34 and S.48 of A&C Act

In *Ssangyong Engineering and Construction Company Ltd.* v. *NHAI* [*"***Ssangyong Engineering***"*], the SCI set aside a majority domestic award. The specific factual circumstance involved a Circular being issued by the Respondent and unilaterally applied as binding on the other party. This was upheld by the majority arbitral tribunal. Thus, the SCI held that:

> "This being the case, it is clear that the majority award has created a new contract for the parties by applying the said unilateral Circular and by substituting a workable formula under the agreement by another formula de hors the agreement. This being the case, a fundamental principle of justice has been breached, namely, that a unilateral addition or alteration of a contract can never be foisted upon an unwilling party, nor can a party to the agreement be liable to perform a bargain not entered into with the other party. Clearly, such a course of conduct would be contrary to fundamental principles of justice as followed in this country, and shocks the conscience of this Court.". [41]

Thus, the majority award was set aside on the ground that the award had unilaterally altered the terms of the underlying contract, thereby being contrary to the principles of justice and shocking the conscience of the court. However, the minority award was upheld, by invoking the Court's inherent powers under Article 142 of the Constitution of India.

The Court held that this was contrary to the public policy of India. Additionally, relying upon *Associate Builders,* and carefully considering the changes in the law, particularly the Arbitration and Conciliation [Amendment] Act, 2015, the SCI in *Ssangyong Engineering* demarcated the grounds for setting aside domestic awards and setting aside international commercial arbitrations seated in India and resisting the enforcement of foreign arbitral awards.[42]

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[40] Arbitration and Conciliation Act, §48 (1996).
[41] Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131.
[42] *Id.*

V. KEY DEDUCTIONS ON PUBLIC POLICY UNDER INDIAN LAW

India is one of the few jurisdictions to statutorily define public policy through the Arbitration and Conciliation (Amendment) Act, 2015. While some countries consider public policy to mean international public policy, Indian courts have held that there is no workable definition of international public policy, thus, it should be construed to be the doctrine of public policy as applied by courts in India.[43] Within the definition of public policy, India has statutorily included the grounds of fraud, corruption, fundamental policy of Indian law and basic notions of justice and morality.

While public policy has no definition and its elements have been identified statutorily in Section 48(2)(b)(ii), additional elements have been sufficiently postulated by judicial interpretation. In light of the above analysis, the following practical deductions can be made about public policy. These will be helpful while assessing an application resisting enforcement of a foreign award.

A. Court's Discretion in Refusing Enforcement

S.48(2) provides that the Court "*may*" refuse enforcement of a foreign award. This provides discretion to the Court to, in certain circumstances, allow enforcement of a foreign award even if grounds of refusal are made out.

In the case of *Cruz City 1 Mauritius Holdings* v. *Unitech Limited,* [*"***Cruz City***"*] the Delhi High Court proposed a balancing test to determine when a foreign arbitral award may be refused enforcement on the ground of public policy. The Court in *Cruz City* considered whether refusing to enforce a foreign award which is contrary to public policy may be further opposed to '*public policy*'. However, the Court further held that while the width of discretion to refuse the enforcement of an arbitral award is narrow and limited, if sufficient grounds are established, courts can accept the contentions to refuse the enforcement of an arbitral award.[44]

Additionally, in the case of *Vijay Karia & Ors.* v. *Prysmian Cavi E Sistemi SRL* [*"***Vijay Karia"***], the SCI held that while discretion of courts may be employed in some of the grounds for refusing the enforcement of a foreign award, courts do not have any discretion regarding the grounds of fraud, corruption, fundamental policy of Indian law, basic notions of justice and morality. [45]

In the United Kingdom, in the case of *Minmetals Germany Gmbh* v. *Ferco Steel Ltd.,* it has been held that

[43] *Supra* note 6.
[44] Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649.
[45] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.

> "considerations of public policy involve investigation not only of the core procedural defect relied upon by way of objection to enforcement but of all surrounding circumstances which are material to the English Court's decision whether, as a matter of policy, enforcement should be refused. Such circumstances may give rise to policy considerations which so strongly favour enforcement as to outweigh policy considerations to the contrary"[46]

In *Dallah Real Estate and Tourism Holding Company* v. *Ministry of Religious Affairs, Government of Pakistan,* the Supreme Court of the U.K., held that while there may be a discretion to enforce an arbitral award even if grounds for refusal of enforcement are made out in some circumstances, the absence of a valid arbitration agreement is not a ground wherein the court can exercise such discretion. [47]

In *Yukos Oil Co* v. *Dardana Ltd.*, the Court of Appeal in has held that the word 'may' in Article V of the New York Convention suggests that even if one or more grounds are made out, "*the right to rely on them had been lost, by for example another agreement or estoppel*." The High Court of Hong Kong, in the case of *Hebei Import,*[48] held that courts to not have the discretion to enforce an arbitral award if the award is against public policy and the basic notions of morality and justice. [49]

