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A COMPARATIVE STUDY OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS IN INTERNATIONAL COMMERCIAL ARBITRATION IN THE LIGHT OF PUBLIC POLICY EXCEPTION

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DECLARATION

I, the undersigned **Gauri Nirwal**, being fully aware of my legal liability, do hereby declare and certify with my signature that my thesis, entitled **"A Comparative Study of Recognition and Enforcement of Arbitral Awards in International Commercial Arbitration in the Light of Public Policy Exception"** is my original work and the printed and electronic literature referred to in it was used in accordance with the applicable rules of copyright. I have indicated the original location of the ideas, data, and the sources used from others in the references (footnotes) and bibliography.

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SUPERVISOR'S RECOMMENDATION

International commercial arbitration has been a very popular form of settling disputes in between businesses. An abundant number of studies, monographs and articles examine various aspects of international commercial arbitration offering either complex discussion on the phenomenon or sectoral analysis of certain aspects of arbitration. A focal point in the academic discussion, for some years now, is the enforcement of arbitral awards in national jurisdictions. While most of these papers offer various insights on the impediments related to the recognition and enforcement of arbitral awards, very few of them offer complex approach to a particularly important impediment in the way of an efficient enforcement of the awards: the public policy doctrine.

The dissertation offers a complex approach based on a comparative methodology related to the recognition and enforcement of arbitral awards in international commercial arbitration with a special and almost exclusive focus on the public policy exception. The public policy doctrine is a bottleneck of private international law and can serve as a serious impediment in the enforcement and recognition of even judicial awards beyond arbitral ones.

The thesis offers an in-depth analysis of the topic from a special comparative perspective making the various fundamentals of the national legal systems as the starting point for the discussion. The detailed description and the meticulous application of several legal research methods result in a thoroughly crafted work. The comparative method is the prevailing research method and is applied in a manner that provides for novelty and freshness to the work. The terminology is crystal clear and well defined throughout the thesis, paying particular attention to the wording of the relevant international legal authorities.

The structure of the work resembles the coherence of a monograph starting with a thorough literature review embracing all the relevant and up to date literature jurisprudence offers on the topic. A SWOT analysis on arbitration follows the literature review to turn on the real subject matter of the discussion, the enforcement and recognition of arbitral awards. After identifying the problems related to enforcement and recognition (e.g. time limit, state immunity, annulment), the public policy doctrine is examined and analyzed as the potentially biggest impediment for a successful enforcement. The public policy doctrine or exception is examined in two levels: the international and the national levels. The latter gives true novelty to the work as it focuses on quite a few countries across the globe from three continents. The questions of a potential harmonization of domestic and international arbitration laws pose as

valuable discussion in the thesis that suggest the efficiency of international commercial arbitration can be enhanced by taking advantage of the potentials in harmonization.

The chapter on the various interpretations of public policy in light of recognition and enforcement of arbitral awards lists a number of practical concerns related to arbitration (e.g. impartiality of the arbitrators) and examines some important and also relevant aspects on the topic (e.g. consumer protection laws, anti-trust laws). Even in this chapter, the comparative approach shines through and proves the ability of the candidate to systemize, deduct and build conclusions in a very individual and genuine way.

The critical remarks, therefore, derive from a wide scope of discussion and, therefore, the conclusions and recommendations built on the criticism are well-grounded and potentially useful for any further developments in international commercial arbitration.

Debrecen, 31 July 2024

Dr. Tamás Fézer, PhD

supervisor

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LIST OF ABBREVIATIONS

&	*and*
etc.	*etcetera*
ADR	*Alternate Dispute Resolution*
B2B	*Business-to-Business*
B2C	*Business-to-Consumer*
BIT	*Bilateral Investment Treaty*
BJC	*Belgian Judicial Code*
CEPANI	*Belgian Center for Arbitration and Mediation*
CISG	*United Nations Convention on Contracts for the International Sale of Goods*
CPC	*Federal Swiss Code of Civil Procedure*
CPL	*Civil Procedure Law of the People's Republic of China 1991*
EC	*Treaty establishing the European Economic Community, Treaty of Rome*
ECJ	*European Court of Justice*
ECOSOC	*United Nations Economic and Social Council*
EU	*European Union*
FAA	*Federal Arbitration Act*
FDI	*Foreign Direct Investment*
FSIA	*Foreign Sovereign Immunities Act*
IBA	*International Bar Association*
ICC	*International Chamber of Commerce*
ICJ	*International Court of Justice*
ICSID	*International Center for Settlement of Investment Disputes*
ILA	*International Law Association*
IMF	*International Monetary Fund*
LCIA	*London Court of International Arbitration*
PILA	*Swiss Private International Law Act*
SCIA	*Swiss Chambers Arbitration Institution*
TEC	*Treaty Establishing the European Community*
TEU	*Treaty on European Union*

TFEU	*Treaty on the Functioning of the European Union*
U.S.C.	*United States Code*
UK	*United Kingdom*
UN	*United Nations*
UNCITRAL	*United Nations Commission on International Trade Law*
UNGA	*United Nations General Assembly*
US	*United States*
v.	*versus*
WIPO	*World Intellectual Property Organization*
ZPO	*Zivilprozessordnung (German Code of Civil Procedure)*

1. INTRODUCTION

1.1. Aim of the Research

The dissertation is conducted to examine the concept of *International Commercial Arbitration* in various jurisdictions and develop an understanding of its enforceability and applicability, and the use of *public policy* defense in recognition and enforcement of arbitral awards. Thus, to fulfill the said purpose, the main purpose of this research is: i) to examine the arbitration laws in different legal systems (Asia, Europe, and America) especially focusing on the enforcement and recognition of arbitral awards and draw a comparative study, ii) to study various case studies in international commercial arbitration and analyze the problems faced in the Recognition and Enforcement of International arbitral awards, iii) detailed study of public policy defense implications with the help of various case laws and text materials to identify its crucial main points since arbitration policies on the concept of public policy have not been fully researched and its consequences remain in the realm of the unknown, and iv) to identify the crucial main points of research, its purpose, and its findings, which could guide the development of the structure of the dissertation. To verify the above aims, the dissertation addresses the following five research questions and hypotheses:

1. Does the enforceability and applicability of international commercial arbitration differ significantly across legal systems in Asia, Europe, and America?
2. Is the recognition and enforcement of International arbitral awards often hindered by various challenges, including differences in legal systems, cultural differences, and jurisdictional conflicts?
3. Is public policy defense a crucial concept in international commercial arbitration and has a significant impact on the enforceability and applicability of arbitral awards?
4. Does comparative analysis of international commercial arbitration laws across legal systems provide insights into best practices and areas for improvement in the recognition and enforcement of arbitral awards?
5. Is the use of international commercial arbitration as a means of dispute resolution likely to continue to increase due to its flexibility and efficiency, despite ongoing challenges related to recognition and enforcement?

1.2. Methodology and Research Structure

1.2.1. Research Design

a) Qualitative Research: The Author has conducted qualitative research to gather in-depth information and understand the concept of international commercial arbitration in different legal systems.
b) Comparative Research: Comparative research is also conducted to examine the arbitration laws in different legal systems (Asia, Europe, and America) with a specific focus on the enforcement and recognition of arbitral awards. The study focuses on some Asian, European, and American jurisdictions placing the concept of public policy into the center. The definition of public policy is broad and is interpreted differently in every jurisdiction. Due to the pervasive nature of international commercial transactions, it is important to understand the different laws, cultures, and economies to make fair and effective decisions. By examining the concept of public policy with broad geographical coverage, the Author aims to understand specific challenges and opportunities that arise while enforcement and recognition of arbitral awards, contributing to a more effective and universally applicable framework for resolving cross-border commercial disputes. The Author has applied comparative methodology by studying various case studies and legislations to compare legal systems.
c) Case Studies: The Author has analyzed various case studies from diverse forums, including national courts, arbitration forums, the European Court of Justice, and the International Center for Settlement of Investment Disputes, to identify the problems faced in the recognition and enforcement of international arbitral awards, and to develop a detailed study of public policy defense implications.

1.2.2. Data Collection

a) Primary Data: The Author has collected primary data through a thorough review of relevant works of literature, including books, academic journals, research papers, case laws, precedents, statutory interpretations, and customary laws from various jurisdictions necessary for the research. For the Author to evaluate the judgments on the definition of the word ‘public policy,’ it was also necessary to analyze domestic

and international legislations on arbitration to understand how this notion is defined and what socioeconomic and political variables may have impacted the decision. Therefore, the Author used traditional research methods to provide structure and developed approaches from primary sources to critically assess the arbitration practices. To understand the concept broadly and to attain critical analysis and results, the Author has also used and examined other relevant primary sources such as legislations, arbitration rules and institutions, textbooks, reference manuals, articles in periodicals, and various treaties and conventions.

b) Secondary Data: The Author has collected secondary data from online databases and repositories such as LexisNexis, Westlaw, and HeinOnline.

1.2.3. Sampling

a) The Author has done purposive sampling to select cases and jurisdictions for analysis based on the relevance to the research questions.

1.2.4. Data Analysis

a) Thematic analysis: The Author has analyzed collected data using a thematic analysis approach, which involves identifying key themes and patterns across the data set.
b) Comparative study: The use of comparative study involved identifying similarities and differences in the arbitration laws of different legal systems.
c) Case Studies: The Author has analyzed case studies to identify the problems faced in the Recognition and Enforcement of International arbitral awards, and to develop a detailed study of public policy defense and its implications.

1.2.5. Limitations

With a focus on a few chosen jurisdictions, this dissertation has presented a comparative analysis of the defense of public policy in the recognition and execution of arbitral rulings on those jurisdictions. Although the study offers insightful information, it is crucial to recognize its limits:

1.2.5.1.Data Limitations

The Author's research is limited to the available literature and case studies, which may not be comprehensive or fully representative of all jurisdictions and legal systems. The United States, some European jurisdictions, and Asia (India and China) are among the selected jurisdictions the study focuses on. Future studies might broaden this study to consolidate more ranges and create economies, giving us a more complete picture of global arbitration patterns.[1]

1.2.5.2.Oversimplification of Legal Systems

The research may bias the differences within the legal frameworks since each one is complex and influenced by many different external factors. Other factors, such as the political and economic environment which might impact the recognition and enforcement of international commercial arbitration are not taken into consideration. The recognition and enforcement of arbitral decisions may furthermore be more impacted by other components, such as the capability of the arbitral institutions, the arbitral process, and the ability of the arbitrators.[2]

1.2.5.3.Language Barriers

The research is also limited by language barriers, as the Author is proficient in English and may not be able to access or analyze materials in other languages.

1.2.5.4.Impact of Cultural Differences

The investigation does not particularly look at how cultural differences influence on recognition of arbitral rulings. Cultural differences might influence how laws are interpreted and how prepared courts are to maintain arbitral decisions. For example, certain countries can be less willing to maintain arbitral awards that concern fundamental rights or that would harm the public's belief within the legal framework.[3]

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[1] Drahozal, Christopher R. "Empirical findings on international arbitration: An overview." (2016).
[2] Charlottin, D., Leonor Díaz-Cordova, and Lucy Greenwood. "Noises Off: Towards Greater Consistency in International Arbitration Awards." *Journal of International Arbitration* 2 (2022): 213.
[3] Yiannibas, Katerina, 2018.

1.2.5.5.Delay and Frustration

An arbitral judgment can be delayed or prevented from being enforced by using the public policy defense as a defense. The effect of this approach on the efficiency of international commercial arbitration is not quantified, nevertheless, future studies might go deeper into this problem and offer suggestions for how to lessen its impact.[4]

1.2.5.6.Suitability of Arbitration

At last, the study observes that although there are numerous points of interest to international commercial arbitration, not all sorts of conflicts or parties may be suitable for it. It does not, despite that, provide specific occurrences where arbitration would not be reasonable. Future studies might go more profound into this subject and encourage parties on whether to deliberate about arbitration and when to explore alternative dispute resolution strategies.[5]

1.3. Relevance and Scope of the Research

The concept of arbitration has slowly evolved as a method to settle disputes outside of courts. With increasing business transactions at national and international levels, today, arbitration is one of the most sought-after dispute resolution mechanisms and is legally binding upon parties. It allows parties to resolve disputes by independent arbitrators which makes it a neutral process.[6]

The dissertation focuses on the defense of *public policy* in recognition and enforcement of arbitral awards, which is becoming increasingly important in the context of international trade and investment disputes. In general language, public policy refers to a set of guidelines that are considered fundamental to society and reflected in rules and regulations. However, public policy serves as a restraint for the recognition and enforcement of an arbitral award and can be used to set aside an award that violates public policy. There are instances when

[4] Charlottin, D., Leonor Díaz-Cordova, and Lucy Greenwood, 2022.
[5] Zhao, Mary. "Transparency in international commercial arbitration: adopting a balanced approach." *Va. J. Int'l L.* 59 (2019): 175.
[6] Tresham, Jessica, et al. “Why Is Arbitration so Popular in Cross-Border Disputes?” *Womble Bond Dickinson*, 9 Feb. 2023, www.womblebonddickinson.com/uk/insights/articles-and-briefings/why-arbitration-so-popular-cross-border-disputes.

the losing party refuses to comply after the arbitral tribunal has issued an arbitral award, and the winning party seeks enforcement in the local court in which the losing party is situated. In contrast, the enforceability of the award is rejected on the grounds of violation of the public policy of that country.[7] The lack of enforcement of arbitral awards may lead to complex issues, calling for effective strategies ahead of time.[8] Thus, it is critical to inspect the effective approaches that can be employed to avoid complex issues related to the lack of enforcement of arbitral awards.

The defense of public policy has been widely interpreted across the world and due to its dynamic nature, it is always evolving with society's values and changing beliefs.[9] Therefore, the analysis of public policy defense in arbitration cases must keep pace with ongoing changes in society and not violate the fundamental principles of morality and justice.[10] The study of the defense of public policy helps us to understand the limitations of an arbitrator's power and the prospective concerns of violating public policy during the enforcement of arbitral awards, which may help the parties to create better arbitration agreements and evade disputes that could lead to unenforceable arbitral awards. The study will promote greater consistency in international commercial arbitration decisions and build parties' confidence in the international arbitration practice.

1.4. Structure of the Dissertation

This dissertation aims to explore the defense of public policy as a ground for refusal and enforcement of arbitral awards. For this purpose, the dissertation is divided into different Chapters. Chapter 1 describes the aims, scope, and relevance of the study about enforceability and applicability and the use of public policy defense in the recognition and enforcement of arbitral awards. It also focuses on the methodology and structure of the dissertation. Chapter 2 of this dissertation focuses on background literature and the history of international commercial arbitration and regulatory frameworks at the international level

[7] Dar, Wasiq Abass. (2015). Understanding public policy as an exception to the enforcement of foreign arbitral awards. European Journal of Comparative Law and Governance, 2(4), 316-350.
[8] Style, Christopher, & Balthasar, Stephan. (2012). Enforcing international arbitral awards: pitfalls and strategies. Dispute Resolution International, 6(1), 3-16.
[9] Gibson, Christopher S. "Arbitration, civilization and public policy: Seeking counterpoise between arbitral autonomy and the public policy defense in view of foreign mandatory public law." *Penn St. L. Rev.* 113 (2008): 1227.
[10] Cremades, Bernardo M., and David JA Cairns. "The brave new world of global arbitration." *The Journal of World Investment & Trade* 3.2 (2002): 173-209.

governing international arbitration. It also throws some light on the core issues in the recognition and enforcement of arbitral awards. Chapter 3 focuses on the definition and concept of public policy and its relationship to the law. The purpose of this Chapter is to describe how public policy is applied in the legal world, particularly in the field of international commercial arbitration. Chapter 4 is the methodological part of the dissertation with a comparative analysis of different jurisdictions approaching the concept of public policy exception. A brief look at the narrow or wide interpretation of public policy and its use for the refusal of arbitral awards is also carried out in this Chapter. This helped the author in analyzing the actual position of these jurisdictions on the subject and identifying gaps and reasons for refusing recognition and enforcement of arbitral awards on the grounds of violation of public policy, as detailed in Chapter 5. Lastly, in Chapter 6, the conclusion is an effort to share the understanding of public policy as an exception to the enforcement of foreign arbitral awards, and its interpretation across different jurisdictions as examined under this study. This Chapter also explores the pro-arbitration and anti-arbitration countries as identified, the conclusion of the hypothesis, and provides recommendations for the practical takeaways for legal practitioners, policymakers, and businesses involved in international commercial arbitration.

1.5. Essential Terminology and Considerations

1.5.1. Arbitration

Arbitration is usually referred to as an alternate dispute resolution (ADR) method. In today's growing world, it has become a standard way of resolving disputes privately by opting out of the court settlement process. Arbitration is a binding procedure and is conducted by the arbitrators which is based on provided rules and regulations in an agreement of a contract signed between parties. The World Intellectual Property Organization (WIPO) defines arbitration as a "procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute".[11] Arbitration can be informal, formal, binding, or non-binding[12], subject to the discretion of the arbitrating

[11] "What Is Arbitration?" *WIPO*, www.wipo.int/amc/en/arbitration/what-is-arb.html. Accessed 12 Jan. 2023.
[12] Main, Thomas O. "Arbitration, What Is It Good For." Nevada Law Journal, vol. 18, no. 2, Winter 2018, pp. 457-476. HeinOnline.

parties. Article 33 of the United Nations (UN) Charter also identifies arbitration as a mode of dispute resolution to preserve international peace and security.[13] Different jurisdictions have adopted mandatory arbitration rules for dispute resolution which is discussed in later Chapters of this dissertation.

1.5.2. Commercial

International commercial arbitration is not only defined by arbitration, but also whether arbitration is *commercial* or not. There is no strict definition for the term commercial in international arbitration frameworks. However, in a general sense, commercial can be defined as a transaction entered between two or more parties in the course of their business activities, and it usually excludes consumer contracts and other aspects of private law outside the scope of this subject. For example, the Indian Supreme Court defined the term *commercial* as used in the United Nations Commission on International Trade Law (UNCITRAL) Model Law and interpreted it to include all *commercial relationships* in contradiction to relationships of a matrimonial, family, cultural, social, or political nature.[14]

1.5.3. International and Domestic Arbitration

UNCITRAL Model Law defines arbitration as *international* if the parties to an arbitration agreement have their places of business in different countries at the time of the conclusion of that agreement.[15] Sometimes the parties have places of business in more than one country. It may include any location where parties carry out their economic activities.[16] Thus, it is necessary to verify in each specific case based on the applicable law whether the transaction is international or not.[17] Arbitration is given a *domestic* nature when the arbitration

[13] Article 33 (1), Chapter VI: Pacific Settlement of Disputes of the United Nations Charter, 1945 states that *"The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice".*
[14] Case *R.M. Investment and Trading Co. v. Boeing Co*., A.I.R. 1994 S.C. 1136.
[15] Article 1 (3)(a) of the UNCITRAL Model Law on International Commercial Arbitration (1985).
[16] CLOUT Case 106: CISG, Supreme Court, Austria, 2 Ob 547/93, 10 November 1994.
[17] Cordero-Moss, Giuditta. *International commercial contracts: Applicable sources and enforceability*. Cambridge University Press, 2014.

proceedings take place within one single jurisdiction, and different jurisdictions perceive different notions of domestic arbitration.

1.5.4. Ad Hoc and Institutional Arbitration

The terms of the contract signed between parties dictate the type of arbitration, and arbitration, thus, can be either *institutional* or *ad hoc*. [18] Ad Hoc arbitration is when parties manage all the disputes themselves without the involvement of an arbitral institution. Institutional arbitration is when parties appoint an arbitrator to deal with arbitration proceedings and involve an arbitral body, and the parties to the arbitration must agree in advance regarding the finality and binding nature of the arbitral award. One of the main reasons for parties to choose ad hoc arbitration is that it is less expensive involving limited costs by the parties. However, without the rules of an arbitral institution, the parties may find it difficult to conclude in a friendly manner as there is no permanent structure for arbitration proceedings.

1.5.5. Arbitral Awards

An *arbitral award* is the final decision that is rendered by an arbitration tribunal. The arbitration proceedings end with an arbitral award for the parties who resort to arbitration and are final and binding on the parties to the arbitration. The widely accepted meaning of an *award* is that it is the final decision by the arbitrators, dispositive of the issues in the case.[19] The courts in different jurisdictions have adopted two different methods to determine the meaning of the term *award*. They either refer to the domestic laws of the parties or opt for autonomous interpretation of the word. In most cases, only one award is issued resolving the dispute between parties.

The UNCITRAL Model Law rules assert that "*the award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay*."[20] The International Chamber of Commerce (ICC) Rules also provide for the same. It

[18] Bjork, Charles. "Update: International Commercial Arbitration." *UPDATE: International Commercial Arbitration - GlobaLex*, 2022, www.nyulawglobal.org/globalex/International_Commercial_Arbitration1.html.
[19] Moses, Margaret L. *The principles and practice of international commercial arbitration*. Cambridge University Press, 2017.
[20] Article 35 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

states that "*every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made*".[21] The New York Convention does not define the term *arbitral award*, however, it merely states that the term arbitral award shall "*include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted*".[22] Tribunals may issue certain *orders* and *awards* in the course of arbitral proceedings and an award is the final decision by the arbitral tribunal to solve the dispute, whereas order is the decision by the tribunal as to how an element of the arbitration, or relating to the arbitration, will be addressed.[23] The award can also be partial or interim as well which may be final and binding on the parties. A partial award resolves one or more specific arbitration matters leaving the rest to be resolved in one or more succeeding awards. At the same time, a final award is the principal decision or final decision of the tribunal resolving all residual matters submitted to the tribunal. The award should reflect the opinion of the arbitrator(s), or the majority of the tribunal duly signed by all the arbitrators.[24] It should also include the reasons for the decision and the date and place where the award was issued.[25]

However, some states have different sets of rules and requirements regarding arbitral awards. If an award is made on a foreign land, most jurisdictions treat an award as a foreign award within the meaning of the New York Convention, 1958. However, the situation might be a little different from country to country. Only a marginal number of states are ready to treat their territory where the case simply presents one or more foreign elements.[26] For example, the United States Code on arbitration states that "*an agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with*

[21] Article 35 (6) of the 2021 ICC Rules of Arbitration.
[22] Article I (2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958.
[23] Cole, Tony, et al. "Legal instruments and practice of arbitration in the EU: Study for the JURI committee." *Transnational Dispute Management* 12 (2015).
[24] Article 29 of the UNCITRAL Model Law on International Commercial Arbitration (1985).
[25] Article 31 of the UNCITRAL Model Law on International Commercial Arbitration (1985).
[26] Bermann, George A. "Recognition and Enforcement of Foreign Arbitral Awards: the Application of The New York Convention by National Courts. Questionnaire/Outline for National Reporters." (2014).

one or more foreign states."[27] Even if the award is seated in the same jurisdiction, if it contains some foreign elements, it will be a foreign award.

1.5.6. Public Policy

The term public policy does not hold a specific definition, however, in general terms, it refers to the rules and regulations made in the interest of the public or society. However, when we discuss international commercial arbitration, the definition of public policy has been defined by courts and legislations all over the world and interpreted in many different ways, leading to ambiguity and vagueness while recognizing and enforcing an arbitral award. The International Law Association (ILA) in its *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*[28] (ILA Resolution) has defined public policy in an international context as "*the body of principles and rules recognized by a State, which, by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of said award would entail their violation on account either of the procedure under which it was rendered (procedural international public policy) or of its contents (substantive international public policy).*"[29] To summarize, if procedural or substantive public policy violates the principles of law, it could lead to the refusal of an arbitral award. However, the ILA Resolution also clarifies that only the part that conflicts with public policy should be refused, while the rest should be enforced.[30] The complexities of the concept of public policy are further elaborated in Chapter 3 of this dissertation.

1.6. Conclusion

The concept of international commercial arbitration has seen massive popularity and growth in recent years, and studying the defense of public policy in recognition and enforcement of

[27] 9 U.S.C. §202 (2012): United States Code, Title 9 - Arbitration, Chapter 2 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sec. 202. Agreement or award falling under the Convention.
[28] The ILA Resolution was adopted by the at the 70th Conference held in New Delhi, India (2-6 April 2002). The resolution recognizes the significance of finality in arbitration, and public policy's role in fundamental principles, laws, and international frameworks.
[29] Point 1(d) of Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards.
[30] Point 1(h) of Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards.

arbitral awards is a highly debated topic due to its complex and extensive nature. This Chapter lays the foundation for this dissertation work, focusing on the study objectives, methodology, scope, and relevance of the study and research design, establishing a broad framework for the subsequent Chapters in this dissertation. It is significant to understand the role that public policy defense plays in international commercial arbitration and explore the distinct aspects of public policy in different jurisdictions.

2. LITERATURE REVIEW

2.1. Introduction to International Commercial Arbitration

International commercial arbitration is the fastest-growing alternative dispute settlement method arising out of commercial transactions to avoid the court litigation procedure. With growing trade and globalization, more parties are entering into cross-border agreements and contracts. However, when the parties in an international dispute are not able to impose their jurisdictions and laws on each other, arbitration seems to be an effective solution. However, before the beginning of the arbitral proceedings, the parties have to agree and notify their intention to resort to arbitration. They are free to choose their arbitrator and the place of arbitration. The main question that arises is if a country is a signatory to the convention and if there is any difference between the domestic laws and the international arbitration laws concerning the enforcement of a foreign award. The legal framework applicable to arbitration includes various international treaties and conventions or any other sources of law. Moreover, the courts prove to be expensive, lengthy, and inefficient when it comes to trade disputes. The number of international arbitration cases continues to grow each year and every country has its own arbitration rules and procedures.

To contest the issue related to the enforcement of awards, several countries have entered various international treaties. The enforcement of an award depends on each country's domestic law. However, some various international conventions and treaties lay down rules to standardize the legal environment in which international arbitral agreements and awards are enforced. The ICC promoted a new treaty known as the New York Convention adopted by the United Nations Economic Social Council in 1958. It focused on the recognition and enforcement of foreign arbitral awards. The UN Commission in 1985 framed a model for regulating international arbitration known as the UNCITRAL. This framework is not binding on states, but the states may adopt the rules and regulations of this model in their domestic laws. The parties have the freedom to choose their governing laws in case any dispute arises. Around a similar time, the European Convention on International Commercial Arbitration was adopted in 1961 in Europe to deal with the same issues. The arbitrators are required to apply the correct substantive and procedural law and interpret the arbitration agreement to furnish an enforceable award. The conventions reflect the common goals of European, American, and Asian countries to enforce arbitration awards. Arbitration has been used for

centuries and has become practical and time-sensitive over time. And by ratifying these international conventions, the signatory countries become obligated to resolve any disputes in connection with arbitration agreements in accordance with the international frameworks, however, the rules remain flexible and supple for the parties in arbitration. The award passed by the arbitration tribunal is subject to recognition and enforcement in the losing party's jurisdiction. However, the process is different in every country and, thus, gives a completely mixed result altogether.

2.2. International Regulatory Frameworks on Arbitration

2.2.1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (The "New York" Convention 1958)

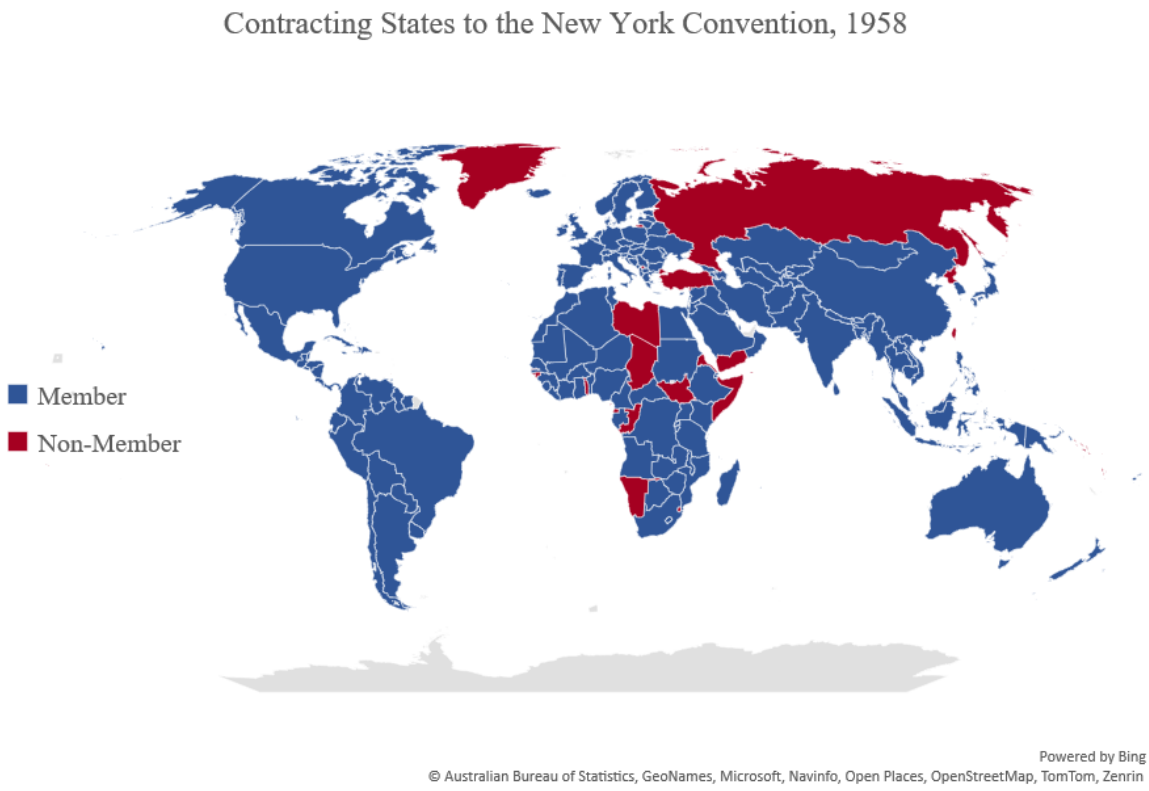

Figure 1: Contracting States to the New York Convention, 1958

The New York Convention was the result of dissatisfaction with the previously established Geneva Protocol on Arbitration Clauses, 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 which had some serious deficiencies. Therefore, the ICC took the initiative to replace these treaties and issued a draft convention in 1953 to formulate new arbitration rules and procedures in line with the growing trade and economy. In 1955,

the United Nations Economic and Social Council (ECOSOC) produced an amended draft convention which was discussed during a United Nations Conference in 1958. This led to the establishment of the New York Convention. At present, 172 contracting states ratified this convention.[31] The interest in arbitration was increasing at a breakneck pace, changing significantly. There is a phenomenon as *international commercial arbitration* with a tendency towards uniform rules that has continued to grow over time.[32] The main aim of the Convention is to abolish discrimination in foreign as well as non-domestic arbitral awards. It puts an obligation on contracting states to ensure proper recognition and enforcement of awards in their jurisdiction in the same way domestic awards are enforced. The Court has to refer the case to arbitration at the request of one of the parties, where the parties have made an arbitration agreement provided the agreement must be in writing.[33]

2.2.2. European Convention on International Commercial Arbitration, 1961

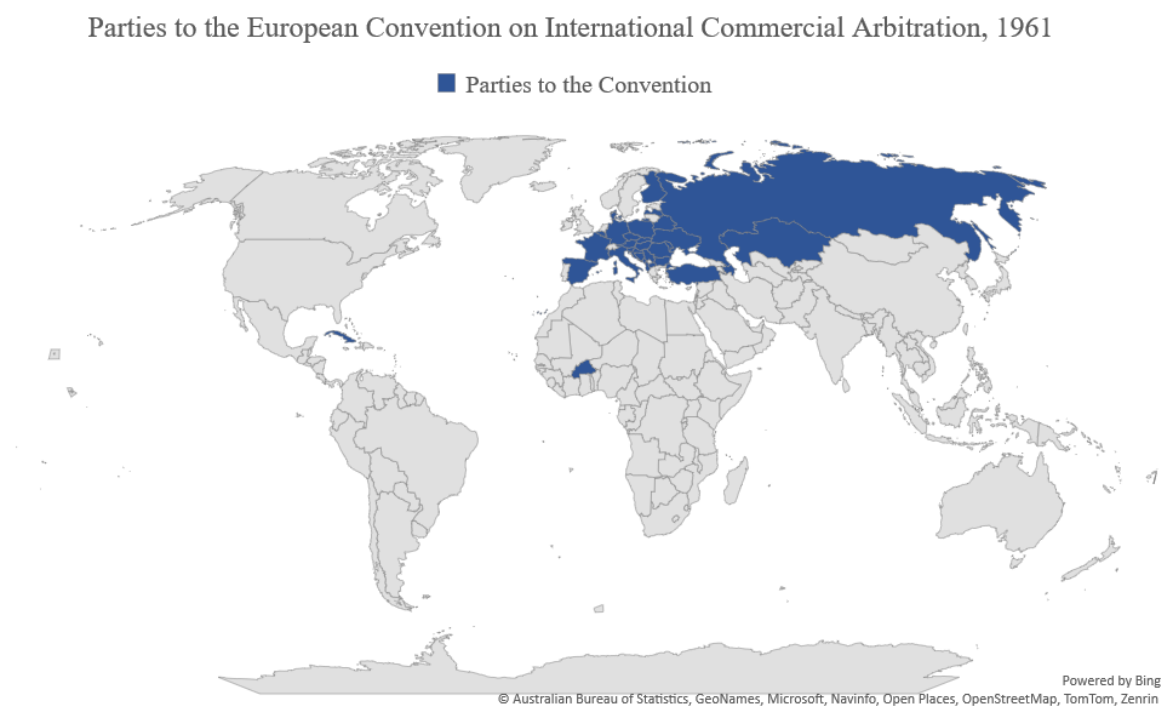

Figure 2: Parties to the European Convention on International Commercial Arbitration, 1961

Soon after the New York Convention was enforced, the European Convention came into the big picture. This was the first convention to mention *International Commercial Arbitration*

[31] "Contacting States » New York Convention." *New York Arbitration Convention*, www.newyorkconvention.org/countries. Accessed 08 Dec. 2023
[32] Bergsten, Eric E. *Dispute settlement: International commercial arbitration*. UN, 2005.
[33] Article II (3) of the New York Convention, 1958.

in its title name. The convention was signed on April 21, 1961, in Geneva at the UN meeting. It brought a change in attitude towards international arbitration in Europe with 31 parties to the convention. The European countries are in charge of the rules for arbitration procedure; however, those rules should recognize the exceptional requirements for international commercial arbitration in which one or both the parties are foreign.

2.2.3. UNCITRAL Arbitration Rules and Model Law on International Commercial Arbitration

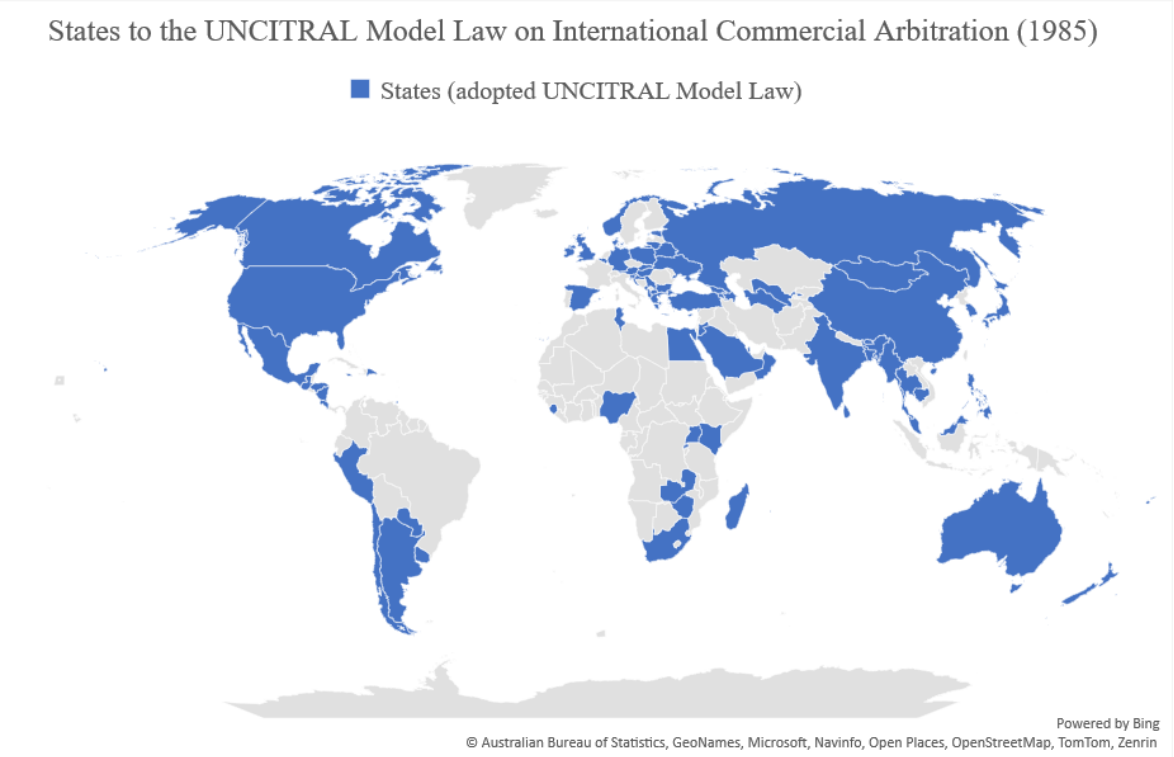

Figure 3: States to the UNCITRAL Model Law on International Commercial Arbitration (1985)

The United Nations Commission on International Trade Law adopted the UNCITRAL Arbitration Rules in 1976. These rules were specifically made to deal with ad hoc arbitrations. Soon these rules were used by various arbitration institutions as well with suitable changes. These rules provide a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their *commercial relationship* and are widely used in *ad hoc* arbitrations as well as administered arbitrations.[34]

[34] "UNCITRAL Arbitration Rules Commission on International Trade Law." *United Nations Commission On International Trade Law*, United Nations, uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration. Accessed 08 Dec. 2023.

The Rules were revised in 2010 and 2013 by the Commission to improve the efficiency of arbitration proceedings as per the changing needs without altering its basic motive. The UNCITRAL Model Law on International Commercial Arbitration was adopted in 1985, soon after the Arbitration Rules were established. The UNCITRAL Model Law is non-binding upon parties; however, the parties have to incorporate its provisions into their domestic laws. It covers all stages of arbitration proceedings and reflects the main aspects of arbitration laws widely accepted by the different states in the world.

The UNCITRAL Model Law was amended in 2006 to stay in conformity with international commercial practices. The UNCITRAL Model Law states that the parties must be treated with equality and each party should be given a fair and full opportunity to present his case before the arbitral tribunal.[35] They have the freedom to agree on procedures to be followed during arbitral proceedings. At present, the Model Law has been adopted in 89 States in their legislation.[36] The difference between UNCITRAL Arbitration Rules and UNCITRAL Model Law is that "*the UNCITRAL Model Law provides a pattern that lawmakers in national governments can adopt as part of their domestic legislation on arbitration. The UNCITRAL Arbitration Rules, on the other hand, are selected by parties either as part of their contract or after a dispute arises; to govern the conduct of arbitration intended to resolve a dispute or disputes between themselves.*"[37] That means that the Arbitration Rules are directed at the parties whereas, the UNCITRAL Model Law deals with the States. UNCITRAL strives to build on the success of the New York Convention by promoting such uniform and effective application of the Convention.[38]

[35] Article 18 of the UNCITRAL Model Law on International Commercial Arbitration (1985) states that "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".
[36] "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006 Commission on International Trade Law." *United Nations*, uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status. Accessed 14 Jan. 2024.
[37] "Frequently Asked Questions - Arbitration." *United Nations Commission On International Trade Law*, United Nations, uncitral.un.org/en/texts/arbitration/faq. Accessed 18 Dec. 2023.
[38] "Presentation - Guide - NYCG 1958." *1958 New York Convention Guide*, newyorkconvention1958.org/index.php?lvl=cmspage&pageid=10&menu=729&opac_view=-1. Accessed 19 Dec. 2023.

2.2.4. ICSID Convention / Washington Convention, 1965

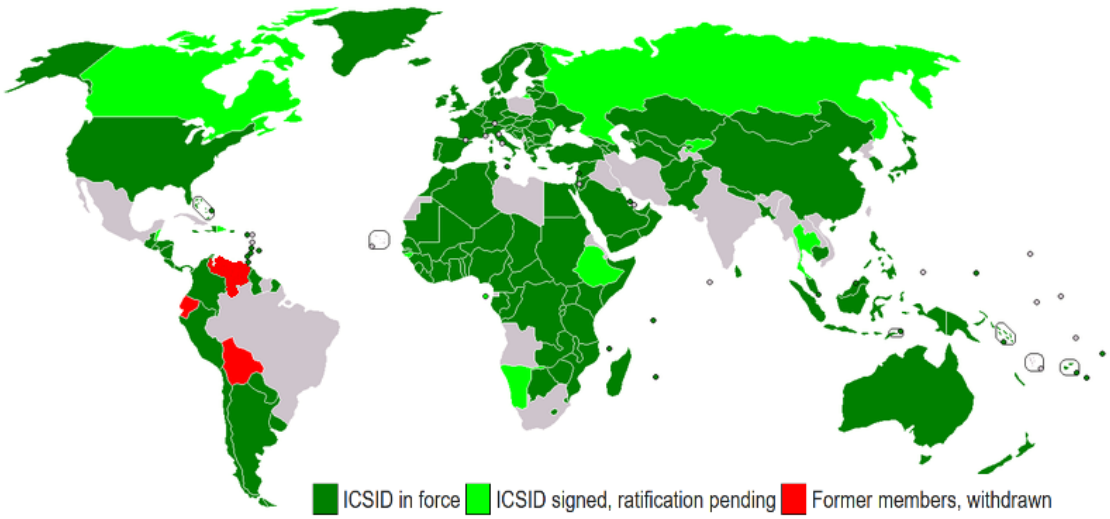

Figure 4: Countries map for International Center for Settlement of Investment Disputes, 1965[39]

The International Center for Settlement of Investment Disputes (ICSID) Convention, also known as the Washington Convention on the Settlement of Investment Disputes between States and Nationals of States, was adopted in 1965. ICSID is an arbitration institution established in Washington D.C. funded by the World Bank. It is a framework for resolving disputes widening the scope of international investments. The Convention is ratified by 153 Contracting States at present.[40] However, countries with big economies such as South Africa, India, and Brazil refrain from participating in the ICSID Convention. Since 2000, India has never supported participating in the ICSID Convention asserting that the ICSID arbitration rules favor developed nations and there is an absence of judicial review of the award even if it violates India's public policy. India's concerns were addressed by ICSID, nonetheless, India's reluctance to alter its ICSID position remains unexplained.[41] Brazil also consciously opted out of the ICSDS Convention and enforced its own model investment treaty emphasizing dispute resolution.[42] South Africa decided to oppose ICSID proceedings after the case of *Piero Foresti, Laura de Carli v. Republic of South Africa*[43], leading to the termination of European Bilateral Investment Treaties and the enacted the Protection of

[39] Pierre0090. *Countries map for International Centre for Settlement of Investment Disputes*. 5 Aug. 2012. *Wikimedia*, https://commons.wikimedia.org/w/index.php?curid=20545646.
[40] "ICSID Convention." *ICSID*, icsid.worldbank.org/resources/rules-and-regulations/convention/overview. Accessed 8 Jan. 2024.
[41] Vidyarthi, Abhisar. "Revisiting India's Position to Not Join the ICSID Convention." *Obtenido de Kluwer Arbitration Blog: http://arbitrationblog. kluwerarbitration. com/2020/08/02/revisiting-indias-position-to-not-join-the-icsid-convention*. 2020.
[42] Vidigal, Geraldo, and Beatriz Stevens. "Brazil's new model of dispute settlement for investment: return to the past or alternative for the future?." *The Journal of World Investment & Trade* 19.3 (2018): 475-512.
[43] Case *Piero Foresti, Laura de Carli and others v. Republic of South Africa*, ICSID Case No. ARB(AF)/07/1.

Investment Act 22 of 2015, which mandates exhaustion of domestic remedies before consenting to international arbitral proceedings.[44] The main purpose of the ICSID Convention was to promote cross-border investments in States. During arbitration proceedings, there is no intervention of domestic courts. ICSID is independent of any local court or State. The awards passed by ICSID are "*binding on the parties and not subject to any other appeal or to any other remedy*."[45] It was the beginning of Investment arbitration as a special form of arbitration under the ICSID Convention, of 1965.

2.3. Advantages and Disadvantages of Arbitration

The popularity of using international commercial arbitration has increased over the years over any other forms of dispute resolution. There are many reasons for parties to choose arbitration rather than choosing litigation. Some of the most import

2.3.1. Neutrality and Confidentiality

The litigation procedure is often public whereas in arbitration the proceedings can be confidential at the request of the parties. Many companies want dispute procedures to be confidential as they do not want to reveal information about their company and its business operations, any kinds of disputes it engages in as they do not want a potentially negative result of a dispute to become public[46]. The English Court in *Hassner Insurance Co of Israel v. Stuart J Mew*[47] stated that "*if there is at least an implied term in every agreement to arbitrate that the hearing shall be in private*," persons not involved in arbitration will not be admitted during arbitration proceedings. This must be mentioned in the documents which are "*created for that hearing*." Parties are free to choose their Arbitrator which is an independent and neutral person. It is important to choose arbitrators in odd numbers. It is advantageous in technical cases as parties can define the qualifications of arbitrators with expertise. The arbitrators appointed are expected to spend more time on a dispute than judges can usually do. This helps in delivering high-quality judgment in arbitration cases.