B. Beyond Mere Statutory Violation

The expression 'fundamental policy of Indian law' calls for a violation that is beyond mere statutory violation. In *Renusagar,* the Court held that Article V(2)(b) of the New York Convention had omitted the reference to "*principles of law of the country in which it is sought to be relied upon*" while replacing the Geneva Convention of 1927. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, it was held that contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.[50]

It is important to assess the nature, object and scheme of a statute to determine if the violation of such statute would constitute a violation of the fundamental policy of Indian law. In *Vijay Karia,* the SCI held that any rectifiable breach under the FEMA cannot be said to be a violation of the fundamental policy of Indian law. It held that the Reserve Bank of India could step in and direct the parties to comply with the provisions of the FEMA or even condone the breach. However, the arbitral award

[46] Minmetals Germany Gmbh v. Ferco Steel Ltd., [1999] 1 All ER (Comm) 315.
[47] Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46.
[48] Hebei Import & Export Corporation v. Polytek Engineering Company Ltd., [1999] 2 HKC 205.
[49] Yukos Oil Co v. Dardana Ltd., [2002] EWCA Civ 543.
[50] *Supra* note 6.

would not be non-enforceable as the award would not become void on this count.[51] Citing its judgment in *Renusagar,* the SCI 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 of being compromised. "Fundamental Policy" refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts*."[52]

C. Basic Notions of Justice & Morality

A recent instance wherein a majority arbitral award was set aside as being opposed to 'justice' is that of the case of *Ssangyong Engineering,* wherein it was held that the award unilaterally altered the contract which is opposed to the fundamental principles of justice and shocks the conscience of the court. Thus, when it comes to the public policy of India argument based upon most basic notions of justice, it is clear that this ground can be attracted only in very exceptional circumstances when an award shocks the conscience of the Court.[53]

D. Mistake of Fact or Law

The SCI has repeatedly held that the scope of enquiry under Section 48 does not permit review of a foreign arbitral award on its merits. Courts do not have the ability to take a 'second look' at the foreign arbitral award at the enforcement stage.[54] This is now incorporated as a statutory rule under Section 48(2)(b), Explanation 2. Further, the Delhi High Court, in the case of *Cairn India & Ors.* v. *Government of India* recently held that once an arbitral tribunal has been vested with jurisdiction by parties, it has the right to make both right and wrong decisions as these are errors which fall within their jurisdiction.[55]

In *Vijay Karia*, the SCI, while citing Albert Jan van den Berg in his treatise The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, has noted that,

> "it is a generally accepted 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. Furthermore, under the New York Convention, the task of the enforcement judge is a limited one. The control exercised by him is limited to verifying whether an objection of a respondent on the basis of the

[51] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.
[52] *Id.*
[53] Ssangyong Engineering and Construction Company Ltd. v. NHAI, 2019 (15) SCC 131.
[54] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.
[55] Cairn India & Ors. v. Government of India, O.M.P.(EFA)(COMM.) 15/2016 & I.A. Nos. 20459/2014 & 3558/2015, Judgment Dated February 19, 2020.

> grounds for refusal of Article V is justified and whether the enforcement of the award would violate the public policy of the law of his country. This limitation must be seen in the light of the principle of international commercial arbitration that a national court should not interfere with the substance of the arbitration".[56]

E. Natural Justice

Section 48(1)(b) permits a party to resist enforcement on grounds relating to violation of natural justice if a party is unable to present its case during the arbitration proceedings. However, a party may also resist the enforcement of an arbitral award on the ground of natural justice as being against public policy under Section 48(2)(b)(ii) (as natural justice forms a part of the fundamental policy of Indian law). A foreign award can possibly be challenged if the arbitral tribunal had ignored the submissions of the party in totality and the resulting award was contrary to the principles of natural justice, thereby violating public policy. This was the finding of the Delhi High Court in the case of *Campos Brothers Farms* v. *Matru Bhumi Supply Claim Pvt. Ltd*.[57] An appeal against the Single Judge's order in this case is currently pending before the Division Bench of the Delhi High Court.[58]

F. Construction of Contract

Under Section 48(2), a court is not permitted to delve into merits of the award and evaluate the manner in which the arbitral tribunal has construed the terms of the underlying contract. However, recently, in a rare decision, the SCI has declined the enforcement of a foreign arbitral award in the case of *National Agricultural Cooperative Marketing Federation of India* v. *Alimenta S.A.*[59] [*"***National Agricultural**"] under the Foreign Awards Act as the enforcement application in the present case was filed in 1993. In this case, the Appellant was allegedly unable to comply with the contractual terms wherein the Appellant was to export groundnuts. The SCI noted that the export required government approval, however, the government did not grant the Appellant the necessary approvals to carry out its contractual obligations. Further, the agreement itself contained a clause wherein it was provided that the contract between the parties would be cancelled if the shipment was prohibited by an executive or legislative act by the government which would make the shipment impossible [*"***Contingency Clause***"*]. In its award, the arbitral tribunal awarded damages upon the Appellant for a breach of contract.