[44] Onyema, Emilia. "African participation in the ICSID System: Appointment and disqualification of arbitrators." *ICSID Review-Foreign Investment Law Journal* 34.2 (2019): 365-387.
[45] Article 53 of the ICSID Convention, 1965.
[46] Moses, Margaret L., 2017.
[47] Case *Hassneh Insurance Co of Israel v. Stuart J Mew,* [1993] 2 Lloyd's Rep 243.

2.3.2. Choice of Law

The parties have options in how their dispute is resolved. Unlike litigation, where the choice of governing law is possible but limited by the jurisdiction of the court, arbitration allows parties more flexibility. They can choose the governing law, the seat of arbitration (i.e., the country), and the language in which they wish to conduct arbitration proceedings. International commercial arbitration endows the parties with complete freedom to agree on procedural rules to be followed. Party autonomy is the ultimate power determining the form, structure, system, and other details of the arbitration.[48] The place where arbitration proceedings are held does not predetermine the language of the proceeding. The parties can agree on any most suitable language.

2.3.3. Finality of Award

The award passed is final and binding on the parties. Under the New York Convention, courts are obligated to enforce an award passed by an arbitration tribunal except if there are some serious irregularities or it is outside the integrity of the court, the enforcement of awards cannot be refused by courts. International arbitration awards should be easily enforceable, in the same way as a domestic court judgment. It can be viewed as an advantage or disadvantage. Sometimes, it can be frustrating for parties to not be able to have another appeal or tribunal review to correct a flawed award.

2.3.4. Cost and Time

The arbitration procedure is said to be a more cost-effective and time-saving procedure than the litigation procedure. Sometimes due to the busy schedules of arbitrators or parties from different countries, it may be difficult to schedule hearing dates delaying the whole arbitration procedure. However, in terms of cost, it is not always the same. The arbitration proceedings might cost more in real practice. It might be less expensive where the arbitrations can be held quickly and fast as compared to court procedures. However, in the

[48] Kartuzov, Mikhail. "Advantages and Disadvantages of International Commercial Arbitration in comparison to Litigation and other means of dispute resolution." *Evropský politický a právní diskurz* 3 (2015): 64-68.

case of complex arbitration cases where there are two or three arbitrators involved, the parties have to pay enormous amounts and incur significant other charges. Arbitration is growing into a big global business, with tremendous increases in the volume of disputes and high competition, leading to imbalances in negotiations when one party is much larger than the other. However, to address such financial challenges associated with arbitration, many novel institutions and practices have emerged in recent times, and one such innovation is third-party funding (TPF) in international commercial arbitration.[49]

2.3.5. Challenging an Award

There are certain limitations to challenge the arbitration award. There is no *right to appeal* in arbitration procedures. The award once passed by the tribunal is final and binding upon both parties. Due to the presence of *res judicata*, even when the arbitrator has made a mistake of fact or law, the award cannot be challenged (but there are some exceptions). Also, international arbitration is subject to many layers of rules and regulations which sometimes makes it more complex in structure than litigation procedure.

2.3.6. Limitation on Arbitral Tribunal

The arbitration procedure does not give the tribunal any right to give penal punishments. To seek such sanctions, a party needs to approach the national courts. Also, only the parties who have entered into an arbitration agreement can become the parties in a dispute. Third parties cannot be included in the proceedings. Fast-track hearings are difficult in international commercial arbitration as no arbitration proceeding can be done without a hearing. Because arbitral tribunals lack *imperium* or coercive power, their procedural orders are inevitably less effective than those of courts and may have to be enforced through a separate court order.[50]

Despite these disadvantages, arbitration remains the most fashionable way of resolving commercial disputes at the international level. It offers some advantages over the litigation

[49] De Boulle, Thibault. "Third-Party funding in international commercial arbitration." *Ghent University* (2014).
[50] Kotuby, Charles. "Proskauer on International Litigation and Arbitration: A Review." *Conflict of Laws*, Charles Kotuby https://conflictoflaws.net/News/2020/08/CoL_Banner-1.png, 10 Oct. 2007, conflictoflaws.net/2007/proskauer-on-international-litigation-and-arbitration-a-review/.

process; however, these disadvantages should also be taken into account by parties while entering into any arbitration agreement.

2.4. Recognition and Enforcement of Arbitral Awards

Recognition and enforcement of arbitral awards is the most important part of the entire process of International Commercial Arbitration.[51] Usually, international commercial arbitration takes place in a neutral country. It is a widespread practice for the winning party to enforce the award in other foreign jurisdictions. The term *recognition of arbitral award* in the arbitration process makes it a part of the domestic legal system. It often acts as a defense mechanism and bars re-litigation in the courts. Enforcement is when successful parties seek to obtain the award passed in their favor by the arbitrator. When the losing party does not comply, the parties can seek assistance under various International Conventions like the New York Convention.

Arbitration cannot be said to be successful if the award is not enforced. The winning party needs to enforce it. If the award given by the Tribunal is unenforceable, the time and money that parties invest go in vain. The New York Convention of 1958 largely shaped the international enforcement of awards. The United States Federal Arbitration Act of 1926 (FAA) provides that the court "*shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the awards specified in the New York Convention.*"[52] The enforcement procedure of this Convention does not apply to those arbitral awards that have already been converted into judgment by other foreign courts. It is done to avoid duplication of cases in litigation and arbitration courts.

Proper recognition and enforcement of arbitral awards serve both as a means of ensuring the efficiency of the arbitral procedure and also as a main factor favoring the use of arbitration in preference to other modes of dispute resolution.[53] For a dispute to be arbitrable, the agreement to arbitrate i) objective arbitrability, must relate to a subject matter that is suitable

[51] Case *Comandate Marine Corp v. Pan Australia Shipping Pty Ltd.*, [2006] FCAFC 192; 157 FCR 45; 238 ALR 457 ordered an efficient dispute resolution mechanism leading to an enforceable award or judgment by an adjudicator, is an essential underpinning of commerce.
[52] 9 U.S.C. §207 (2012): United States Code, Title 9 - Arbitration, Chapter 2 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Sec. 207 - Award of arbitrators; confirmation; jurisdiction; proceeding.
[53] Teitelbaum, Ruth M. "The Leading Arbitrators' Guide to International Arbitration edited by Lawrence W. Newmanand and Richard D. Hill." (2009): 143-156.

for the resolution of a dispute and, ii) subjective arbitrability, involves parties who are entitled to submit their disputes to arbitration.[54] A series of cases in various jurisdictions have shown that, in general practice, the courts favor local laws more than international laws. The real problem lies when the host countries in which enforcement and recognition of an award are sought, treat foreign arbitral awards as a *domestic award* enforced in the same manner. Even after the award is made binding upon both parties, in the end, the parties may reach a compromise settlement. A party that is aggrieved by the award will take better initiatives to challenge it as soon as possible and get it enforced in its favor. However, the conflicting jurisdictional laws of the countries and different interpretations of judges make it difficult. Balancing laws is necessary to maintain harmony and equilibrium between the parties seeking enforcement. The grounds for challenging an award are wider than the scope of enforcement.

2.5. Problems in Recognition and Enforcement of Arbitral Awards

International arbitration is an accessible means of dispute resolution. It has increased with time because of its confidentiality, speedy process, and contractual nature. Most of the parties' resort to arbitration proceedings rather than litigation to avoid court proceedings and to maintain business relationships with the other disputing parties. Despite various International Conventions, the enforcement of foreign awards is a complicated issue within contracting states. Still, many issues complicate the enforcement proceedings.

2.5.1. Application of National Laws and Regulations

The national procedural rules for enforcement of foreign awards vary from one country to another county in several aspects. The national court relates to domestic legal laws which complicate the enforcement of foreign awards. It is difficult for national courts to interpret the provisions of the International Conventions while enforcing an award. It is one of the main reasons which undermines the effectiveness of arbitration as a dispute settlement. The parties enforcing the arbitral award might face difficulties while doing so. The award can be

[54] Cheng, Tai-Heng, and Ivo Entchev. "State incapacity and sovereign immunity in international arbitration." *Singapore Academy of Law Journal* 26 (2014): 942-974.

refused in one country and accepted in another. This is due to different legal jurisdictions and different legal procedures for example civil law and common law legal systems.

2.5.2. Absence of International Center for Arbitration

Foreign companies usually consider foreign locations for International Dispute Resolution rather than India due to the low perception of the legal environment in India. However, the government is taking steps to make this situation better and friendly to deal with international arbitration cases. The arbitral agreements to select governing law and an arbitration forum play a key role in international commercial transactions by providing certainty for the parties involved in that contract. The first international arbitration center has been set up in Mumbai recently. Indian parties make up an estimated 30 percent of the arbitration cases overseen by the Singapore and London International Arbitration Centers[55]. Therefore, it is assumed that the Mumbai Center for International Arbitration will prove to be more cost-effective and less time-consuming for the parties.

Whereas, Europe has many leading international arbitration institutions like the International Chamber of Commerce (Paris), London Court of International Arbitration (London), Permanent Court of Arbitration (Hague), Swiss Chambers Arbitration Institution (Geneva), Vienna International Arbitral Center (Vienna) and many more. Even in America, there is the American Arbitration Association and the International Center for Dispute Resolution (New York). Therefore, where there are no international centers for arbitration, it is difficult for the parties to get the award enforced. The Indian International Arbitration Center was recently established in 2016 and lacks experience in dealing with complicated cases. The parties sometimes have to invest a lot of time and money to approach the international institutions.

[55] "CM Launches India's First International Arbitration Centre." *The Hindu*, 1 Nov. 2016, www.thehindu.com/news/cities/mumbai/CM-launches-India%E2%80%99s-first-international-arbitration-centre/article15476696.ece.

2.5.3. Time Limit

The New York Convention does not prescribe any time limit for enforcement of foreign awards. The time limit depends on the national laws. In America, as specified by the United States FAA, there is a three-year limitation period on the enforcement of foreign arbitration awards. But this does not obstruct the limitation period which is permitted under State laws. Therefore, the winning party may be able to enforce an award in the form of a foreign judgment after the limitation period is over. As per 9 U.S.C. §207, "*Within three years after an arbitral award falling under the [New York] Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.*"[56] Therefore, the courts have viewed this three-year limitation period for awards covered by the New York Convention as mandatory. The Indian Arbitration Act does not prescribe any time limit for the enforcement of arbitral awards. However, High Courts have held that the period of limitation will be the same as that given under the Limitation Act which is three years.[57]

2.5.4. Issues of State Immunity (When State is one party)

As per the Doctrine of State Immunity, a State has complete immunity from the jurisdiction of domestic courts including from the enforcement of judgments and awards.[58] During the past few decades, international commerce has increased significantly. Sovereign states participate actively in international trade business and transactions with private parties. However, enforcement of an arbitral award against the State is a perplexing task as it may be affected by the Immunity of the State where the State is the losing party. While private parties may enter into agreements with the State hoping it will behave like any other commercial partner, it is important to recognize that States will ultimately prioritize their

[56] 9 U.S.C. §207 (2012).
[57] See *Noy Vallesina vs Jindal Drugs Limited,* 2006 (3) ARBLR 510 (Bom). The Bombay High Court held that "the provision for limitation as provided under articles 136 and 137 of the Limitation Act would apply for enforcement of a foreign award under Part II Chapter 1 of the Act".
[58] Cheng, Tai-Heng, and Ivo Entchev, 2014.

interests and sovereignty.[59] Therefore, the parties should be prepared for the possibility that the State will assert its sovereign rights when necessary. However, the State keeps its defense of Sovereignty when it is at stake.

However, ICSID expressly states that a disputing State will not defend sovereign immunity.[60] America adopted the Foreign Sovereign Immunity Act in 1974 and the United Kingdom passed the State Immunity Act in 1978 which established that "*state cannot claim immunity for its commercial activities*." But the question which remains is whether states adhere to these principles or not. Under the European Convention on State Immunity, the convention narrows down the view of enforcing arbitral agreements and states:

> "*Where a Contracting State has agreed in writing to submit to arbitration a dispute which has arisen or may arise out of a civil or commercial matter, that State may not claim immunity from the jurisdiction of a court of another Contracting State on the territory or according to the law of which the arbitration has taken or will take place in proceedings relating to:*
> *(a) the validity or interpretation of the arbitration agreement;*
> *(b) the arbitration procedure;*
> *(c) the setting aside of the award,*
> *unless the arbitration agreement otherwise provides.*"

This sets out the principle for countries to not apply State immunity as a defense. In the case of *Underhill v. Hernandez*[61], the Supreme Court of the United States stated that "*every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory*." The French Court applied the *doctrine of waiver*[62] to waive State's immunity from execution. The Court refused the enforcement of an arbitral award on the defense of State Immunity in the *Creighton v. Qatar*[63] case. The case proved that it is not

[59] Sharma, Rajesh. "Enforcement of Arbitral Awards and Defence of Sovereignty: The Crouching Tiger and the Hidden Dragon." *In March 2010, the Chair of Legal Linguistics, the Legal Linguistics Association of Finland and the University of Lapland hosted a conference on legal linguistics. The focus was on law and language in international partnerships and conflicts. The members of the organizing committee were Professor Tarja Salmi-Tolonen (Chair), Ms Iris Tukiainen and Mr Richard Foley.*. 2011.
[60] Articles 25-27 of the ICSID Convention, 1965.
[61] Case *Underhill v. Hernandez*, 168 US 250 at 252 (1897).
[62] Campbell, Colin P. "Doctrine of Waiver." *Mich. L. Rev.* 3 (1904): 9. Colin P. Campbell defines the Doctrine of Waiver as "*the relinquishment of a right either voluntarily made or imposed by law*."
[63] Case *Creighton Ltd. v. Gov. of the State of Qatar*, 181 F.3d 118 (D.C. Cir. 1999).

always easy when enforcement is sought against the State as "*it may cause diplomatic difficulties and affect relationships between the countries*." In Indian law, state immunity is not a good defense to refuse enforcement of arbitral awards. States do not enjoy this immunity in commercial agreements. In the present scenario, several state-owned entities, foreign states, and the Union of India constitute a mainstream of party litigants in commercial disputes in India. The defense of state immunity is highly disregarded by Indian domestic courts.

The contrary judgments of various courts of the country are frustrating the purpose of arbitration and it has become a threat to international commercial arbitration. With an increase in cross-border disputes, the world is moving towards a new international dispute paradigm. Unfortunately, an award cannot enforce itself. The winning party must take steps to enforce it. When it is enforced, it is deemed to have been also recognized.[64] When a party loses an award, that party is sometimes unwilling to comply with the award. The commercial entities that contract with States or State-owned entities seeking enforcement of an arbitral award, a growing number of arbitral awards face obstacles. It is not always easy when enforcement is sought against the State as it may cause diplomatic difficulties and affect relationships between the countries.

This case is a crucial step in minimizing the impact of sovereign immunities on the arbitration process from the beginning of the arbitration case until the enforcement and recognition of the award. In 1982, Creighton Limited, a Cayman Islands Corporation entered into a contract with the Government of the State of Qatar to build a hospital in Doha, Qatar. The contract required Creighton to maintain an office in Doha and obtain permission for the performance of the contract from a Qatari issuer. The contract stated i) Qatari law was the choice of law, ii) all the payments should be made in Qatari Riyals, and iii) all disputes were to be settled under the ICC Rules of Arbitration and Conciliation.

In 1986, Qatar removed Creighton from the hospital construction site on the pretext of unsatisfactory performance. Following the dispute, Creighton proceeded with arbitration before ICC. Since there was no place of arbitration specified in the contract, ICC decided Paris as the arbitration seat. Both the parties willingly participated in arbitration proceedings and the ICC Paris gave an order in favor of Creighton in 1993. ICC ordered Qatar to pay

[64] Uba, Helen. (2017). CHALLENGES IN THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN NIGERIA.

Creighton a sum of over $8 million including damages, additional fees, and interest. Creighton sought to enforce the award against Qatar by seizing bank accounts held by the Qatari Ministry of Agriculture and Domestic Affairs in France. As a result, Qatar moved before the Tribunal de Grande Instance de Paris and initiated proceedings to lift those seizures on the ground of Immunity from execution. In January 1997, the court lifted the seizures on the grounds of the subject matter of the Agreement. The court believed that the agreement prevented any waiver of Qatar's immunity from execution. In 1998, the Paris Cour d'appel confirmed the decision of the Tribunal de Grande Instance de Paris that there was no waiver of immunity from execution. In 2000, The Cour de Cassation reversed the decision of the Paris Cour d'appel stating that Qatar agreed to ICC arbitration and therefore was deemed to waive its immunity. The assets of Qatar are not immune from attachment. Qatar moved to dismiss the award on several grounds. Meanwhile, Creighton also moved before the District Court of Columbia, United States seeking enforcement of the award. Qatar contested that the US District Court does not have subject matter jurisdiction to hear the case. The two key issues involved in the following arbitration case were:

a) Subject matter jurisdiction, whether Qatar's agreement to arbitrate under ICC has been deemed to waive its immunity or not?

The ICC promoted a new treaty known as the New York Convention adopted by the United Nations Economic Social Council in 1958. Any dispute under the New York Convention and the UNCITRAL Model Law should be capable of settlement by arbitration. The New York Convention provides that "*an arbitral award may be refused recognition and enforcement if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[65] The Supreme Court of the United States stated in a case that such "*questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.*"[66] The Court can refuse the recognition and enforcement of an award based on this principle. In the following case, there must be a basis on which the US District Court enforces an arbitral award; and the state must not enjoy sovereign immunity.

[65] Article V(2)(a) of the New York Convention, 1958.
[66] Case *Moses H. Cone Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 103 S. Ct. 927 (1983).

- *Doctrine of Sovereign Immunity*

The doctrine of state immunity is an important consideration when business corporations are dealing with state-owned entities or foreign states. It is a complex issue as the immunity doctrine is different in every jurisdiction. It means that a sovereign state cannot be compelled to submit to the jurisdiction of another state.

> "*The general rule of immunity of foreign States is recognized by all civilized States but the municipal laws of different States differ considerably in its application. Exceptions recognized by some States are not allowed by others. The laws vary about the conditions upon which the Courts assume jurisdiction in suits before it.*"[67]

According to the traditional view, a sovereign state should not be subject to any dispute resolution system which is not controlled by the state itself, and "*every award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"[68] The Host State "*waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted under this agreement*."[69] Both the United States and France are parties to the New York Convention. The enforcement and recognition of foreign arbitral awards are well established under the New York Convention. It puts an obligation on contracting states to ensure proper recognition and enforcement of awards in their jurisdiction in the same way domestic awards are enforced.

- *Commercial Activity*

The Foreign Sovereign Immunities Act (FSIA) is a codified 28 U.S.C. §1605(a)(2) that allows U.S. district courts to assert jurisdiction over a foreign State in actions based upon:

- a commercial activity carried on in the United States by a foreign state; or

[67] Case *United Arab Republic and anr. v. Mirza Ali Akbar Kashani*, AIR 1962 Cal 387.
[68] Art. 28.6 of the 1998 ICC Rules of Arbitration, Art. 34.6 of the 2012 ICC Rules of Arbitration. Also see, *Walker Intern. Holdings v. Republic of Congo*, 395 F.3d 229 (5th Cir. 2004)
[69] Clause 15 of the ICSID Convention, 1965.

- an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
- an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

Within the meaning of FSIA, when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are commercial.[70] 28 U.S.C. § 1605 gives general exceptions to the jurisdictional immunity of a foreign state:

> "*(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case—*
> *(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except by the terms of the waiver;*
> *(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.*"

The construction work that Creighton undertook to build a hospital in Qatar can be classified as a commercial activity within the scope of FSIA. Even though the construction activity was public, the fact that under FSIA any commercial activity in connection with a commercial activity of the foreign state, the actions of the foreign entity are considered to be private and therefore, come under the scope of the word *commercial*.

b) Personal jurisdiction, is there a *minimum contact* between Qatar and the United States to enforce an award under United States jurisdiction?

Personal jurisdiction is whether a court has power over the person, or an entity being sued. Creighton claims that the court has full jurisdiction over the case, however, for a court to assert personal jurisdiction over the defendant, the defendant must "*have certain minimum*

[70] Case *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160 (1992).

contacts such that the maintenance of the suit does not offend traditional values with fair and substantial justice."[71]

It is well established that "*personal jurisdiction is a constitutional mandate rather than a statutory one*."[72] The Supreme Court has held repeatedly that certain *minimum contacts* must exist between the person and the jurisdiction to be consistent.[73] In the statute's "*findings and declaration of purpose,*" it is asserted that "*states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned.*"[74]

A contract between the parties alone cannot automatically establish sufficient minimum contacts.[75] There are 5 (five) factors to determine whether "*the exercise of personal jurisdiction and to determine whether minimum contacts exist:*

(1) quantity of contacts with the forum state;
(2) the nature and quality of contacts;
(3) the connection of the cause of action;
(4) the interest of the state providing a forum; and
(5) the convenience of the parties."[76]

There is some connection required between the lawsuit and the US, or an express or implied waiver of immunity by the foreign state from jurisdiction. In the following case, Qatar lacks any sort of contact with the US. Necessary contact must exist in between for the court to exercise its jurisdiction. However, Creighton claimed that there exists a minimum contract between the Qatari government and the United States since they entered a construction contract with a US-based company, and the contract provided for ICC arbitration. But as Qatar contested that the contract was entered, executed, and performed in Qatar, and the payment was in Qatari Riyals, there is no direct connection between them and the US.

The US District Court held that the court has subject matter jurisdiction under the New York Convention, however, lacks personal jurisdiction as the contract was made in Qatar. A foreign state is immune from the jurisdiction of U.S. courts unless the suit comes within an

[71] Case *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).
[72] Chamlongrasdr, Dhisadee. *Foreign state immunity and arbitration*. Cameron May, 2007.
[73] Case *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982).
[74] 28 U.S.C. § 1602 (1976): United States Code, Title 28- Judiciary and Judicial Venue, Chapter 97 - Jurisdictional Immunities of Foreign States, Sec. 1602 - Findings and declaration of purpose.
[75] Case *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).
[76] Case *Juelich v. Yamazaki Mazak Optonics Corp*., 682 N.W.2d 565 (Minn. 2004).

exception under the scope of the Foreign Sovereign Immunities Act, of 1976. The applicability of an exception to immunity is a matter of *subject-matter jurisdiction*.

If there is no exception to immunity, a court is not competent to hear the claim and must dismiss the suit. The Court also observed that "*every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.*"[77] The court rejected the jurisdictional claims as "*bootstrap arguments*". It held that:

> "*It is implausible that a defendant in Connecticut who had agreed to arbitrate all disputes in New York, and thereby implicitly waived any objection to personal jurisdiction in a suit brought in New York to enforce the resulting arbitral award… Indeed, to accept such a bootstrap argument, under which the courts in every state would have personal jurisdiction over a defendant who had waived its objection in any one state… It seems to us likewise implausible that Qatar, by agreeing to arbitrate in France, a signatory to a treaty containing a similar reciprocal "recognition and enforcement" clause, should be deemed thereby to have waived its right to challenge personal jurisdiction in the United States*."

Overall, the US District Court has the authority to enforce the arbitral award entered by the French tribunal. By submitting to the jurisdiction of the ICC, the Qatari state had agreed to waive its right to cite immunity in the face of an ICC award. However, Qatar did not agree to submit to the personal jurisdiction of U.S. courts, and it lacked minimum contacts with the U.S. concerning the construction contract.

The decision of *Creighton v. Qatar* set a new precedent defining the scope of the waiver of immunity from execution. It was appreciated for limiting the impact of State Immunities in commercial activities conducted by States or State-owned entities. On the other hand, the decision was criticized by many commentators that the court took an extremely lenient test[78] to determine implied waiver of immunity from execution by submitting it to the ICC arbitration. Soon after this case, the courts in Paris took a very restrictive approach to the scope of general waivers by sovereign States of their immunity from execution. The Court

[77] Article 34(6) of the 2021 ICC Rules of Arbitration.
[78] Chamlongrasdr, Dhisadee, 2007.

observed that "*there was no need to discover an implied waiver*," and expressly waived any right of immunity from execution in general terms.[79] To sign an arbitration clause does not mean that the derogation from the state immunity needs an explicit or implicit waiver. However, it is still unclear whether a State signing an agreement to arbitrate under the ICC arbitration clause waived its immunity from jurisdiction and execution of final awards or not. The method used by the French Court of Cassation, based on an "*interpretation of the State's intention*" and the "*detection of an implicit waiver*," may not be the most appropriate approach to obtain a balanced and stable result.[80]

2.5.5. Annulment and Enforcement

Annulment hinders the enforcement of awards as the court at the seat of arbitration has the power to annul an award made within its jurisdiction. According to the ICSID Convention, the annulment procedure can be used to set aside an award submitted to the convention. The ad hoc committee is authorized to annul the award in these circumstances:

> *[1]* "*The Tribunal was not properly constituted,*
> *[2] The Tribunal manifestly exceeded its powers,*
> *[3] One of the arbitrators was corrupt,*
> *[4] There was a serious departure from a fundamental rule of procedure, and*
> *[5] The award has failed to state the reasons on which it is based.*"[81]

Also, the New York Convention provides for annulment in the Country of the seat. It is a ground for refusal under this Convention. The UNCITRAL Model provides various grounds for this recourse (setting aside an award).[82] But neither the ICSID Convention nor the UNCITRAL Model Law creates a mechanism for appeal to review and challenge the merits

[79] Case *NML Capital Ltd. v. Republic of Argentina*, 189 L. Ed. 2d 234 (2014).
[80] Meyer-Fabre, Nathalie. "Enforcement of Arbitral Awards Against Sovereign States, A New Milestone: Signing ICC Arbitration Clause Entails Waiver of Immunity from Execution Held French Court of Cassation in Creighton v. Qatar." *Mealey's International Arbitration Report* 48 (2000).
[81] Article 52(1) of the ICSID Convention, 1965.
[82] Article 34 of the UNCITRAL Model Law on International Commercial Arbitration (1985).

of the decision by the Tribunal.[83] This system of annulment has resulted in various inconsistent decisions delaying[84] the whole procedure of enforcement.

2.5.6. Subject Matter Not Capable of Settlement through Arbitration

The arbitrability of a dispute concerns the problem of whether a dispute is capable of settlement by arbitration under the applicable law or not. Arbitrability is a term used for *subject matter arbitrability*. The Court can refuse the recognition and enforcement of an award based on this principle. The New York Convention provides that "*an arbitral award may be refused recognition and enforcement if the subject matter of the difference is not capable of settlement by arbitration under the law of that country.*"[85]

The question of *subject matter arbitrability* may arise either at the start of the arbitration proceeding or after it as a challenge to the award or its enforcement. The Court has to examine the agreement to arbitrate to check the subject matter of the dispute and whether it was validly made or not. The U.S. Supreme Court has stated in a case that such "*questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration*."[86] Indian Law does not permit actions of torts (arising out of contracts), criminal proceedings, anti-competition matters, etc. to be tried under arbitration proceedings. However, Employment contracts cannot be referred to arbitration, but director-company disputes are arbitrable matters as no master-servant relationship exists in this case.[87]

The national law is necessary for the enforcement of foreign awards. If foreign awards do not comply with the public policy of the State where enforcement is sought or the subject matter is not arbitrable, it can be denied enforcement of that award. European member states have different legislation on arbitration with different provisions regarding subject matter

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[83] Oseoamen, Clement Erohubie. "Problems of Enforcement of Awards in International Investment Law." *The University of Liverpool* , 2014. *Academia.Edu*, https://www.academia.edu/8447303/Problems_of_enforcement_of_awards_in_International_Investment_law . Accessed 4 Mar. 2020.

[84] See Case *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1. The Case lasted almost a decade because it went through two annulment decisions. Also, See Case *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2 which did not end until seven years.

[85] Article V(2)(a) of the New York Convention, 1958.

[86] Case *Moses H. Cone Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 103 S. Ct. 927 (1983).

[87] See Case *Comed Chemicals Ltd. v. C.N. Ramchand* (ARBITRATION PETITION NO. 17 OF 2007) decided by C.K. THAKKER, J on November 07, 2008.

arbitrability. For example, the arbitration law in Belgium does not recognize labor law, or insurance law as arbitrable matters; however, these matters may be recognized in other member states. Therefore, it is a chaotic situation when enforcement of foreign awards is sought by the winning party as the result might not be the same in different jurisdictions.

2.5.7. Wide Court Interpretation of Public Policy

Public policy is the most widely used ground to avoid enforcement of arbitral awards. It remains a highly debated and controversial topic. The purpose of public policy is to protect the fundamental principles of the society. It can be defined as "*a mechanism that corrects the choice-of-law designation for substantive reasons, namely the defense of the forum's fundamental legal principles and moral values*."[88] However, the application of this ground is based on the interpretation of national courts. Public Policy is "*a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.*"[89] An award can be vacated if it violates public policy, a non-statutory ground under the FAA. Public policy is a non-statutory ground for setting aside an award in the United States because it is not one of the grounds for non-enforcement provided under the FAA.[90] In one of the most controversial Indian judgments *ONGC v. Saw Pipes Limited*[91], the Supreme Court widened the scope of public policy. As a result, more parties will be able to challenge awards on the grounds of public policy. It has opened a backdoor for the losing parties unhappy with the decision passed by Arbitral Tribunals. This was widely criticized as this would flood the Indian courts with claims. The Supreme Court did not exclude foreign awards from the judgment.

Whereas, in the *Eco Swiss Case*[92], the French Court took a narrow view of public policy. The Court refused to set aside the award and stated that "*public policy could be invoked as an exception only in cases where the enforcement of the award would be contrary to the French legal order or would entail the violation of a fundamental rule of law*." The courts

[88] Guedj, Thomas G. "The Theory of the Lois de Police, A Functional Trend in Continental Private International Law—A Comparative Analysis with Modern American Theories." *The American Journal of Comparative Law* 39.4 (1991): 661-697.
[89] Case *Richardson v. Mellish,* (1824) 2 Bing 229, 130 E.R. 294.
[90] Moses, Margaret L., 2017.
[91] Case *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd.,* AIR 2003 SC 2629.
[92] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055.

in America have taken a restrictive approach as well. They have made it clear any interference from the courts should be minimal; the defense of public policy has to be interpreted in a narrow form. As seen in the judgment of *Telenor Mobile Communications v. Storm LLC*[93], the Court paid more focus on the enforcement of foreign awards narrowing the concept of public policy. The Court rejected the argument that "*public policy requires the court to decline to enforce a foreign arbitral award*" where the award colluded with the interest of one of the parties.

However, the Supreme Court of India decided to follow the decision of the *Saw Pipes* case in the *Satyam Case*[94]. The Court held that "*the losing party could bring an independent action in India to set aside a foreign arbitral award on the expanded grounds of public policy*" as set out in the case of Saw Pipes. The same view was taken by the Bombay High Court in the case of *Western Maharashtra Development Corporation Ltd v. Bajaj Auto Ltd*[95]. These cases have misinterpreted the provision of public policy and have contradicted the New York Convention. Therefore, the diversified interpretation of the term public policy may lead to the refusal of enforcement of the arbitral awards as every court in each legal system has its interpretation. Many national courts tend to apply domestic public policy rather than international public policy.

2.6. Political Impacts on International Commercial Arbitration[96]

Political events generally do not have a major impact on international commercial arbitration. However, some high political developments created significant geopolitical uncertainty with emerging challenges to international law and order. Some political events may also impair businesses' confidence in arbitrating in the affected jurisdictions. Brexit is one of such major challenges faced by the European Union with concerns arising mainly from its socioeconomic impacts such as trade barriers, financial institutions, etc. Because of

[93] Case *Telenor Mobile Communications AS v. Storm LLC*, 524 F. Supp. 2d 332 (S.D.N.Y. 2007).
[94] Case *Venture Global Engineering v. Satyam Computer Services,* (2008) S.C.A.L.E. 214.
[95] Case *Western Maharashtra Development Corporation v. Bajaj Auto,* [2010] 154 CompCas 593 (Bom).
[96] This section relies on the findings published in Nirwal, Gauri. "Effect of Brexit on International Commercial Arbitration." *PUBLIC GOODS AND GOVERNANCE* 3.1 (2018): 19-24.

Brexit, there have been many substantial political consequences that have also influenced other aspects such as legal and economic ones.[97]

The English courts have always supported the recognition and enforcement of arbitral awards. London is an established seat of arbitration favored all over the world. The biggest question that arose after Brexit was its long-term impact on the international commercial arbitration community. It however depended on the perception of local courts in EU Member States and to take the risk of disregarding EU law by the United Kingdom (UK) seated arbitral tribunals. London's relationship with international arbitration is reciprocally dependent as well as beneficial on the other hand. The position of the UK is highly competitive currently in international arbitration and its withdrawal from the EU generated many uncertainties and complexities in international law including arbitration and its position post-Brexit.

2.6.1. Effect of Brexit on International Commercial Arbitration

One of the many changes in the European Union is Brexit and the impact has on the choice of law and jurisdiction. It is imperative to consider that the UK remains a signatory to the New York Convention, which provides for the enforcement of arbitral awards across currently 156 jurisdictions, including all EU Member States. However, pre-Brexit, it was doubtful whether an issue may arise at the stage of recognition and enforcement (in an EU Member State) of an award rendered by a London-seated arbitral tribunal overlooking the application of EU law. The jurisdiction clauses designating English courts and parallel proceedings with English courts raised intricate legal questions subject to many uncertainties after an effective Brexit, including:

2.6.1.1. Anti-Suit Injunctions

An anti-suit injunction is an order directing a party to not pursue a legal action in a different jurisdiction. Anti-suit injunctions are used especially in the Common law countries. There are two kinds of anti-suit injunctions:

[97] Iancu, Anca Ioana, and Gheorghe Iancu. "Legal, Political and Economic Implications of Brexit." *Drepturile Omului* (2016): 21.

i. Ordering a party to refrain from commencing or continuing arbitration (Restraining Arbitration proceedings)
ii. Ordering a party to refrain from commencing or continuing proceedings before another State court/ Arbitration court (Restraining Parallel Court Proceedings)

The latter kind is more widely practiced within the European Union. The European Court of Justice (ECJ) has long held that intra-EU anti-suit injunctions are incompatible with European Union law.[98] The decision in the *West Tankers*[99] case meant that under the scope of the Brussels Regulation, an anti-suit injunction could not be granted to restrain proceedings brought in another EU Member State in case of an arbitration proceeding. Nevertheless, in the *West Tankers* case, the Court of Justice did not address any interface between the Brussels I Regulation and the New York Convention.[100] The Brussels I Regulation does not cover arbitration and states that the "*Regulation shall not apply to … arbitration*."[101]

The judgment had significant implications for arbitration in Europe, especially in London since it follows a common law system. The London practitioners consider anti-suit injunctions in favor of arbitration as essential to uphold arbitration agreements with a London seat.[102] As described by Lucy Scott-Moncrieff in her article, "*The City of London is a legal center - not just a financial one', which was a welcome acknowledgment to my chosen profession that London is not just a global financial center - it is a global legal center too... London has the largest concentration of judicial expertise anywhere in the world*."[103] The practitioners of the Civil Law system took an optimistic approach and considered this judgment to be following the EU law.

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[98] Case C-185/07 *Allianz SpA v. West Tankers Inc*., [2009] AC 1138, ECLI:EU:C:2009:69. The Court held that an anti-suit injunction obtained in the English courts against a party who brought court proceedings in Italy in breach of an arbitration agreement was incompatible with EU Law. Similar ECJ ruling in Case C-159/02 *Turner v. Grovit*, [2004] 1 Lloyd's Rep. 216, EU:C:2004:228.

[99] Case C-185/07 *Allianz SpA v. West Tankers Inc*., [2009] AC 1138, ECLI:EU:C:2009:69.

[100] A treaty governing the recognition and enforcement of foreign arbitral awards to which all EU Member States are party.

[101] Article 1(2)(d) of the Brussels I Regulation: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[102] Gaffney, John P. "ECJ in West Tanker Shocker: London Anti-Suit Injunctions Fall Foul of EC Law." *Kluwer Arbitration Blog*, Wolters Kluwer, 12 Feb. 2009, https://arbitrationblog.kluwerarbitration.com/2009/02/12/ecj-in-west-tanker-shocker-london-anti-suit-injunctions-fall-foul-of-ec-law/. Accessed 21 Aug. 2023.

[103] Scott-Moncrieff, Lucy. "Arbitration: What Makes London So Special? - The Law Society." *The Law Society*. https://www.lawsociety.org.uk/news/speeches/arbitration-what-makes-london-so-special/. Accessed 1 Jul. 2018.

Since the UK is no longer a part of the EU, the English courts are not bound by EU jurisdiction or laws leaving a wider scope for London Arbitration courts to grant anti-suit injunctions in respect of arbitration proceedings brought before EU Member State courts. The courts of EU Member States remain prohibited from granting anti-suit injunctions. This might give London an advantage over arbitration seats in the EU such as Paris[104]. The approach of the English courts to arbitration is arguably a far more attractive attribute of London as a seat.[105] However, the return of anti-suit injunctions depend highly on EU-Brexit negotiations.

2.6.1.2. Intra-EU BIT Agreements

The importance of foreign direct investment (FDI) cannot be denied in the economic growth of any country. The provisions for the protection of foreign investment in the EU have reference in various international treaties concluded among the EU member states. International investment can be defined as a complex system of international agreements, multilateral as well as bilateral, which are interrelated to one another.[106] The foundation of the international investment system is the Bilateral Investment Treaty (BIT).[107] The main question that arises post-Brexit is what the UK should do with its existing BITs and how to approach the new investment treaties.

The ECJ in the case of *Slovak Republic v. Achmea B.V.* [108] apprehended that an arbitration clause in the BIT agreement has an "*adverse effect on the autonomy of EU law*" making it incompatible with the European law. The European Commission has taken the clear view that BITs concluded between the EU Member States are contrary to EU law and in 2015 launched infringement proceedings against Austria, the Netherlands, Romania, Slovakia, and Sweden.[109]

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[104] The UK House of Lords in the *West Tankers* case held that the English courts' power to grant anti-injunction suits will give an advantage to London over other Arbitration seats. .

[105] Cannon, Andrew, et al. "Anti-Suit Injunctions and Arbitration Post-Brexit." *Herbert Smith Freehills | Global Law Firm*, 22 Oct. 2023, www.herbertsmithfreehills.com/insights/2016-07/anti-suit-injunctions-and-arbitration-post-brexit.

[106] Juillard, Patrick. "Bilateral investment treaties in the context of investment law." *Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment in South East Europe* 28 (2001): 29.

[107] BIT is an agreement between two countries that sets up rules and regulations for foreign investment in each other's countries.

[108] Case C-284/16 *Slovak Republic v. Achmea B.V.*

[109] Intra-EU bilateral investment treaties (Intra-EU BITs) are agreements between EU Member States establishing the terms and conditions for private investment by nationals and companies of one country in another one.

The European Commission has been gradually seeking to replace intra-EU BITs. With the EU's power over Foreign Investment, the EU Member States are not entitled to negotiate and conclude BIT agreements without the approval of the EU. The European Commission is seeking to replace BITs between all EU and non-EU countries with EU-negotiated investment agreements. The EU has negotiated various free trade and investment agreements with third parties. The UK currently has 12 intra-EU BITs with Bulgaria, the Czech Republic, Croatia, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.[110] The EU's approach of replacing investor-state arbitration with a two-tiered Investment Court System is likely to lose its essence after Brexit. The UK will not be directly bound by the regulations of the EU. There will no longer be any ambiguity regarding the validity of BIT agreements. The UK will regain its powers to negotiate and conclude new BIT agreements and may benefit from these deals. The EU's new policy of eliminating EU BITs could give the UK a competitive advantage over other European Countries after Brexit. From an investor's perspective, Brexit would be a comforting development.

2.6.2. Positive Impact or Negative Impact?

Europe has many well-established seats of arbitration in Paris, Stockholm, and Geneva. Post-Brexit, the competition continues to grow in the global market for dispute resolution. At the moment, English is the most dominating language all over the world. London attracts many cross-border arbitration disputes due to its *lingua franca* English, attracting companies twice as likely to choose English law over other governing laws for international commercial arbitration.[111] Moreover, London attracts many eminent judges and arbitrators. The English courts respect the skilled independence of the arbitration procedures. The English courts will continue to attract the brightest and the finest judges.

[110] "Brexit and Investor-state Dispute Settlement - What Impact Will Brexit Have on Foreign Direct Investment?" *International Arbitration Report Issue 8*, Norton Rose Fulbright, June 2017, nortonrosefulbright.com/-/media/files/nrf/nrfweb/imported/international-arbitration-review---issue-8.pdf?revision=ca56e1c3-6ae0-4a32-91fa-9dfc53e07dba&revision=ca56e1c3-6ae0-4a32-91fa-9dfc53e07dba.

[111] "2010 International Arbitration Survey: Choices in International Arbitration." *Queen Mary University of London, School of International Arbitration*, 2010, https://arbitration.qmul.ac.uk/research/2010/. According to the survey, the most frequently used governing law is English law (40%).

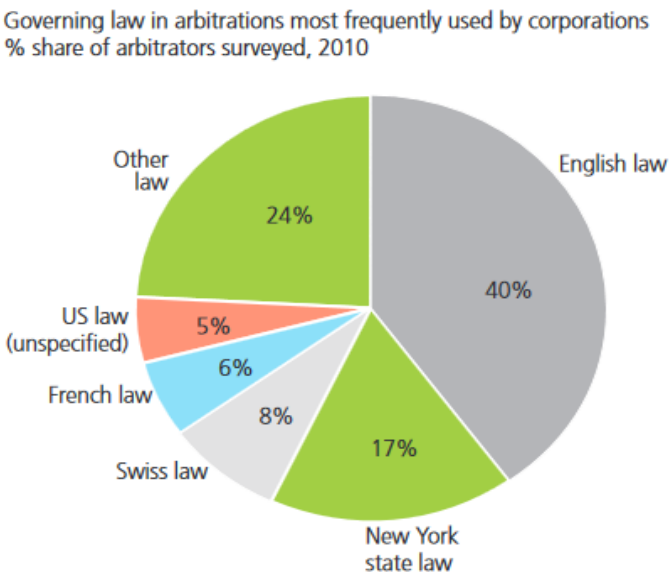

Figure 5. Governing Law in Arbitration Used by Corporations[112]

Pre-Brexit, some commentators argued that London could benefit from Brexit because the city might be perceived as a more *neutral seat* and the English courts would no longer be controlled by the European Court of Justice (ECJ)'s ruling in the *West Tankers* case.[113] According to the 2015 International Arbitration Survey, the five most preferred and widely used seats are London, Paris, Hong Kong, Singapore, and Geneva.[114] The English courts may enable EU-wide anti-suit injunctions. And since many comparable jurisdictions such as Switzerland and France do not have anti-suit injunction protection, London may gain an advantage over other EU-seated arbitration tribunals. However, the return of anti-suit injunctions largely depended on whether the UK chose to remain a party to the Brussels Regulation. By a similar token, the UK may be able to conclude more BITs with third countries with EU limitations which may allow investors to maximize investment trade. However, from 1 January 2021, the rules of jurisdiction as set out in the Brussels Regulation were no longer applicable in the UK.[115]

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[112] "2010 International Arbitration Survey: Choices in International Arbitration." *Queen Mary University of London, School of International Arbitration*, 2010, https://arbitration.qmul.ac.uk/research/2010/. According to the survey, the most frequently used governing law is English law (40%).

[113] Liu,Joe. "Keep Calm and Arbitrate? The Impact of Political Events on International Arbitration." Kluwer Arbitration Blog, Wolters Kluwer, https://arbitrationblog.kluwerarbitration.com/2017/10/11/keep-calm-arbitrate-impact-political-events-international-arbitration/. 11 Oct. 2017.

[114] "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration." *Queen Mary University of London, School of International Arbitration*, 2015, arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

[115] "Rules on Jurisdiction after Brexit." *The Law Society*, 13 Jan. 2021, www.lawsociety.org.uk/topics/brexit/rules-on-jurisdiction-after-brexit.

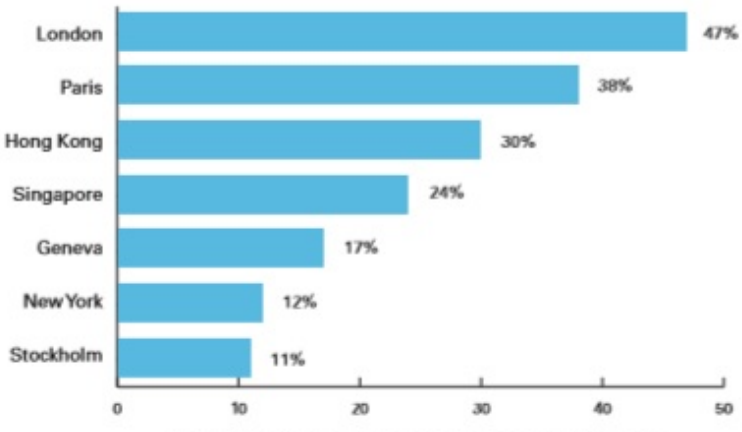

Figure 6. Most Preferred Arbitration Seats (2015 International Arbitration Survey)[116]

Figure 7: Post-Brexit: Most Preferred Arbitration Seats (2021 International Arbitration Survey)[117]

Comparing the pre-Brexit and post-Brexit arbitration survey data, it is evident that there is no impact on London as the most preferred seat of arbitration. The UK is safe and immunized from the impacts of the legal revolution of Brexit the EU is arranging new BITs which could well substitute an increase in foreign investments from the UK. Brexit is not likely to have immediate consequences on arbitration; however, the changes will bring some positive impact on the UK as a seat of arbitration. The New York Convention, 1958 would continue

[116] "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration." *Queen Mary University of London, School of International Arbitration*, 2015, arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.
[117] "2021 International Arbitration Survey: Adapting arbitration to a changing world." *Queen Mary University of London, School of International Arbitration*, 2021, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.

to ensure the recognition and enforcement of arbitral awards in its signatory countries, including the UK as well as the EU Member States.