[56] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL, 2020 SCC OnLine SC 177.
[57] Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., (2019) 261 DLT 201.
[58] Campos Brothers Farms v. Matru Bhumi Supply Claim Pvt. Ltd., EFA(OS) (COMM) 10/2019.
[59] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A, Civil Appeal No. 667 of 2012.

The SCI held that the export could not have taken place without the approval of the Government. Export without the government's permission would have violated the law, thus, enforcement of the award would be violative of the public policy of India. Considering that the Contingency Clause would have become applicable, the contract itself would have been cancelled. The contract was thereby rendered void under Section 32 of the Indian Contract Act, 1872.[60] Thus, enforcing an award which seeks the payment of damages for breach of a contract (which was rendered void) is contrary to the fundamental policy of Indian law. The SCI, relying upon several judgments, including that of *Associate Builders* and *Ssangyong Engineering*, held the foreign arbitral award to be unenforceable as being opposed to the fundamental policy of Indian law and the basic notions of justice, and thereby public policy. This judgment could be problematic for many reasons, foremost being appreciation of the merits of the dispute and re-assessment of the tribunal's construction of the contract.

G. Fraud or Corruption

While Indian courts have had an opportunity on expand upon what may constitute the fundamental policy of Indian law and basic notions of justice and morality, there is minimal jurisprudence on what constitutes fraud or corruption in the context of refusing the enforcement of a foreign arbitral award.

H. Other Potential Grounds

Further, courts in other jurisdictions have held that award without reasons is contrary to public policy,[61] however, such objections may now be classified into the bucket of "patent illegality" in India and be unavailable as an objection to the enforcement of foreign arbitral awards. There are certain other grounds that courts have held to be contrary to public policy such as acting in bad faith, duress, impartial hearing, surprise decisions, etc.[62] However, Indian courts have not had the opportunity to evaluate such grounds yet – and it is likely that many of these grounds would be considered 'patent illegality' and not be available as a ground to resist the enforcement of a foreign award.

I. Applicability of Public Policy under A&C Act

The ground of public policy is available in India both for challenge to an India-seated award and to resist enforcement of a foreign award. However, in an international commercial arbitration conducted

[60] Indian Contract Act, §32 (1872), provides that, "*Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void*."

[61] Smart Systems Technologies Inc. v. Domotique Secant Inc., 2008 QCCA 444.

[62] DIRK OTTO & OMAIA ELWAN, ARTICLE V(2), IN RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Kronke, Nacimiento, Otto, et al. eds. 2010).

in India, the ground of challenge relating to public policy of India would be the same as the ground of resisting enforcement of a foreign award in India. This is because Section 34 of the A&C Act, which deals with challenge to awards made by India-seated arbitral tribunals, differentiates between international commercial arbitrations held in India and other arbitrations held in India. Thus, after the Arbitration and Conciliation (Amendment) Act, 2015, grounds relating to patent illegality appearing on the face of the award do not apply to (i) international commercial arbitration awards made in India; and (ii) foreign awards being resisted in India.

VI. CONCLUSION

Resistance to enforcement of foreign awards in a country must be approached with circumspection. The question whether enforcement of a foreign award violates the public policy of India must be considered in the context that India is a signatory to the New York Convention.[63] It is the sovereign commitment of India to honour foreign awards, except on the exhaustive grounds provided under Article V of the New York Convention.

While it may be tough to construe public policy without a workable definition, judicial interpretation offers sufficient guidance, whilst maintaining that judicial interference remain minimal. It is essential to recognize the need for restraint in examining the correctness of a foreign award or a domestic award tendered in an international commercial arbitration, as opposed to a domestic award. As stated in *Fritz* v. *Scherk*, we cannot have trade and commerce in world markets and international seas exclusively on our terms, governed by our laws and resolved in our courts.[64] Concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.[65]

As the Court in *Cruz City* has aptly stated, a policy to enforce foreign awards itself forms a part of the *public policy of India* – and courts should strive to find the right balance between the policy of enforcing foreign awards and considering the grounds for resisting the enforcement of foreign awards.[66] In light of judicial guidance and international circumspection over public policy as a ground for refusal of enforcement of foreign awards – hopefully, public policy will not be argued readily only when all other points fail!

[63] Cruz City 1 Mauritius Holdings v. Unitech Limited, (2017) 239 DLT 649.
[64] Fritz Scherk v. Alberto Cuvler, 417 US 506 (1974).
[65] Mitsubishi Motors Corpn. v. Soler Chrysler-Plymouth Inc., 87 L Ed 2d 444.
[66] *Supra* note 63.