2.6.3. The Analysis of the Brexit Situation

"*Arbitration appears to be a safe port in the Brexit storm, benefitting from known and certain rules on enforcement of awards under the New York Convention unaffected by Brexit.*"[118]

Arbitration is widely chosen as a cross-border dispute-solving method because of its independent nature and friendly ways. Brexit created many complexities in many areas creating an impact not only on the United Kingdom but also on the European Union. Therefore, it was not possible to analyze the clear impact of legal and political events on international commercial arbitration. It has surprised the entire world and is one of the most important interests politically and economically. However, it established a stronger arbitration system for London since the English courts are arguably the far more attractive attribute of London as an arbitration seat. The parties choosing to arbitrate disputes in London continue to benefit from a *tried and tested* arbitration law and also the jurisprudence of the English courts created under that law.[119] Moreover, the choice of English language remains the language of business, irrespective of the consequences of Brexit.

The UK along with other EU Member States remains a party to the New York Convention of 1958 which has not impacted London as a seat of arbitration in any significant way. It is however difficult to predict the long-term impact of Brexit on international arbitration. The general approach of the UK courts did not change the choice of jurisdiction clause. Pre-Brexit, it was debated that Brexit would hit "*something much more fundamental, namely the tenets of the rule of law that politicians with populist sentiments*" and challenge the arbitration process.[120] While many EU-negotiated agreements address what would happen in case a state joins the EU, however, none addresses the problem of an EU state leaving the European Union. Any arbitration proceedings and judgments commenced before Brexit continue to be recognized and enforced under European Union Rules and Regulations. Brexit

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[118] Parry, Angharad. "London Arbitration: Some Considerations after Brexit." *Lexology*, Twenty Essex, 12 Sept. 2017, www.lexology.com/library/detail.aspx?g=18ed9aff-1311-46c5-8525-de5c438fb5a1.

[119] "2015 International Arbitration Survey: Improvements and Innovations in International Arbitration." *Queen Mary University of London, School of International Arbitration*, 2015, arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

[120] As stated by Sophie Nappert in a convivial debate on Brexit organized by Young ICCA, London on 9 November 2016 on the topic "Young ICCA International Arbitration Debate: What Does Brexit Mean for the Future of International Arbitration in London?". Text available at https://www.youngicca.org/young-icca-international-arbitration-debate-what-does-brexit-mean-future-international-arbitration.

has proved to have positive advantages on arbitration and opportunity growth in this part of the legal sector, however, the UK's smooth transition is a challenge toward the new legal framework post-Brexit. The UK has a right to become a signatory to all the treaties and conventions post-Brexit. The UK does not have a right to enforce laws freely throughout the European Union, however, it was and will remain to be one of the most preferred seats for arbitration and the significance of the political impact on arbitration is not rigorous.

2.7. Conclusion

International commercial arbitration is a popular method of resolving disputes arising from international business transactions. To understand the nature of international arbitration, it is important to recognize various international regulations and frameworks. These frameworks ensure consistency and uniformity in arbitration practices across different jurisdictions. This Chapter sheds some light on some of the most important international regulations and frameworks governing arbitration practices. The New York Convention of 1958 is a crucial framework for aligning the recognition and enforcement of arbitral awards across several jurisdictions. Similarly, the European Convention on International Commercial Arbitration has facilitated the spread of uniform arbitration practices within Europe with many EU member states implementing international frameworks in their local legislations. The UNCITRAL Arbitration Rules and Model Law also showcase the United Nations' function in establishing consistent and uniform international arbitration practices. The ICSID Convention, also known as the Washington Convention of 1965, has played a significant role in investment disputes underlining the diverse nature of arbitration within transnational trades and investments. This facilitates the establishment of the interface between international commercial arbitration and its governing rules, which can make or break an arbitration case. It is, therefore, undisputable, that international commercial arbitration is a dynamic field that is constantly evolving with changing norms and regulations.

3. PUBLIC POLICY[121]

3.1. General Notion of Public Policy

Public Policies are said to be as long standing as governments. To put it simply, whenever, and wherever governments have existed, public policies have been made and implemented. To handle the requirements and diverse predicaments of the population, policies are created; further known as public policies. Public policy is a course of action created and/or enacted, typically by a government, in response to public, real-world problems. Carl Joachim Friedrich, a German-American professor and political theorist was of the opinion that "*public policy is a proposed course of action of a person, group, or government within a given environment providing opportunities and obstacles which the policy was proposed to utilize and overcome to reach a goal.*"[122] From the above definition, public policy is a set of activities the government opts to take when tackling a problem that concerns society as a group, rather than on an individual level. Furthermore, public policy insinuates policies that the government forms on the public's behalf to settle a certain issue. The public policy process is a dynamic and complicated process that occurs through public forums. These policies can be political, economic, cultural, or social. Public policy plays a key role in society as it helps to understand the intentions of the government for a particular sector, or department. Through this, the public can even measure the achievements made by the government to resolve their issues.

Politics plays a critical part in the implementation process since it determines the results of the activities. Woodrow Wilson published an article on *Public Administration* in which he argued for a complete separation of politics and administration. However, the awareness of the degree to which politics influences the administration and the acts done by the administration sparked interest in the execution of public policy. Thus, the concept of public policy and its execution have changed throughout time. Many key significant public policy documents facilitated shaping the modern approach to how policy is formed. The evolution of public policy is marked by the expansion of the power of the people as well as government. After the Second World War, the development of public policy got substantial

[121] This section relies on the findings published in Nirwal, Gauri. "The General Concept of Public Policy and Law." *Acta Univ. Sapientiae: Legal Stud.* 11 (2022): 69.
[122] Friedrich, Carl Joachim. "Public policy and the nature of administrative responsibility." *The Science of Public Policy* (2000).

attention as the analytical approaches to social problems were combined into formal policy processes. The importance of the analytical approach was highlighted by several other disciplines to get a better understanding of the policy-making process, for cognizant decisions. Economists in the 1960s developed many different cost-effective analysis theories as a method of problem-solving. Other related disciplines of social sciences gave additional inputs; and added several other approaches to confront the tribulations through the system approach.[123]

In the 1950s and 1960s, the process of the policy followed a wider policy analysis approach; including political attention by sociologists and economists, centered on the Keynesian Economic Model.[124] Many important historical events like *the War on Poverty*, *the Vietnam War*, *the Watergate Scandal*, and *the Energy Crisis of the 1970s* were first proposed as the events that formed the development of the policy sciences. In case of a lack of tangible results, measurable indicators were considered important, especially during the implementation of a program for professions in social sciences. This dispute led policy analysts to take a more rational approach, which focused on achieving maximum social improvements that surpassed costs. Public policy puts down overall orders, rather than thorough directions. After the lines of action have been determined, specified sub-policies that convert the general theory into a concrete one are required to implement it. It initiates the rudiments of ambiguity and doubtful prediction which establishes the basis of all policy making. It is made and implemented to attain the objectives that the government has thought for the crucial advantage of the people. The reason for the formulation and execution of these policies is for the welfare of the citizens.

The principle of party autonomy is one of the fundamental principles of international commercial arbitration as it allows the parties to choose the governing law and the arbitral rules that will apply to their dispute. However, the principle of party autonomy is subject to limitations, and one of the limitations is public policy. Public policy is the most widely used ground or exception to avoid enforcement of arbitral awards when it comes to international commercial arbitration. The concept of public policy is critical in international commercial arbitration because it provides a framework for assessing whether an arbitral award should be enforced or not. However, it remains a highly debated and controversial topic. The

[123] Mokhaba, Mmori Benjamin. *Outcomes-based education in South Africa since 1994: Policy objectives and implementation complexities*. Diss. University of Pretoria, 2006.
[124] Moran, Michael, Martin Rein, and Robert E. Goodin, eds. *The Oxford handbook of public policy*. Oxford University Press, 2008.

purpose of public policy is to protect the fundamental principles of society. It is defined as "*a mechanism that corrects the choice-of-law designation for substantive reasons, namely the defense of the forum's fundamental legal principles and moral values*."[125] However, the application of this ground is based on the interpretation of national courts. Public policy is always an "*unsafe and treacherous ground for legal decision*"[126]. The prominent role of national courts in international arbitration has been recognized in almost every country, some more than others. Although the researchers utilized a variety of approaches to investigate the nature of public policy, a well-defined conceptual framework for public policy can only be developed through an in-depth examination of the policy implementation process[127] which is critical for comprehending the nature of public policy.

International commercial arbitration is often conducted in a neutral country. It is customary for the prevailing party to seek enforcement of the judgment in other foreign jurisdictions. Enforcement occurs when winning parties attempt to get the arbitrator's award in their favor. When the losing party fails to comply, the parties may seek help under a variety of international conventions, such as the New York Convention. Arbitration cannot be considered successful unless and until the award is enforced. Public policy is one of the New York Convention's grounds for challenging the execution of a foreign arbitral decision. It is mostly tainted by the fact that this defense is incapable of being defined precisely and is entirely reliant on the rules of different nations for applicability and varies by state.

Public policy can be generally defined as a system of laws, regulatory measures, courses of action, and funding priorities concerning a given topic promulgated by a governmental entity or its representatives. The concept of public policy originated as early as the fifteenth century.[128] It reflects a common law origin and initial definitions of public policy focused on acts injurious to the public interest or immoral or illegal actions. Public policy is a concept that is adapted periodically to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions. Courts often refer to *public policy* as the basis of the bar.[129] Thus, if the court feels that such an issue falls within the scope of public policy, it may interfere to protect the interest of the public. Commonly, public policy is used to

[125] Guedj, Thomas G, 1991.
[126] Case *Janson v. Driefontein Consolidated Gold Mines Ltd*., (1902) AC 484, 500.
[127] Van Meter, Donald S., and Carl E. Van Horn. "The policy implementation process: A conceptual framework." *Administration & society* 6.4 (1975): 445-488.
[128] Knight, William Stanley Macbean. "Public policy in English law." *LQ Rev.* 38 (1922): 207.
[129] Shore, Laurence. "Defining 'Arbitrability'." *New York Law Journal* 15 (2009).

describe the authoritative or mandatory rules that parties cannot exploit.[130] It provides a framework for assessing whether an arbitral award should be enforced or not and limits the principle of party autonomy. As the use of arbitration continues to grow, these concerns will likely continue to be the subject of debate and controversy in the legal and political spheres.

3.2. Elements of Public Policy

Although the majority of research on public policy implementation is based on the "*generalized theory of policy implementation*" which confines the concept of policy implementation to a top-down connection, the study recommends that a more democratic approach should be used.[131] This method is effective and is also referred to as the bottom-up technique. The intermediate factors affect the process of policy implementation[132] Due to intermediate factors, the results of government public policy may differ from the policy objective. The researchers anticipate that public policy implementation will be "*dynamic and complex,*" yet a study of public policy implementation instances shows that the degree of complexity may vary.[133] According to the researchers, under certain circumstances, it is conceivable for some factors to have a more complicated impact on the public policy implementation process, thus affecting the efficacy of the policy results.

The researchers identified three drawbacks to the central (top-down) approach to public policy implementation. The first problem that arises when a central method is used to execute public policy is whether top management is clear about its objectives. The second problem is how policy is conveyed from the top to the bottom. The third issue is about the difficulty that the traditional approach to the problem faces since it becomes problematic for the democratic method when input for goal formulation comes directly from top management.

The researchers found three possible explanations for the disconnect between organizational performance and policy results. These include disagreements over facts, values, and

[130] Kossuth, Louis, and P. Sanders. "Transnational (or Truly International) Public Policy and International Arbitration." *Comparative Arbitration Practice and Public Policy in Arbitration, Kluwer Law International* (1987).
[131] DeLeon, Peter, and Linda DeLeon. "What ever happened to policy implementation? An alternative approach." *Journal of public administration research and theory* 12.4 (2002): 467-492.
[132] Hupe, Peter L. "The thesis of incongruent implementation: Revisiting Pressman and Wildavsky." *Public Policy and Administration* 26.1 (2011): 63-80.
[133] Brynard, Petrus. "Policy implementation: Lessons for service delivery." *Journal of public administration* 40.si-3 (2005): 649-664.

policy.[134] According to social exchange theory, if public policymakers fail to achieve a good social exchange because of their actions, they risk being labeled *illegitimate* by the public. Some academics have referred to it as the government's reputational risk or political risk.[135]

Since it works under a variety of social, political, and economic circumstances, the public policy process is said to be "*dynamic in nature*."[136] Policymakers work under a variety of circumstances to provide services to the public. Due to the dynamic nature of public policymaking, it becomes complicated. Consider the time value of money argument, for example. If the value of a policy varies over time, it becomes exceedingly difficult for policymakers to predict its future value, particularly given the qualitative character of the policy. This is often referred to as the subjective risk that policymakers confront as a result of the dynamic character of public policy in a given scenario. The researchers believe that economic feasibility is critical for public policymakers because it allows them to determine the value of a public policy to both the general population and the government. It aids in the decision-making process for the formulation of public policy.[137]

Occasionally, policymakers will continue to use the same old methods in new situations. This results in policy failure, since the process of policy implementation is dynamic, and therefore not every policy will be effective in all circumstances. While public input is critical for making policy decisions, under a central decision-making system, decision-makers often disregard it. This explains the disconnect between governmental policy and popular expectations. Policy analysis is necessary to guarantee that policies are implemented smoothly. The implementation process is entirely responsible for the policy results. The policy results may determine the governments and its activities' legitimacy. A government may be branded illegitimate by the people if it fails to implement a policy. As a result, the government's legitimacy is contingent upon the effectiveness of its public policies.

While through the policy-making process, decision-makers often choose the most cost-effective option when developing a policy.[138] Harold Lasswell is credited with developing

[134] Heath, Robert L., and Michael J. Palenchar. *Strategic issues management: Organizations and public policy challenges*. Sage Publications, 2008.
[135] Power, Michael. "The risk management of everything." *The Journal of Risk Finance* 5.3 (2004): 58-65.
[136] Simon, Christopher A. "policy analysis". *Encyclopedia Britannica*, 31 Oct. 2023, https://www.britannica.com/topic/policy-analysis. Accessed 20 Dec. 2023.
[137] Aven, Terje, and Ortwin Renn. "Improving government policy on risk: Eight key principles." *Reliability engineering & system safety* 176 (2018): 230-241.
[138] Simon, Christopher A., 2023.

the five-stage policy process model.[139] The first step of this procedure is referred to as *agenda setting*. This stage identifies the issues and proposes remedies to them. The second stage is referred to as *policy formulation*, and it is at this step that policymakers examine a collection of workable solutions to a specific issue and eliminate the infeasible ones. At this point, decision-makers often undertake a comprehensive cost-benefit analysis. A decision is only viable if the advantages outweigh the costs. Policymakers who have received training in strategic management tend to limit policy options using a ranking system to find the most viable alternatives. This is the third stage of *decision-making*, during which the government determines the course of action to follow. After that, the tools of public administration are employed to carry out the policy. This fourth step is referred to as *policy implementation*. The fifth step of the public policy process is referred to as the *policy assessment stage*.[140]

Not only is it the government's duty to assess the ability of public policy, but it is also the people's responsibility in a democracy to provide feedback on the execution of public policy. For example, with the advancement of telecommunications technology brought about by the internet and cable, academics have shifted their emphasis to ways to increase public involvement in policymaking. This is sometimes referred to as "*e-democracy*."[141] E-democracy allows the public to use a variety of technologies to give input to the government. This increases the degree of public involvement in the process of developing public policy.

Political scientists conduct four kinds of policy research: substantive area research; evaluation and effect studies; policy process research; and policy design research. The substantive field of study is concerned with policy formulation in a particular area of politics, which may include health, the environment, and others. For instance, the study of social security politics may be considered a substantial area of research.[142] While conducting a thorough examination of policy implementation in the politics of a particular region, the researchers noted that Aaron Widavsky did not define policy analysis.[143] According to the researchers, policy analysis is a multidisciplinary endeavor that may be accomplished via the following four strategies:

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[139] Howlett, Michael, and Sarah Giest. "The policy-making process." *Routledge handbook of public policy*. Routledge, 2012. 17-28.
[140] Howlett, Michael, and Sarah Giest, 2012.
[141] Macintosh, Ann. "Characterizing e-participation in policy-making." *37th Annual Hawaii International Conference on System Sciences, 2004. Proceedings of the*. IEEE, 2004.
[142] Derthick, Martha. "How easy votes on Social Security came to an end." *The public interest* 54 (1979): 94.
[143] Nelson, Barbara J. "Public policy and Administration: an Overview." *A new handbook of political science* (1996): 559-594.

1. Prospective and retrospective analysis: Prospective analysis involves predicting the potential effects of a policy before it is implemented, while retrospective analysis involves evaluating the actual effects of a policy after it has been implemented.[144]

2. Descriptive and normative analysis: Descriptive analysis involves describing and analyzing the current state of a policy or situation, while normative analysis involves evaluating whether the current state is desirable or not.[145]

3. Problem-finding and problem-solving: Problem-finding involves identifying and defining the issues or challenges that a policy is intended to address, while problem-solving involves developing and implementing solutions to those issues or challenges.

4. Segmented and integrated analysis: Segmented analysis involves breaking down a policy into its parts and analyzing each part separately, while integrated analysis involves looking at the policy as a whole and analyzing how the various parts interact with each other.[146]

The approach in which policies are conveyed to the organization's lower levels, particularly the government, influences their execution since the bureaucracy reacts differently when political masters' express policies formally.[147] While organizational hierarchy is critical for policy implementation, when seen from a democratic perspective, it becomes a barrier. It can be deduced that public policy is an important consideration in the context of arbitration, as the outcome of an arbitration may have significant effects on the public interest. For example, the Treaty on the Functioning of the European Union (TFEU) outlines several exceptions to the general obligation for EU member states to follow EU law and avoid discrimination against nationals and businesses from other member states. Some key exceptions that may be relevant in public policy are:

1. Legal and regulatory compliance: One of the most crucial elements of public policy is for the parties to an arbitration to comply with legal and regulatory requirements.

[144] Bovens, Mark. "Analysing and assessing accountability: A conceptual framework 1." *European law journal* 13.4 (2007): 447-468.
[145] Dunn, William N. *Public policy analysis*. routledge, 2015.
[146] Dunn, William N., 2015.
[147] Friedrich, Markus. "Communication and bureaucracy in the early modern Society of Jesus." *Schweizerische Zeitschrift für Religions-und Kulturgeschichte* 101 (2007): 49-75.

For example, an arbitration award that violates local regulations such as antitrust or competition laws could be deemed as a violation of public policy.

2. Protection of fundamental rights: Another principal element of public policy is the protection of basic and fundamental rights of its society, such as the right to due process or the right to a fair trial for parties. An arbitration award violating fundamental rights could be deemed as a violation of public policy resulting in refusal of an arbitral award.

3. Public health and safety: Public policy may also be concerned with protecting public health and safety. For example, an arbitration award that would lead to environmental damage or threaten the public's safety could be deemed a violation of public policy.

4. Protection of public interest: Public policy may also be concerned with protecting the interest of the public. An arbitration award undermining the stability of economic markets or damaging the reputation of public institutions could also be regarded as a public policy violation.

Invoking the defense of public policy in arbitration proceedings is invoked as a fallback after all other remedies have been exhausted, and public policy makes use of laws to influence the interaction between the government and the general public. The domestic courts are, however, usually careful while setting an arbitral award aside on the grounds of public policy as there is a strong opinion by legal experts in favor of maintaining the arbitral awards. Resolving inconsistencies between policy objectives and addressing gaps in public policy defense requires an independent approach.

3.3. Domestic, International and Transnational Public Policy

3.3.1. Domestic and International Public Policy

International and domestic public policy are important concepts in arbitration law that refer to the standards of conduct and principles that govern the decision-making process of arbitrators. International public policy refers to the fundamental principles of justice and fairness that are recognized as universal norms and standards of conduct in international arbitration. These principles are considered essential to ensure the legitimacy and enforceability of arbitral awards across different jurisdictions. Some of the examples of

international public policy include the protection of human rights, the prohibition of corruption, and the observance of due process. International public policy may also be referred to as *global public policy*. In an international context, the policies pursued by one government may affect the policies pursued by another, complicating matters.

Domestic public policy, on the other hand, refers to the principles and policies of a specific country that are considered fundamental to its legal system and public interest. These principles are used to limit the power of arbitrators and to ensure that arbitral awards do not violate the legal or public policy of the country where enforcement is sought.[148] Domestic public policy may include, for example, the protection of public health, safety, or the environment, or the protection of consumers and workers. Domestic public policy impacts the internal affairs of a country's citizens, but when the government's activities in the international arena begin to affect the public, it becomes international public policy.

When it comes to the distinctions between domestic and international public policy, it is recommended that management adopt an aggressive approach at the policy level, since the issue may affect many sectors, including social, political, and economic.[149] Domestic public policy is stated to be formed from enactments of statutes, constitutional restrictions, or any other judicial procedures inside a given state. The term is used to describe a variety of issues like personal rights and freedom, social welfare, health care, education, legislation, law enforcement, etc. Since the arbitration is connected to only one nation, only that nation's public policy is considered. Domestic public policy has an impact on the life of every citizen in the nation since it shapes issues such as environmental protection, legislation, education, social welfare, and law enforcement.[150]

The government confronts policy difficulties both domestically and internationally because of the development of newer technologies and shifting sensitivities. For example, although the management may face no threat to its sovereignty while formulating domestic policy, the process of public policy formation is influenced by foreign events. This prompts us to consider whether domestic public policy is autonomous. International public policy, on the other hand, refers to the principles that govern a country's domestic policy that will also be

[148] Lew, Julian DM, et al. *Comparative international commercial arbitration*. Kluwer Law International BV, 2003.
[149] Bayvel, AC David, and Nicki Cross. "Animal welfare: a complex domestic and international public-policy issue—who are the key players?." *Journal of Veterinary Medical Education* 37.1 (2010): 3-12.
[150] "Domestic Policy." *Legal Dictionary*, 23 July 2016, legaldictionary.net/domestic-policy/.

applied in an international setting.[151] International public policy encompasses the public policies of many jurisdictions; therefore, the domestic court must consider the arbitration's international aspects while enforcing its domestic public policy limitations. Certain nations, such as France and Switzerland, have even replaced their domestic public policy arbitration statutes with international ones. Indian courts made a distinction between domestic and international awards, indicating that domestic public policy is more limited in scope than foreign public policy under the Indian arbitration law.[152] The distinction between domestic and international public policy, on the other hand, is very thin. The domestic public policy and the international public policy differ in their levels of enforcement. The arbitration at the International Court of Justice (ICJ) may reflect the differences between the domestic public policy and the international public policy. For instance, the *Tampico Beverages Inc. v. Productos Naturales*[153] at the Supreme Court of Colombia revealed the differences in enforceability between domestic public policy and international public policy.

International public policy is related to the country's reputation in an international arena where countries engage, while domestic public policy is often concerned with the country's general welfare. International public policy enables a country to strengthen its ties with other countries. The domestic public policy enables the government to gain legitimacy from the country's domestic populace. Transnational public policy is international since it enables the participation of other nations. Domestic public policies are defined by domestic legislation, while international public policies are determined by international legislation. When researchers attempt to establish a link between domestic and foreign public policy, the idea of state sovereignty comes under criticism. While a country may operate independently on the international stage, it may have to surrender part of its sovereignty to join international agencies and organizations such as the World Bank and the United Nations. For example, a government may accept stringent conditions to get a loan from the International Monetary Fund (IMF). It is still up to the IMF to determine whether to sanction the loan or not.

Today, the world is now referred to as a global community. Domestic public policy information is readily transferable to the international level. International response may

[151] Rashid, Md. Mamonor. "Public Policy in International Commercial Arbitration: An Analysis." *FutureLaw*, 2018, futrlaw.org/rationality-public-policy-international-commercial-arbitration/.
[152] Section 34 of the Indian Arbitration and Conciliation Act, 1996 enables the court to set aside an arbitral award if the court finds that the award conflicts with the public policy of India. Whereas Section 48 enables the court to refuse the enforcement of foreign awards if the court finds that the enforcement of the award would be contrary to the public policy of India.
[153] Case *Tampico Beverages, Inc. v. Productos Naturales de la Sabana S.A. Alquería*, dated 12 July 2017.

compel the government to reform or alter domestic policies. For example, United Nations General Assembly (UNGA) decisions have an impact on the domestic public policy of different countries worldwide. Civilian engagement is supporting governments in redefining the role of domestic and international public policy.[154] The connection between public policy and law becomes apparent at the implementation stage of public policy. Usually, laws are the tools utilized to carry out public policy. Domestic policies are governed by domestic law, while foreign policies are governed by international law. Generally, the general populace is interested in domestic laws as they influence the planning and implementation in the social, economic, and other spheres of a citizen's life. The quality of governance can improve by improving the level of implementation of both domestic and international laws. In both cases, public policy's role in arbitration is to ensure that arbitral awards do not violate fundamental legal principles and policies, whether at the international or domestic levels. In arbitration, public policy issues are generally decided by the courts of the country where enforcement is sought, and the interpretation of public policy varies greatly from country to country.

3.3.2. Transnational Public Policy

International commercial arbitration has become a popular alternative to litigation in resolving disputes between international parties. One of the key features of international commercial arbitration is that it is transnational, as it involves parties from different countries and the proceedings take place in a neutral country.[155] As such, the development of transnational public policy has been an important consideration in international commercial arbitration.

Transnational public policy refers to principles and norms that are recognized by different countries and are considered to be fundamental to the functioning of the international legal system. These principles and norms can be reflected in international treaties and conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the New York Convention on the Recognition and Enforcement of

[154] Deibert, Ronald J. "International plug'n play? Citizen activism, the Internet, and global public policy." *International studies perspectives* 1.3 (2000): 255-272.
[155] Borrás, Susana, and Claudio M. Radaelli. "The politics of transnational policy-making: The case of the European Union's social investment strategy." *Journal of European Public Policy*, 23.3 (2016): 307-325.

Foreign Arbitral Awards. They can also be based on customary international law or emerging norms that are recognized by the international community.[156]

In the context of international commercial arbitration, transnational public policy is important because it provides a framework for determining the validity and enforceability of arbitration agreements and awards. For example, an arbitration agreement that is contrary to public policy may not be enforceable, and an arbitral award that violates public policy may be set aside. Transnational public policy can also be used to determine the scope of arbitrable disputes, such as whether certain disputes are too sensitive or too important to be subject to arbitration.[157]

One of the key challenges in developing transnational public policy in international commercial arbitration is the diversity of legal systems and cultures that are involved. Different countries may have different concepts of public policy and may apply them in diverse ways. For example, some countries may have a more interventionist approach to public policy, while others may have a more laissez-faire approach. This can lead to different outcomes in cases involving transnational public policy, depending on the jurisdiction of the parties or the place of arbitration. It is also, however, important to note that the legal cultures, values, and moral principles of individual countries influence the enforcement and recognition of arbitral awards. The line between substantive and procedural public policy often becomes blurred and reflects their interconnected nature. The case of *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*[158] serves as a crucial example of the intersection between international commercial arbitration and transnational public policy. This case highlighted the challenges that arise when transnational arbitration agreements conflict with national public policy. The UK Supreme Court observed that enforcing and recognizing arbitration awards must respect the public policy of the countries involved. This is because transnational public policy is closely tied to national laws, which shape how arbitration agreements are interpreted and enforced. In similar cases such as *Norsolor SA v. Pabalk Ticaret Limited Sirketi*[159] and *PT Putrabali*

[156] Dennis, Michael J. "Modernizing and harmonizing international contract law: the CISG and the Unidroit Principles continue to provide the best way forward." *Uniform Law Review* 19.1 (2014): 114-151.
[157] Ryabinin, Andrey, and Tibor Varady. *Procedural Public Policy: In Regard to the Enforcement and Recognition of Foreign Arbitral Awards*. Lap Lambert Academic Publishing, 2018.
[158] Case *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46.
[159] Case *Norsolor SA v. Pabalk Ticaret Limited Sirketi*, 1984 Rev. Arb. 431.

Adyamulia (Indonesia) v. Rena Holding and Others[160], the courts underlined the tension between enforcing international arbitral awards and the need for national courts to safeguard their fundamental legal rights and moral values. These cases demonstrate that transnational public policy in arbitration cannot be separated from national frameworks.

To address this challenge, international organizations such as the International Chamber of Commerce (ICC) and the International Bar Association (IBA) have developed guidelines and best practices for international commercial arbitration.[161] These guidelines and best practices seek to promote consistency and predictability in the implementation of transnational public policy, as well as to ensure that arbitration continues to be a viable and effective means of resolving international disputes. The role of domestic courts is another crucial factor in the development of transnational public policy in international commercial arbitration. Domestic courts play a significant role in enforcing arbitration agreements and awards, and they have the authority to nullify awards that are contrary to public policy. However, domestic courts may have different interpretations of transnational public policy, which can lead to inconsistent outcomes in cases involving international commercial arbitration.[162] To address this issue, many countries have adopted the UNCITRAL Model Law on International Commercial Arbitration, which provides a uniform framework for the enforcement of arbitration agreements and awards. The UNCITRAL Model Law incorporates principles of transnational public policy, such as the requirement that awards be enforceable only if they are not contrary to the public policy of the country where enforcement is sought. This helps to promote consistency in the application of transnational public policy across different jurisdictions.

To conclude, transnational public policy is a principal factor to consider in international commercial arbitration. It establishes a framework for determining the validity and enforceability of arbitration agreements and awards, and it contributes to the continued viability and effectiveness of arbitration as a means of resolving international disputes. However, because of the diversity of legal systems and cultures involved, developing transnational public policy can be difficult. To address this issue, international organizations

[160] Case *PT Putrabali Adyamulia (Indonesia) v. Rena Holding and Others*, Cour de cassation, Chambre civile 1, 29 June 2007, No. 05-18.053.
[161] Moses, Margaret L., 2017.
[162] Ryabinin, Andrey, and Tibor Varady, 2018.

and domestic courts have developed guidelines and best practices aimed at promoting consistency and predictability in the implementation of transnational public policy.

3.4. Public Policy and Law

"*With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fiction and come down on the side of justice.*"[163]

Public policy is always more extensive than the laws that define it. The relationship between law and public policy can be described as a "*hand in glove*" one a law plays to protect the private interest while the public policy pursues social justice and mediates the competing interests.[164] While legislation may be utilized to provide for reward or punishment in a particular sector, public policy is constantly pursuing larger goals. The public expects the government's public policies to effect change in society. The civil courts may address the first nature of conflict and the law of takings or regulatory laws may deal with the second aspect. Public policy may shape the legal plane of bureaucracy or public administration and guarantee the rule of law ideals. It acts as an enabling authority and, on the other, monitors arbitrariness and unfairness in the bureaucratic government.[165] Jacob Dolinger in his article states that the character of public policy may have a damaging effect due to its diverging nature and has a "*barrier effect*".[166] Therefore, the different interpretations of public policy add numerous layers of complexity in determining the validity of arbitral awards. Without laws, public policy may exist. For example, even if the government does not outright prohibit smoking, it may nevertheless establish a public policy against it, since public policy can reflect societal preferences.

The policymakers must comprehend the objectives of public policy. If policymakers determine that a policy conflicts with the country's laws, they replace or modify it. The policymakers understand that nothing becomes law unless and until it is authorized by the legislative body of that country. It is the function of public policy as a guide that enhances

[163] See Case *Enderby Town Football Club Ltd v. The Football Association Ltd*., [1971] 1 All ER 215.
[164] Kim, Kiyoung. "The relationship between the law and public policy: Is it a chi-square or normative shape for the policy makers?." *Social Sciences* 3.4 (2014): 137-143.
[165] Kim, Kiyoung. "Public Policy and Governance: Some Thoughts on Its Elements." *Available at SSRN 2589526* (2015).
[166] Dolinger, Jacob. "World public policy: real international public policy in the conflict of laws." *Tex. Int'l LJ* 17 (1982): 167.

its popularity among the populace. Historically, the court's role has been to interpret the laws, not to establish new ones. Due to the presence of regulatory agencies in the states, the function of public policy guidance becomes critical. It is the regulatory authorities' responsibility to enforce the laws. These regulatory organizations are mandated to act following administrative law. Public policy's guiding function precludes regulatory agencies from adopting legislation against it. Public conduct is controlled in the nation via the enforcement of laws. The executive branch of government is accountable for implementing public policy that reflects popular preferences.

Government size has a direct correlation with the intricacy of the laws. Increased government size increases the complexity of the laws. At times, citizens accuse the government of implementing unconstitutional laws. This adds to the executive's workload. The diverse nature of public policy adds to its value for policymakers. If public policymakers formulate policies based on prior experiences, the public may not enjoy a steady result. This is because public policy is inherently dynamic. A particular policy may be applied to a particular social, economic, or political sector. For instance, a change in public policy resulted in the repeal of the United States' prohibition laws. The liquor business thrived in the United States after the shift in public opinion, although many states continue to have laws prohibiting *drink and drive*.

Public policy is used as the moral, social, and/or economic considerations that are applied by courts as grounds for refusing enforcement of an arbitral award. In civil law systems references to good faith and good morals, as well as to public policy as a bar to parties' freedom are incorporated in codes. In common law references to public policy are mainly included in judicial practice, but also in legal documents. The House of Lords of England in early 1853 explained that public policy is a "*principle which does not permit the doing of anything that could harm the basic principles of any society*". For international private law, public policy is a reaction to foreign laws that are contrary to the *ius naturale principles*[167], on the other hand, public policy appeals to the principles forming the *political and social foundation* of the specific society civilization or to the *principles of preserving certain legislative policies*. While the dynamism of the concept of public policy cannot be denied, it is important to exercise extreme caution in applying the concept.[168] Public policy, by its

[167] *Ius naturale* is a Latin term for natural rights, the laws common to all beings.
[168] Case *Kiran Atapattu v. Janashakthi General Insurance Co. Ltd*, SC Appeal 30-31/2005.

nature, is a dynamic concept that evolves continually to meet the changing needs of society, including political, social, cultural, moral, and economic dimensions.

The concept of public policy is prejudiced by the old concept that it is against sovereign dignity to submit to any type of dispute resolution system not controlled by the state itself. Hence, it is a concept formed based on public good. Lord Mansfield laid down the principle that "*no court will lend its aid to a man who finds his cause of action upon an immoral or illegal act*", thus, in effect, laying the foundations for the refusal to enforce an illegal contract.[169] Public policy outlines what a government ministry hopes to achieve and the methods and principles it will use to achieve them. It states the goals of the ministry. A policy document is not a law, but it will often identify new laws needed to achieve its goals. So, policy sets out the goals and planned activities of a ministry and department, but it may be necessary to pass a law to enable the government to put in place the necessary institutional and legal frameworks to achieve its aims. Laws must be guided by current government/public policy.

Public policy ensures public safety, and it becomes even more critical as the regulatory function of the government expands. While developing public policy, public policymakers confront both qualitative and quantitative risks. Budgetary analysis, forecasting, and cost-benefit analysis may all be included in public decision-making. Numerous variables, most notably public expectations, influence the formation of public policy. Public policy mediates between the interests of transnational business and those of the State with the closest connection to the contract. Each State has its concept of public policy. For example, in cases of trade activities, what is legal in one state might be illegal in another state. In most countries, Commercial Whaling is a banned practice, however, countries like Japan, Norway, and Iceland still practice it.[170] Similarly, a dispute between distributor and alcohol producer is regarded as arbitrable in many countries where easy enforcement of awards might be difficult in Islamic states where consumption of alcohol is prohibited, the rules will be stricter while enforcing an award as it is against their public policy. It directly or indirectly affects citizens. It takes elements from various disciplines such as public administration, sociology, economics, history, and the importance of cultural practices and customs. If a government is unable to sustain an effective public policy, it loses public

[169] Case *Holman v. Johnson*, (1775) 1 Cowp 341, 98 ER 1120.
[170] "Japan Whaling: Why Commercial Hunts Have Resumed despite Outcry." *BBC News*, BBC, 2 July 2019, www.bbc.com/news/world-asia-48592682.

legitimacy. Though there is no precise definition of public policy, it is an accepted norm that states have the ultimate right to refuse to enforce an arbitral award on grounds of public policy.

3.5. Public Policy and Public Order

Public policy and *ordre public* (public order) refer to the general legal framework of a particular state or country and reflect upon the rationale and underlying purpose of that legal framework. Public policy and public order are both legal concepts that play a significant role in many legal frameworks including in the context of international commercial arbitration. The terms public policy and *ordre public* are interchangeable in many ways and may seem to have similar concepts, however, there is a slight difference between the two. The concept of public policy was first recognized in English common law[171] and the expression *ordre public* was first recognized under French civil law.[172] In literal translation, the terms look very much alike, but upon closely investigating them, *ordre public* has a similar meaning with the public policy under common law, however, it is perceived differently under civil law.[173]

Initially, the concept of public policy was invoked to promote public interest and fundamental notions of society. However, due to the dynamic nature of public policy, over time public policy adapts to the changing needs of society, impacted by various social, cultural, and economic factors. As cited by Murphy, K. in his article, "*Initial definitions of public policy focused on the rejection of acts or causes of action held "immoral or illegal," "injurious to the interests of the public," or "productive of evil to the church and the community."*[174] He further states that *"subsequent attempts to delineate the bounds of public policy were equally imprecise. The legal realists have in the end prevailed and it is now generally accepted that public policy is defined by the use courts find for it.*"[175] Today, the concept of public policy is defined widely by the courts in every state and jurisdiction and

[171] Murphy, Kent. "The traditional view of public policy and ordre public in private international law." *Ga. J. Int'l & Comp. L.* 11 (1981): 591.
[172] Husserl, Gerhart. "Public Policy and Ordre Public." *Virginia Law Review* (1938): 37-67.
[173] Forde, Michael. "The "Ordre Public" Exception and Adjudicative Jurisdiction Conventions." *International & Comparative Law Quarterly* 29.2-3 (1980): 259-273.
[174] Murphy, Kent, 1981.
[175] Murphy, Kent, 1981.

has evolved to become a tool for courts to refuse claims or actions in the absence of precedent.

Although *ordre public* has a sense that is akin to public policy in a larger context, civil law jurisdictions have embraced the term *ordre public* in legislative sources. As cited by Forde, M, "*in civil law countries ordre public also connotes legislative provisions which are peremptory or jus cogens, i.e. provisions which cannot be contracted out of or otherwise undercut*"[176], the provisions of order public cannot be overruled by private agreements and is mandatory to be complied with. For example, the *Omega Case*[177] serves as a model of *public policy* and *ordre public* applicability in reality. It underlines the discretion given to Bonn authorities in invoking these concepts and staying within the limitations set by the European Treaty. Ordre public refers to the fundamental principles and values of a jurisdiction necessary for the functioning and well-being of that society. However, these principles are not universally uniform, but rather contingent upon the specific time and place they are applied. As quoted by Gerhart Husserl in his article, "*Public policy is necessarily variable. It changes with changing conditions. The ordre public is a function of time and place.*"[178] The concepts of public policy and order public are both dynamic and play a vital role in shaping legal decisions and awards by prioritizing public values and interests. Thus, it is important to understand both concepts to assess their significant impact on rules and regulations, particularly within the European Union.

3.6. Public Policy under International Arbitration Frameworks

International commercial arbitration is a method of resolving disputes between private parties outside of national court systems. As such, it is governed by several international frameworks that guide how to conduct arbitrations and how to enforce arbitral awards. This section is focused on the most important international commercial arbitration conventions. By ratifying these international conventions, the signatory countries become obligated to resolve any disputes in connection with arbitration agreements following the dispute

[176] Forde, Michael, 1980.
[177] Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-gmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, [2004] ECR, I-9609.
[178] Husserl, Gerhart, 1938. Also Refer Case *Strauss and Co. v. Canadian Pacific Rico*., 254 N. Y. 407, 173 N. R. 564 (1930).

resolution clauses. Public policy is an important concept in international arbitration because it refers to the fundamental principles and values that are deemed necessary for any legal system to function. Some of the key international frameworks that govern public policy in international commercial arbitration are as follows:

3.6.1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (The "New York" Convention)

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) is a multilateral treaty that provides a framework for the recognition and enforcement of foreign arbitral awards. The Convention is widely considered to be the cornerstone of the modern system of international commercial arbitration and has been adopted by over 160 countries. The New York Convention was the result of dissatisfaction with the previously established Geneva Protocol on Arbitration Clauses, 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards, 1927. Grounds for refusal of awards can be found under Article V of the convention which is divided into two parts. The first part lists the grounds that must be proven by the party and the second part where the court itself may *ex-officio* (at its discretion) deny enforcement.

The convention states that the Recognition and Enforcement of an award may be refused if the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.[179] This public policy ground is set out in Article V(2)(b) of the Convention. The public policy exception is intended to be a narrow ground for refusing recognition or enforcement and is interpreted narrowly by most courts. However, the definition of public policy is extremely broad and open-ended. In general, the exception is only invoked in cases where the award is contrary to fundamental principles of law or morality in the country where enforcement is sought. For example, a court may refuse to recognize or enforce an award that violates the basic human rights of a party, or that is based on corruption or fraud. The broad meaning of public policy has turned this ground into

[179] Article V (2) of the New York Convention, 1958 states the grounds on which the court itself may ex-officio deny enforcement.

the most invoked one by the party's resisting recognition and enforcement of a foreign arbitral award.[180]

Even though the New York Convention does not explicitly specify any specific type of public policy, the intent of the creators of the New York Convention directed at challenging foreign awards based on international public policy grounds. [181]An expansive construction would vitiate the New York Convention's basic effort to remove obstacles to enforcement. The defense of public policy acts as a close-minded device protective of national political interests undermining the Convention's utility.[182] Overall, the public policy exception under the New York Convention provides an important safeguard for parties seeking to enforce foreign arbitral awards. It ensures that recognition and enforcement will not be granted in cases where the award violates fundamental principles of law or morality, while at the same time promoting the finality and enforceability of international arbitral awards. It is important to note that the public policy exception is not intended to provide a second chance for a court to re-examine the merits of the case or to substitute its judgment for that of the arbitrators. Rather, it is a limited basis for refusing recognition or enforcement based on the facts of the case.

3.6.2. The United Nations Commission on International Trade Law, 1966 ("UNCITRAL Model Law")

The UNCITRAL Model Law on international commercial arbitration is a set of legislative guidelines that provide a framework for the conduct of international commercial arbitrations. The UNCITRAL Model Law has been widely adopted by many countries as the basis for their national arbitration laws. The UNCITRAL Model law provides a comprehensive set of procedural rules upon which parties may agree for the conduct of arbitral proceedings arising out of their commercial relationships and is widely used in ad hoc arbitrations as well as administered arbitrations. The drafting committee when framing this Article had the goal of limiting the ambit of public policy only in situations where recognizing or enforcing the award would go against the fundamental concepts of the country's legal system. The

[180] Bouzarjomehri, Sormeh, and Eisa Amini. "Public Policy as Ground for Refusal of International Arbitral Awards-A Comparison Between Different Judicial Practices." *J. Pol. & L.* 9 (2016): 81.
[181] Ryabinin, Andrey, and Tibor Varady, 2018.
[182] As noted by *Smith J.* in Sattar, Sameer. "Enforcement of arbitral awards and public policy: Same concept, different approach." *Transnational Dispute Management (TDM)* 8.5 (2011).

UNCITRAL Model Law does not define the term public policy, leaving it to the courts of each country to interpret and apply the concept. Each nation has a different standard to apply to its land laws and precedents to tackle arbitration disputes. Both the New York Convention and the UNCITRAL Model Law gave direction to the contracting states but did not define the concept of public policy.

Courts interpreting the public policy ground under the UNCITRAL Model Law have tended to apply a similar standard as courts interpreting the public policy exception under the New York Convention. For example, courts may set aside an award if it is based on corruption or fraud, or if it violates basic principles of human rights. However, courts generally will not set aside an award simply because they disagree with the arbitrator's decision on the merits of the case. Article 34 Clause 2 (b)(ii) states that an award may be refused if the court finds that the award conflicts with the public policy of the State. This provision however "*caused the most consternation*" amongst drafters of the Convention, who thought of it both as a "*safety valve*" and a "*major potential loophole.*"[183] The public policy ground under the UNCITRAL Model Law provides an important safeguard against the enforcement of arbitral awards that violate fundamental principles of law or morality. It also helps to ensure that the arbitral process is consistent with the rule of law and that the finality of arbitral awards is not used to promote injustice or illegality.

3.6.3. ICSID Convention, 1965 ("Washington Convention")

The ICSID is an international institution that was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, 1965 or Washington Convention) to provide a framework for resolving investment disputes between foreign investors and host states. Under the Washington Convention, arbitral awards are generally final and binding and are enforceable in the same manner as final judgments of the courts of the country in which they are rendered. However, the Washington Convention does contain a public policy exception, which provides that a state may refuse to enforce an ICSID award if it is contrary to the state's public policy.

[183] Winnie (Jo-Mei) Ma. *Public policy in the judicial enforcement of arbitral awards: lessons for and from Australia*. Diss. Bond University, 2005.

Article 52 of the Washington Convention sets out various grounds for annulment except Public Policy. Article 54 of the Washington Convention provides that "*a Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.*"[184] Therefore, each member state is under obligation to recognize and enforce an award rendered under the convention. The Washington Convention does not define the term public policy, leaving it to the interpretation of the courts of each country. However, the public policy exception is generally considered to be a narrow ground for setting aside an award and is intended to be used only in cases where the award is fundamentally inconsistent with the most basic principles of justice and morality. The role of ICSID in recognition and enforcement is not prescribed, but if a party informs ICSID of the other party's non-compliance with an award, it is ICSID's practice to contact that party to request information on the steps that party has taken or will take, to comply with the recognition and enforcement of that award.[185] In practice, the public policy exception under the Washington Convention has been applied in a limited number of cases such as where the award is based on corruption, fraud, or a violation of human rights. However, it has not been used to challenge awards simply because the state disagrees with the arbitrator's decision on the merits of the case.

Overall, the public policy exception under the Washington Convention provides an important safeguard against the enforcement of arbitral awards that violate fundamental principles of law or morality. By ensuring that the outcome of the arbitration is consistent with the most basic principles of justice and morality, the Washington Convention helps to promote investment and the rule of law in the international community.

3.6.4. European Convention on International Commercial Arbitration, 1961

The European countries oversee the rules for arbitration procedure; however, those rules should recognize the exceptional requirements for international commercial arbitration in which one or both parties are foreign. The European Convention does not provide for the defense of public policy in recognition and enforcement leaving this to be dealt with by other arbitration treaties, including the New York Convention, to which the European Convention

[184] Refer ICSID Convention, 1965.
[185] Refer ICSID Convention, 1965.

is an addition. It provides for the annulment of an award in a Member State only if it constitutes a ground for refusal of recognition or enforcement in another Member State. Such annulment should be for the specified reasons corresponding to Articles V(1)(a) to (d) of the New York Convention, thus excluding the exception of public policy.[186]

The European Convention limits the international impact of all other grounds for the setting aside of awards since it is only applicable to the European Member states. The European courts act strictly on the defense of public policy and are mostly reluctant to interfere in its recognition and enforcement of awards.

3.6.5. The International Chamber of Commerce (ICC) Rules

Figure 8: ICC as the most preferred arbitral institution (2021 International Arbitration Survey)[187]

The ICC is one of the world's leading institutions for international commercial arbitration.[188] It administers arbitrations according to its own rules known as the ICC Arbitration Rules which are revised from time to time. While the ICC Rules do not have a specific provision on public policy, the ICC Court of Arbitration has the power to refuse to enforce an arbitral award in cases where the award conflicts with public policy. Under the ICC Rules, a party

[186] Article IX(1) of the European Convention on International Commercial Arbitration, 1961.
[187] "2021 International Arbitration Survey: Adapting arbitration to a changing world." *Queen Mary University of London, School of International Arbitration*, 2021, https://arbitration.qmul.ac.uk/research/2021-international-arbitration-survey/.
[188] Refer "ICC World's Most Preferred Arbitral Institute, Global Survey Finds - ICC - International Chamber of Commerce." *ICC*, 6 May 2021, iccwbo.org/news-publications/news/icc-worlds-most-preferred-arbitral-institute-global-survey-finds/, and "ICC Reaches Major Arbitration Milestone with 27,000th Case - ICC - International Chamber of Commerce." *ICC*, 6 May 2022, iccwbo.org/news-publications/news/icc-reaches-major-arbitration-milestone-with-27000th-case/.

seeking to challenge the recognition or enforcement of an arbitral award on public policy grounds must make its challenge in writing, within 30 days after receipt of the award.[189] The challenge must specify the reasons why the award conflicts with public policy.

The ICC Court of Arbitration has the power to review the challenge and to refuse recognition or enforcement of the award if it finds that the award conflicts with public policy. The Court may also request additional information from the parties, hold hearings, or appoint experts to assist in its review. Like the public policy exception under the New York Convention and the public policy ground under the UNCITRAL Model Law, the public policy standard under the ICC Rules is a high standard and is intended to be used only in cases where recognition or enforcement of the award would be fundamentally inconsistent with the rule of law or with the most basic principles of justice and morality. In furtherance, ICC rules also impose an obligation on arbitrators to exert all reasonable efforts to ensure that the award can be legally enforced.[190] The latest ICC Rules provide an efficient procedure to ensure compliance with arbitral awards during the arbitration process. It also ensures that the arbitration process and award are not in violation of the principles of the rule of law, justice, and morality. This enables the ICC to promote fairness and efficiency during the recognition or enforcement of awards on the grounds of public policy.

3.6.6. The International Bar Association (IBA) Guidelines on Conflicts of Interest, 2014

The IBA Guidelines on Conflicts of Interest in International Arbitration provide a framework for identifying and resolving conflicts of interest that may arise in the context of international arbitration. Although the IBA Guidelines are not binding on parties, they are widely recognized as one of the best practices for safeguarding the integrity and impartiality of the arbitral process. [191] The IBA Guidelines stipulate that arbitrators should avoid situations involving conflicts of interest that could undermine their independence and impartiality, for example, if the relationship of an arbitrator with a party or its lawyer is such that his or her impartiality could be reasonably challenged. In particular, the IBA Guidelines recommend that arbitration officials disclose all circumstances that may cause legitimate reservations

[189] Article 36 of the 2021 ICC Rules of Arbitration.
[190] Article 26 of the 1998 ICC Rules of Arbitration, and the same text is found in Article 41 of the 2012 ICC Rules of Arbitration.
[191] Abu-Manneh, Raid, and Lisa Dubot. "The Conduct of the Parties in International Arbitration: The Current State of Play." *International Bar Association*, 21 Oct. 2022, www.ibanet.org/conduct-of-parties-in-international-arbitration.

about their impartiality or independence, including their relations with the parties, their lawyers, or the subject of the arbitration. [192] The IBA Guidelines do not directly address the issues related to public policy, but by promoting transparency and accountability in the arbitration process, they help ensure that the final result is consistent with the fundamental principles of law, justice, and morality.

3.7. Conclusion

The concept of public policy has an intricate character and numerous interpretations in international commercial arbitration. It is a set of rules and regulations in the interest of the state and its public. Public policy is strongly associated with law and is especially used as an exception in the enforcement of arbitral awards. Public policy defense can be seen in some of the major international arbitration frameworks such as the New York Convention, UNCITRAL Model Law, ICSID Convention, European Convention on States of International Commercial Arbitration, the ICC Rules, and International Arbitration Association. There is no common definition of public policy, however, the international frameworks have attempted to outline the application of public policy defense during the recognition and enforcement of arbitral awards to protect the interest of the public. By inspecting the important aspects of public policy, this Chapter has emphasized the crucial role of public policy in shaping the international arbitration process, serving as a foundation for more efficient and effective alternate dispute resolution in global trade.

[192] Abu-Manneh, Raid, and Lisa Dubot, 2022.

4. PUBLIC POLICY EXCEPTION IN INTERNATIONAL COMMERCIAL ARBITRATION AS PERCEIVED IN DIFFERENT JURISDICTIONS

The main objective of this Chapter is to study the integration of international commercial arbitration into national legislation, especially in Asia, America, and European regions. Today efforts are being taken to harmonize the laws. This Chapter identifies and comments on some of the areas where differences remain including differences in recognition and enforcement of arbitral awards in various jurisdictions and where further examination and research to reach and solve disputes amicably might be useful.

A violation of public policy, in some countries, may render an agreement non-arbitrable. Courts often refer to public policy as the basis of the bar. Thus, if the court feels that such an issue falls in the scope of public policy, the court may intervene and assign it to the court only, to protect the benefit of the public. The question of interpretation is about the parties not agreeing to submit the specific dispute to arbitration, while arbitrability is about disputes that cannot be settled by arbitration because there is the involvement of public policy. Jurisdictions that restrict the use of the public policy exception and give it a narrow understanding have been considered to be *arbitration friendly*, whereas jurisdictions that fail to do so are looked down upon as arbitration-unfriendly states. Because of the UNCITRAL Model Law and the New York Convention, the parties can rely on one of the grounds mentioned for challenging the enforcement of arbitral awards. The Court in the case of *Scherk v. Alberto-Culver Co.* stated that the main aim and principle of the New York Convention was "*to encourage the recognition and enforcement of commercial arbitration agreements in international contracts*" and "*unifying the standards by which agreements to arbitrate are observed and enforced*" in the contracting states. [193]

The defense of the public policy must be "*construed narrowly in light of the overriding purpose of the New York Convention.*"[194] It should only apply where enforcement would violate the "*most basic notions of morality and justice.*"[195] However, the New York

[193] Case *Scherk v. Alberto-Culver Co*., 417 U.S. 506 (1974).
[194] Refer Case *International Navigation Ltd. v. Waterside Ocean Navigation Co. Inc.* 737 F.2d 150. Any interference by the national court in international arbitration on the defense of Public Policy should be minimal under the New York Convention and should be interpreted narrowly.
[195] Case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) and Bank of America*, 508 F.2d 969 (2d Cir. 1974).

Convention does not provide for any procedure for the domestic courts as to how the defense of public policy should be interpreted. The concept of public policy is extremely broad and open to misinterpretation. The pro-arbitration approach of national courts is mostly evident in developed jurisdictions such as America and Europe. However, many developing jurisdictions such as India are still striving to narrow down the scope of public policy defense.

4.1. Public Policy in Europe

While European legislation and international arbitration law frequently battle, their relationship is inexorably connected. At times, the European laws may compel European countries to take actions that jeopardize their international obligations and responsibilities, as well as their national laws, and the most controversial aspect arises when European law challenges the fundamental concept of international arbitration law, particularly in the context of public policy. Although arbitration is governed by the laws of the State or States involved in the proceedings or parties, numerous international regulations, and treaties, such as the 1958 New York Convention, the UNCITRAL Model Law, and several other domestic and international sources of law, also influence arbitration practice, particularly about public policy. The arbitral awards are often not subject to appeal; however, they may be put aside in an extremely limited number of cases involving public policy violations or procedural injustice.

Numerous European Union (EU) Member States (such as France, Germany, and Belgium) define public policy in terms of basic principles such as justice, honesty, and fairness. Thus, an award may be annulled if it breaches the core concept of fundamental beliefs, such as "*corruption, fraud, or a lack of process integrity,*" which would be deemed to be a violation of public policy.[196] The European countries attempt to maintain a pro-arbitration stance, however, it is an indisputable reality that defiance of required legal standards may amount to a breach of public policy in some circumstances. The 1999 *Eco Swiss* case[197] is one of the most closely scrutinized judgments of the ECJ. It was the first judgment to invoke the concept of *European public policy* as a justification for refusing to enforce arbitral verdicts.

[196] Moses, Margaret L., 2017.
[197] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055.

George A. Bermann describes public policy as a term used in a variety of contexts around the world to describe values that are so fundamental to a society's "*morals*", and "*well-being*", that cannot be overridden by "*words, deeds, and agreements between the parties, clauses governing the choice of law or forum (including arbitration provisions), or even by general conflict of law principles*."[198]

The emergence of EU Law as private and commercial law has resulted in the establishment of new legal standards, resulting in the development of contractual and private legal connections in international commercial arbitration. A violation of public policy is a justification for refusing to accept or enforce a foreign arbitral tribunal's ruling, and one that courts should consider under the New York Convention. The Model Law of the United Nations Commission on International Trade Law ("UNCITRAL") conforms to the New York Convention by permitting a court to annul an arbitral award if it is found to be detrimental to public policy.

The legal framework includes the Europe's competition legislation and regulations (including the Treaty on the Functioning of the European Union (TFEU) and the Treaty on the European Union (TEU)), as well as the national Code of Civil Procedures for some EU Member States and European countries such as Switzerland and United Kingdom as a primary source. Furthermore, whenever it is necessary to comprehend the challenges involved, this section incorporates Europe's secondary law including any applicable regulations, directives, decisions, recommendations, and opinions. Additionally, this section will explore case laws to address and illustrate the nexus between the EU competition laws and international commercial arbitration. It will assess the approach of Europe and its European countries towards public policy and how the concept of public policy has changed over time.

4.1.1. Belgium

Belgium is a host to major multinational corporations and international organizations, which makes it a popular place with a growing market and trade. The Belgian law on arbitration was previously governed by the Belgian Judicial Code (BJC), which was amended by the

[198] Bermann, George A. "European Union law and international arbitration at a crossroads." *Fordham Int'l LJ* 42 (2018): 967.

Arbitration Act of 2013, applying to both domestic and international arbitrations.[199] The Act was later amended by the Arbitration Act of 2016. With Brussels as a hotspot for arbitration hosting organizations like the ICC Belgium and CEPANI (the Belgian Center for Arbitration and Mediation), the arbitration trends are approaching more effective and harmonized dispute resolution methods. Belgium has ratified the many important international conventions on arbitration, including the New York Convention, ICSID Convention, as well as the European Convention on International Commercial Arbitration.

The Domestic Belgian Law provides public policy defense as a valid ground for refusal of recognition and enforcement of an arbitral award.[200] The Belgian public policy defense can be used in cases of violation of competition laws, anti-suit injunctions[201], failure to respect the rights of the defense or violation of rules on consumer protection. Recognition and enforcement of an arbitral award conflicts with public policy only when it is contrary to the *moral, political, or economic* order of the country. However, the Belgian courts have always construed the defense of public policy with a narrow approach. The defense of public policy is rarely used in commercial arbitration proceedings.

4.1.2. Switzerland

Switzerland is one of the most popular seats for international arbitration disputes. With its well-developed system and pro-arbitration attitude, Switzerland promotes active dispute resolution since the recognition and enforcement of arbitral awards can only be set aside for limited reasons. The international arbitration law in Switzerland is governed by the 12th chapter of the Federal Act on Private International Law, 1987 (PILA) which was enacted in 1989. The law was recently revised in 2020, which did not bring any major changes to the arbitration proceedings. Even though PILA is not based on UNCITRAL law, the provisions of PILA very well reflect the commitments of UNCITRAL Model Law. Switzerland has also signed and ratified the New York Convention, of 1958, and hosts arbitration institutions

[199] The Arbitration Act of 2013 is largely based on the UNCITRAL Model Law on International Commercial Arbitration (1985). The 2013 Arbitration Act is incorporated in Schedule VI of the Belgian Judicial Code (from articles 1676 to 1722 BJC).

[200] Article 1712 (1) of the Belgian Judicial Code (BJC) states that "If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties, shall record the settlement in an award on agreed terms, unless this violates public policy". Also, Article 1717 states that "The award may only be set aside if it is in conflict with public policy".

[201] Petillion, Flip, et al. "Arbitration Procedures and Practice in Belgium: Overview." *Thomson Reuters Practical Law*, 1 July 2022, uk.practicallaw.thomsonreuters.com/Browse/Home/PracticalLaw?contextData=(sc.Default).

such as the ICC, and the Swiss Chambers Arbitration Institution (SCAI)[202]. The domestic arbitration proceedings are however governed by the Swiss Civil Procedure Code (CPC)[203]. The CPC provides for an advanced arbitration structure that is in line with the laws governing international arbitration. The PILA identifies international arbitration as the arbitration where "*at least one of the parties had neither its domicile nor its habitual residence in Switzerland.*"[204]

The concept of public policy under Swiss law is not defined, however, the Swiss courts have on numerous occasions defined the concept of public policy. According to Article 190 of the PILA:

"*Article 190. The award may only be annulled:*

a) *if the sole arbitrator was not properly appointed or if the arbitral tribunal was not properly constituted;*
b) *if the arbitral tribunal wrongly accepted or declined jurisdiction;*
c) *if the arbitral tribunal's decision went beyond the claims submitted to it, or failed to decide one of the items of the claim;*
d) *if the principle of equal treatment of the parties or the right of the parties to be heard was violated;*
e) *if the award is incompatible with public policy*"[205]

It is essential to note that an award can only be invalidated in case the award is final and binding on the parties. For any award to remain within the limits of Swiss law, the award must not be against the concept of Swiss public policy. Also, the recognition and enforcement of foreign arbitral awards are governed by the New York Convention, of 1958.[206]

[202] The Swiss Chambers of Arbitration (Zurich, Basel, Bern, Geneva, Lausanne and Lugano) adopted the Swiss Rules of International Arbitration in 2004 based on the UNCITRAL Model Law on International Commercial Arbitration (1985).
[203] Article 353-399 of Swiss Civil Procedure Code (CPC) of December 19, 2008
[204] Article 176 (1) of the Federal Act on Private International Law, 1987.
[205] Refer Article 190 of Federal Act on Private International Law, 1987, which provides for Finality and the Action for annulment.
[206] Article 194 of Federal Act on Private International Law, 1987 explicitly states that "the recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards".

4.1.3. France

The Arbitration laws in France are governed by the French Code of Civil Procedure and like most nations, are not based on UNCITRAL Model Law. The French courts have usually adopted a very noninterventionist approach while interpreting the questions of public policy. The French decree on arbitration law defines international arbitration as "*an arbitration is international when international trade interests are at stake*."[207] The law puts a clear distinction between national and international arbitration. Article 1514 of the Decree n° 2011-48 of 13 January 2011 on the New French Law on International Arbitration clearly states that an award can be recognized and enforced if the "*party relying on it can prove its existence*" and the award is not in contradiction to the "*international public policy*".[208] An award can be only set off if its recognition and enforcement are in contradiction to the international public policy for the awards made in France as well as awards made abroad.[209] The Court of Appeal of Paris defined the French conception of international public policy as "*the body of rules and values whose violation the French legal order cannot tolerate even in situations of an international character.*"[210]

However, there have been instances when the French courts found public policy breaches when the arbitrators contravened the impartial and independence norms such as creating *inequality* between the parties[211]. The other public policy grounds for refusing the enforcement of an arbitral award include arbitration of insolvency disputes[212], or the original arbitration contract contradictory to public policy rules[213], issues of anti-trust laws[214], or fraud[215]. Also, in the case of *Société Ouest Africaine des Bétons Industriels v. State of Senegal*[216], the Cour de Cassation affirmed that public policy, domestic or international, is not an issue that a judge should consider when dealing with the enforcement of ICSID

[207] Decree n° 2011-48 of 13 January 2011 on the New French Law on International Arbitration.
[208] Article 1514 of the Decree n° 2011-48 of 13 January 2011 on the New French Law on International Arbitration.
[209] Article 1520 of the Decree n° 2011-48 of 13 January 2011 on the New French Law on International Arbitration.
[210] Case *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha*, Court of Appeal of Paris, France, 16 October 1997.
[211] Refer Case *Soc. Excelsior Film TV v. Soc. UGC-PH*, Court of Cassation, France, 24 March 1998, 95-17.285.
[212] Refer Case *Jean Lion et Cie S.A. v. International Company for Commercial Exchanges,* Court of Cassation, France, 6 May 2009, XXXV Y.B. Com. Arb. 353 (2010).
[213] Carbonneau, Thomas E., and Francois Janson. "Cartesian logic and frontier politics: French and American concepts of arbitrability." *Tul. J. Int'l & Comp. L.* 2 (1994): 193.
[214] Refer Case *Labinal v. Mors*, 1993 Rev. Arb. 645.
[215] Fouchard, Philippe, and Berthold Goldman. *Fouchard, Gaillard, Goldman on international commercial arbitration*. Kluwer Law International BV, 1999.
[216] Case *Société Ouest Africaine des Bétons Industriels v. State of Senegal,* ICSID Case No. ARB/82/1.

awards. The French Courts may only set aside an award strictly limited to the five (5) grounds, which excludes the refusal on the grounds of error of fact or law, or merits of the case.[217] Nonetheless, the international arbitration practices in France enjoy a more laissez-faire attitude. The decisions denying the enforcement of arbitral awards are exceedingly rare and there is minimum interference of domestic courts in arbitration proceedings. Both in domestic and international arbitration, there is an evident autonomy of the arbitral process from the judiciary.

4.1.4. United Kingdom

The Arbitration Act of 1996 governs arbitration in England, Wales, and Northern Ireland in the United Kingdom (UK). UK hosts one of the major international arbitration institutions in the world i.e. The LCIA. The UK is a party to both the New York Convention and the Geneva Convention. The Arbitration Act of 1996 governs enforcement of both, the domestic and the international arbitral awards. Section 66 of the act states that an award must be enforced similarly as a "*judgment or order of the court to the same effect*" or the same can be converted into a court judgment.[218] This section can be applied to domestic awards as well as international awards, however, there is a high possibility of the court's interference. Sections 67 to 69 of the act provide a wide range of exceptions for challenging the enforcement of an award based on substantive jurisdiction, serious irregularity, and point of law. English common law does not make any distinction between domestic and international arbitration proceedings, making the scope wider for the annulment of an award. Section 68 of the act states that an award may be annulled if "*the award being obtained by fraud or how it was procured being contrary to public policy*".[219] The Arbitration Act of 1996 also recognizes the enforcement of foreign awards under Part III of the act which specifically deals with the Enforcement of Geneva Convention awards and New York Convention awards. Section 103(3) of the act gives effect to Article V(2)(b) of the New York

[217] Article 1520 of the Decree n° 2011-48 of 13 January 2011 on the New French Law on International Arbitration states that an award may only be set aside where *"(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy*".
[218] Refer the Arbitration Act 1996 of the United Kingdom.
[219] Section 68 of the Arbitration Act 1996 of the United Kingdom.

Convention, i.e., the recognition and enforcement of an arbitral award may be refused on the grounds of public policy.

In general, the UK courts have usually taken the view that the defense public policy must be construed narrowly and not as a hindrance to the enforcement of an arbitral award. In the popular case of *RBRG Trading (UK) v. Sinocore International [2018]*[220], RBRG requested to set aside the arbitral award on the grounds of public policy, and that the claim was based on fraudulent bills of lading. However, the Court of Appeal took a restrictive approach while deciding on the grounds of public policy under Section 103 of the Arbitration Act, 1996. The Court of Appeal stated that:

> "*In enforcing the Award the court is not allowing its "process to be used by a dishonest person to carry out a fraud." In the event, there was no fraud; only an attempt at fraud. There is no public policy to refuse to enforce an award based on a contract during the performance of which there has been a failed attempt at fraud…*"[221]

The mere attempt to fraud or bribe[222] does not constitute an infringement of public policy. The grounds for setting aside an award based on public policy were not sufficient enough to annul the award. The Court also mentioned that in the following case that the illegality was not *central*, but *collateral* to the case, following a pro-arbitration approach. In the case of *Westacre Investments*, the Court of Appeals stated that to set aside an award based on public policy, the elements of illegality which violate the public policy must be of the "*greatest importance*".[223] The concept of public policy is very complicated and should be approached with "*extreme caution*" as expressed by the English Court of Appeal.[224] Also, the English courts have proposed to narrow down the scope of public policy by eliminating the words "*principles of law*", as the key words public policy are adequate to defy any award based on fraud and oppression.[225]

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[220] Refer Case *RBRG Trading (UK) v. Sinocore International,* [2018] EWCA Civ 838.
[221] Refer Para 37 of *RBRG Trading (UK) v. Sinocore International*.
[222] Refer Case *National Iranian Oil Company (NIOC) v. the State of Israel*, ICC Judgment of January 10, 2013. The High Court stated that the enforcement of a contract procured by bribery would not be contrary to public policy, but the enforcement of a contract to pay a bribe would be in violation of the English public policy.
[223] Case *Westacre Investments Inc v. Jugoimport-SDRP Holding Co Ltd,* [1999] EWCA Civ 140.
[224] Case *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation,* (2005] EWHC 726 (Comm)
[225] Tosun, Huseyin Alper. *Public Policy Concepts in International Arbitration*. University of California, Berkeley, 2019.

4.1.5. Germany

Most developed countries have a similar notion of public policy. The German arbitration law is governed by *Zivilprozessordnun*g (ZPO), 1879[226], i.e., the German Code of Civil Procedure applicable on all domestic as well as international arbitrations taking place in Germany. The German law adopted UNCITRAL Model Law in its Arbitration Amendment Act of 22 Dec 1997 reforming most of its provisions on the domestic and international arbitration. The German arbitration law does not provide a distinction between national and international arbitration and has always supported a pro-arbitration stance. The German courts have held that an award will violate public policy if it conflicts with fundamental notions of justice, bonos mores, or conflicts with principles that are fundamental national or economic values.[227] The non-enforcement of an award is a negative effect of public policy that is underlying the positive one. The reason for prohibiting such awards is to protect the interest of the community.

The German courts have always interpreted the term public policy in a narrow sense. Unless the award is in contradiction to the justice or elements of law, mere violations of substantive German law do not constitute a violation of public policy. According to Section 1055 ZPO, an award passed has the similar effect as that of a court's judgment. The provisions of the ZPO provide for the enforcement of domestic awards as well as the grounds on which an award can be refused, based on similar grounds granted under Article 44(2) of the UNCITRAL Model Law.[228] The award is not reviewed based on the merits of the case, but only on the procedural shortcomings. Conversely, the foreign awards are governed by the New York Convention.[229] In a recent judgment, the German Court very well elucidated that the decision of a tribunal being erroneously rejected by the matter decided previously establishes a violation of public policy.[230]

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[226] Zivilprozessordnung [ZPO] [Code of Civil Procedure]. Enacted 30 Jan. 1877, effective 1 Oct. 1879, Germany.
[227] Redfern, Alan, et al. *Redfern and Hunter on international arbitration*. Oxford University Press, 2009.
[228] Section 1059(2) of the Zivilprozessordnung (ZPO), 1879 provides for provisions on recourse applications for setting aside an award.
[229] Section 1061 of the Zivilprozessordnung (ZPO), 1879 governs the recognition and enforcement of Foreign Awards.
[230] Bundesgerichtshof (Federal Court Decision), decision of October 11, 2018 - I ZB 9/18.

4.1.6. Hungary

Hungary has consented to the accompanying worldwide regulations such as the New York Convention and the Geneva Convention. The arbitration laws were first enacted in Hungary in 1994 based on the UNCITRAL Model Laws. The new *Arbitration Act* was enacted in 2017 applicable to both the domestic as well as international arbitrations within Hungary. The law does not stipulate a distinction between domestic and international arbitrations, with no case laws classifying the same.[231]

The Hungarian Arbitration Law provides for the defense of public policy as a ground to oppose enforcement of an award i.e. An award may be refused if the arbitral award is contrary to the public policy and order of Hungary.[232] In 2003, the Hungarian courts were widely criticized when the Supreme Court refused to enforce an award based on a high attorney fee percentage which was deemed to be against public policy.[233] Nonetheless, the Hungarian courts have generally followed the narrow interpretation of public policy, and in cases of slight substantial and procedural breaches, and minor errors in law, the courts were averse to setting aside an award on the violation of public policy.[234]

Ádám Boóc's article presents a detailed examination of Hungary's legal landscape governing arbitral awards. It highlights the critical role of legal frameworks, such as the provisions of the old Hungarian Civil Code, in guiding arbitral decisions to ensure they meet statutory requirements and uphold the parties' contractual agreements.[235] A notable case in this context is the Curia's decision in judgment number Gfv. 30.241/2022/5 related to the review proceedings for annulment of an arbitral award. The Curia clarified that while the applicants claimed the award violated public policy by applying *aequitas* without their consent, the Arbitral Tribunal had based its decision explicitly on Hungarian legal principles. This decision reflects adherence to the principles that arbitral decisions must align with the legal

[231] Bermann, George A., 2014.
[232] Refer Section 47 (2)(bb) and Section 54(b) of the Act LX of 2017 on Arbitration.
[233] Case no. BH 2003.127, Supreme Court Judgement, Hungary.
[234] "Setting aside Arbitral Awards in Hungary Based on Public Order." *Smartlegal*, smartlegal.hu/publication/setting-aside-arbitral-awards-in-hungary-based-on-public-order. Accessed 06 Nov. 2023.
[235] Boóc, Ádám. "Observations on the Annulment of Commercial Arbitral Awards on the Grounds of Conflict with Public Policy in Hungarian Law." Benke, József (szerk.) H TEXNH MAKPH : Ünnepi Tanulmányok Kecskés László 70. születésnapja tiszteletére. Pécs (2023): 81-93.

frameworks agreed upon by the parties, further reiterating the importance of procedural correctness and respect for the autonomy of parties in the arbitration process.[236]

Even though the European Union member states have diverse cultures and backgrounds, the general approach followed by the member states share a common framework and interpretation of the defense of public policy at the International level.[237]

4.1.7. The Intersection of Public Policy and EU Competition Law

4.1.7.1. ECO Swiss Case

The Eco Swiss China Time Ltd v. Benetton International NV, 1999 ("*Eco Swiss*")[238] is the most-discussed case in European arbitration history. The significance of EU public policy in international arbitration was first highlighted in this dispute. The case includes a Dutch firm known as *Benetton*, a Hong Kong-based company known as *Eco Swiss*, and a New York-based corporation known as *Bulova*. The companies entered into an eight-year license deal in 1986, under which Eco Swiss and Bulova were granted the right to manufacture and sell watches with the name Benetton. However, in 1991, Benetton opted to terminate the agreement before its expiration and gave notice of termination to Eco Swiss and Bulova.

Because the agreement contained an arbitration clause allowing the parties to resolve disputes through arbitration with Dutch law as the governing law and by the rules of the Netherlands' Institute of Arbitrators, the parties invoked arbitration, and in 1995, the arbitrator issued a *final Arbitral Award* ordering Benetton to pay USD 23,750,000 and USD 2,800,000 to the Eco Swiss and Bulova respectively, for the damages suffered due to early termination of the licensing agreement.

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[236] Curia Judgment No. Gfv. 30.241/2022/5, Review proceedings decision in relation to the action for annulment of an arbitral award. Also see Boóc, Ádám. "Observations on the Annulment of Commercial Arbitral Awards on the Grounds of Conflict with Public Policy in Hungarian Law." Benke, József (szerk.) H TEXNH MAKPH : Ünnepi Tanulmányok Kecskés László 70. születésnapja tiszteletére . Pécs (2023): 81-93.

[237] FERRETTI, Federico. "EU Internal Market Law and the Law of International Commercial Arbitration: Have the EU Chickens Come Home to Roost?." *Cambridge Yearbook of European Legal Studies* 22 (2020): 133-155.

[238] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055.

While Eco Swiss was concerned about an arbitration panel's incapacity to fully apply a competition law defense, Member State courts quickly interpreted it to entail that an award must be annulled if an arbitral tribunal applied EU competition law erroneously.[239]

- Involvement of Courts
  - **Dutch District Court:** In 1995, after the arbitrators rendered their decision against Benetton, Benetton petitioned the Dutch District Court to vacate the award based on public policy. Benetton contended that the licensing agreement included market segmentation by territory, rendering it contrary to public policy and null and void under Article 81 (2) TEC. In 1996, the Dutch District Court dismissed the case and ordered Benetton to compensate Eco Swiss for damages sustained as a result of Benetton's termination of the licensing agreement, even though neither the parties nor the arbitrators mentioned the issue of the licensing agreement's validity throughout the arbitration proceedings.
  - **Court of Appeals (Gerechtshof):** According to the Court of Appeal's interpretation of Article 1065[240] of the Code of Civil Procedure, 1986 of Netherlands, the Court of Appeals took the view that arbitration award may be annulled if Article 81 TEC (ex-Article 85 EC) is violated. According to the Court of Appeals, the agreement between Benetton, Eco Swiss, and Bulova violated Article 85 EC since it entailed a division of the market based on territory.
  - **The Supreme Court of the Netherlands (Hoge Raad):** Eco Swiss dissatisfied with the Court of Appeal's judgment, submitted an appeal to the Supreme Court of the Netherlands against the Court of Appeals' ruling, which stayed the award and addressed to the ECJ five questions regarding the interpretation of Article 81 TEC (ex-Article 85 EC).

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[239] Liebscher, Christoph. "EU Member State Court Application of Eco Swiss: Review of the case law and future prospects." *EU and US antitrust arbitration: A handbook for practitioners* (2011): 785.

[240] Article 1065 of the Code of Civil Procedure, 1986 of Netherlands sets out the grounds on which annulment of an arbitration award may be sought:

(a) there is no valid arbitration agreement;
(b) the arbitration tribunal has been constituted in breach of the applicable rules;
(c) the arbitration tribunal has failed to comply with its terms of reference;
(d) the award has not been signed or does not state the reasons on which it is based, contrary to the provisions of Article 1057;
(e) the award or the manner in which it has been made is contrary to public policy or accepted principles of morality.

Also, Refer Article 1066(1) and (2) of the Code of Civil Procedure, 1986 of Netherlands which states that an application for annulment does not stop enforcement of the award; but, if a stay is warranted and requested by either party, the court may order a stay of enforcement awaiting a final judgment on the application for annulment. A stay application must be founded on a reasonable likelihood of the arbitral award being nullified.

- **European Court of Justice (ECJ):** The Supreme Court of the Netherlands raised five questions, out of which the main question was whether a national can consider an arbitration award contrary to Article 85 EC allowing a claim for annulment of that award if the claim otherwise complies with statutory requirements.[241] The ECJ responded in its judgment as follows:

  "*The national court should allow a claim for annulment of an arbitration award on the ground that it is contrary to Article 85 of the Treaty even if the national rules of procedure allow annulment on the ground of illegality only in the event of a conflict with public policy or accepted principles of morality*."

  The ECJ's decision ushered in a new era of international arbitration by establishing a precedent for Member States in terms of enforcing arbitral awards. However, the ECJ also clarified that the EU law does not refrain Member States from applying their national laws.

➢ Decision and Analysis

The primary debates surrounding the addresses are the interpretation of Article 85 EC and its implications for the cancellation of the license agreement. The ECJ confirmed that national courts of European Union Member States should allow an annulment claim based on a violation of Article 81 TEC (Article 85 EC).

According to the ECJ:

"…where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with the prohibition laid down in Article 85(1) of the Treaty."[242]

Any transgression of domestic rules of law is not considered a violation of public policy. Owing to the Eco Swiss judgment, the national courts are to construe the definition of public policy widely to include European laws including EU competition laws. The ECJ expressed unequivocally that domestic courts' authority should be limited and used the phrase

[241] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055. Refer Para 10.
[242] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055. Refer Para 37.

"*extraordinary circumstances*"[243] to circumscribe the meaning of the word public policy. Due to the essential and fundamental nature of Article 101 of the TFEU (ex-Article 81 TEC, ex Article 85 EC), which prohibits anti-competitive behavior, the New York Convention must construe public policy.[244]

Eco Swiss voiced concerns about the arbitrability of competition law and the role of national courts in enforcing arbitral awards. According to the ECJ, Article 101 of the TFEU contains a basic provision that is necessary for the Community to fulfill the responsibilities given to it and, in particular, for the internal market to operate.[245] Any decision that contradicts the preceding provision is declared void. The Eco Swiss case's consequences remain uncertain, as it is extremely difficult to define how broadly the word public policy should be applied. *The Eco Swiss case established the standard for other arbitral decisions, such as Thales v. Euromissile*[246]*, in which the Paris Court of Appeals applied a restricted interpretation of the idea of public policy.*

4.1.7.2. SNF v. CYTEC INDUSTRIE[247]

Cytec Industries BV, a Dutch company, and SNF, a French company, both of which manufactured chemical goods, entered into an agreement in which CYTEC agreed to manufacture and supply SNF with raw material named acrylamide, a chemical compound frequently used as a water-soluble thickener and a necessary raw material for SNF's chemical products. In 1991, SNF engaged in a supply agreement with CYTEC for three years, with the possibility of extension. The contract defined minimum annual order obligations for SNF and maximum annual supply obligations for CYTEC, as well as a system for calculating and determining the price of the essential chemicals provided over the contract period.

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[243] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055. The ECJ noted in Para *35 of the Eco Swiss case* noted that the annulment of arbitral awards should be done only in extraordinary turn of events and used the terms "exceptional circumstances" to narrow down the scope of public policy interpretation. This served as the basis for various future judgments where the courts expressed the same view and refused to annul the awards on the grounds of public policy.

[244] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055. Refer Para 39.

[245] See Case C-126/97, *Eco Swiss,* the ECJ in its Summary judgment observed that the public policy must be given a uniform interpretation regardless of the circumstances to frustrate the difference in its interpretation and analysis.

[246] Case *Thales Air Defence BV v. GIE Euromissile and others*, November 18, 2004, J.D.I. (2005) 357.

[247] Case *S.N.F. S.A.S v. La Chambre de Commerce Internationale,* Cour d'appel de Paris, 22 janvier 2009.

The parties signed a new contract in 1993, altering the 1991 contract's exclusive annual order and supply responsibilities and defining an eight-year term, with French law as the governing law and an arbitration clause as a method of resolving disputes under the ICC Rules of Arbitration with Brussels as the seat of arbitration. The disagreement occurred as a result of SNF's unilateral termination of its contract with Cytec. SNF notified CYTEC in early January 2000 that it regarded the 1993 contract to violate Article 81 TEC (prohibiting anti-competitive agreements) and Article 82 TEC (regarding abuse of a dominant position) of the EC Treaty, and that it is void. In May 2000, in response to SNF's termination of the contract, CYTEC initiated arbitration procedures in Brussels claiming damages for the breach of contract.

The Tribunal divided the proceedings into two awards, one on the merits on 5 November 2002 and another on damages and interest on 28 July 2004. In response, SNF challenged both the awards in Belgium (the seat of the arbitration) and France (where enforcement was sought) alleging that the arbitrators had misapplied EC law and that the 1993 contract violated Article 81 TEC and Article 82 TEC and hence should be annulled.

The Tribunal conducted a detailed review of the relevant EC competition law issues in the award of 5 November 2002. In a partial award, the arbitrators determined that one of the contracts breached Article 81 TEC of the EC Treaty since it effectively excluded SNF from the chemicals market. Additionally, the tribunal determined that both parties were accountable for the contract's nullity and that liability should be shared equally between them. The Tribunal found no violation of Article 82 TEC due to a lack of evidence indicating Cytec's behavior did not represent an abuse of a dominating position. In a second award dated 28 July 2004, the tribunal ordered SNF to pay Cytec EUR 4,447,548 in damages, as SNF was found not to have suffered any damages. Due to a lack of evidence, the Tribunal dismissed all of SNF's counterarguments.

- <u>Involvement of Courts</u>
  - **Paris Court of Appeal (Cour de Cassation):** SNF appealed to the Paris Court of Appeal that the arbitral award was against the French international public policy and that the tribunal had misapplied EC competition law. The SNF's claims were denied, and the SNF sought an appeal to the French Supreme Court, which upheld the lower court's ruling. The Paris Court of Appeal dismissed the appeal against the order, and that the court's assessment of an arbitral tribunal's application of

competition laws should be strictly formal except about *"flagrant, real and concrete breaches of international public policy".*[248] Additionally, SNF filed a criminal complaint against Cytec with the Paris Court of Appeal for abuse of its dominating position, but the case was dismissed. The Paris Court of Appeal relied on the *Hilmarton*[249] judgment, which established that French courts are not prevented from executing awards that have been annulled in the jurisdiction in which they sit and ordered enforcement of the tribunal's award.

- **Brussels Court:** In addition, SNF filed a case with the Brussels First Instance Court intending to have the awards declared invalid. Since the awards gave damages to one party for infringing EU competition regulations, the first instance court agreed with SNF that the awards were against the public interest of the EU competition legislation concerning the interpretation of Article 1704(2)(a)[250] of the Belgian Judicial Code. However, the judgment of the first instance court was soon overturned by the Brussels Court of Appeal.
- **Paris Tribunal de Grande Instance ("Tribunal de Grande"):** As a result of the aforementioned decisions, SNF approached the Paris Tribunal de Grande Instance and filed a civil liability action against the ICC, alleging that the ICC breached its obligations by behaving carelessly and by failing to interpret its own Rules at the party's request. The SNF also contested that the ICC failed to examine the arbitral award's legality and conformity with EU public policy and facilitated protracted and costly arbitral hearings by granting 13-time extensions. The Tribunal de Grande dismissed the claims made by SNF. The Tribunal de Grande stated that it maintained a separation of powers between arbitration and the court, barring them from intervening with the arbitration process, and noted that the Paris Court of

[248] Heitzmann, Pierre, and Jacob Grierson. "SNF v CYTEC Industrie: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC'." *Stockholm Int'l Arb. Rev.* 2 (2007): 39.

[249] Case *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV),* 23 March 1994, 92-15.137. In this case, the French court upheld the arbitral award despite the Swiss court's annulment, because the French court viewed the award as an "international award" rather than one integrated into the Swiss legal system, and because its recognition in France did not violate international public policy. Also see Case *Thales Air Defence BV v. GIE Euromissile and others*, November 18, 2004, J.D.I. (2005) 357. The ruling of the Paris Court of Appeal also reaffirms the narrow view of public policy. The award violated international law public policy by being established on an illegitimate contract, and Thales petitioned to annul the award, alleging that the arrangement violated EU competition rules. The court refused to annul the award, holding that only *flagrante*, *effective et concrete (*"obvious, actual *and concrete*") violations of French public policy would be deemed grounds for refusing to enforce an international award.

[250] Article 1704(2) of the Belgian Judicial Code (BJC) provides grounds for setting aside an arbitral award. It reads as *" 2. An arbitral award may be set aside: (a) if it is contrary to ordre public".*

Appeal found no blatant infringement of international public order. It was underlined that the ICC followed its processes, which are outlined in Article 27 of the applicable ICC Rules, to scrutinize arbitral awards and establish an appropriate method for determining costs. Additionally, all parties contributed to the arbitration procedures' extension of time limits. Consequently, any subsequent claims of SNF before the French courts were dismissed.

- Decision and Analysis

The primary question is how far a national court might probe the merits of relevant competition law issues in determining whether an arbitral ruling violates Article 81 TEC and Article 82 TEC. Since the European Court of Justice's decision in the *Eco Swiss* case, there has been debate among arbitration practitioners and scholars about the extent and applicability of review of awards addressing EU competition law issues. *Eco Swiss* case demonstrates unequivocally that a national court in the European Union must annul an arbitral award that violates Article 81 TEC when its domestic rules of procedure oblige it to approve a request for annulment grounds on a failure to observe national rules of public policy. However, the Paris Court of Appeal's and the Brussels TPI's judgments in Case *SNF v. Cytec Industrie* provide profoundly different responses to this topic. The French courts demonstrated a pro-arbitration stance in terms of enforcing arbitral judgments, as well as a reluctance on the part of the courts to revisit subject matters examined by an arbitral tribunal or to assess the merits of an award. Following the decision in the *SNF v. Cytec Industrie* case, the French Courts have applied this standard of analysis in determining whether the arbitral awards are consistent with international public policy. The Brussels Courts, on the other hand, chose a different approach than the French Courts. The Brussels courts considered the merits of the case in light of Article 81 TEC and Article 82 TEC in reaching its findings, concluding that the judgment may be annulled for violation of public policy, i.e., for failing to award appropriate damages to one of the parties. However, the Brussels Court of Appeal overturned the decision. Given the above mentioned, it is apparent that there is no clear EU-wide stance on the scope of review of arbitral decisions before national courts.

4.1.7.3. Tensaccia S.P.A v. Freyssinet Terra Armata S.R.L.[251]

In 1998, two Italian companies, Freyssinet Terra Armata S.R. L (Freyssinet) and Tensacciai S.P.A (Tensacciai), entered into a contract governed by Italian law and included an arbitration provision providing for ICC arbitration with a venue in Lausanne, Switzerland. Freyssinet and Tensacciai were required under the contract to make joint bids for the employment of certain technology in the building of two bridges on the new between Milan and Naples high-speed railway line. However, both parties agreed not to enter into any separate arrangements with other companies or to bid separately in response to the bids. Tensacciai, on the other hand, formed various partnerships with other companies. Freyssinet having been affected by it, filed an arbitration request with the ICC on September 13, 2002, to seek damages for € 4,250,000.

During the arbitration proceedings, Tensacciai argued that the claim should be rejected because the contract violated Italian and European competition regulations and was contrary to the public policy of Switzerland.[252] The ICC Arbitral Tribunal ordered Tensacciai to pay Freyssinet the sum of € 488,258, with interest, in a final judgment dated September 12, 2005. The Arbitral Tribunal essentially found that the parties' contract was legal under Italian and European competition rules and that Tensacciai, who had severely and willfully breached its contractual commitments, was obligated to compensate Freyssinet for the total damages incurred.

- Involvement of Courts

Tensacciai petitioned before the Swiss Supreme Court for the annulment of the award on the grounds of public policy defense. The Swiss Supreme Court denied arbitrators the authority to evaluate the applicability of EU competition law, stating that such an examination does not fall within the scope of public policy. As a non-EU country, the Swiss Supreme Court could not refer the matter to the ECJ for suitable interpretation of EU legislation, thus the Swiss Supreme Court explained its decision as such a conflict of laws may threaten the Swiss Supreme Court's authority.

- Decision and Analysis

[251] Case *Tensaccia S.P.A v. Freyssinet Terra Armata S.R.L.*, 4P.278/2005, 8 March 2006.
[252] Articles 190(2)(d) and (e) of the Federal Act on Private International Law, 1987 reads as *"An arbitral award may be set aside only: d. where the principle of equal treatment of the parties or their right to be heard in an adversary procedure were violated; e. where the award is incompatible with public policy."*

The Swiss Supreme Court refused the award and observed that given that the requirements of EU or Italian competition law cannot be linked to public policy, it would be pointless to investigate whether or not the Arbitral Tribunal overlooked these provisions.[253] The judge used the analogy to equate the concept of public policy to the changing look of a chameleon.[254] Procedural public policy is violated when fundamental and generally recognized principles are not respected, thus leading to an unsustainable contradiction with the sentiment of justice, so that the decision appears inconsistent with the values recognized by a state ruled by law. The Swiss Supreme Court emphasized the existence and general role of competition law in Switzerland, as well as the fact that other rising nations have competition law. Additionally, the Swiss Supreme Court stated the need to distinguish material public policy from procedural public policy. It is interesting to note that since the adoption of the Swiss Arbitration Act in 1987, there have been no arbitration awards annulled on the grounds of public policy. Swiss courts are usually extremely specific and generally take a narrow approach while interpreting the meaning of public policy and have consistently shown a pro-arbitration attitude.

4.1.8. Key Lessons and Implications from Competition Law cases in Europe

The EU competition law is a matter of public policy within the scope of Article V (2) (b) of the New York Convention. This means that EU member state courts may refuse to accept or enforce a foreign arbitral award if the judgment is averse to public policy as a result of non-compliance with EU competition regulations. To ensure more effective enforcement of EU competition law by national courts, it is important to be efficient in establishing guidelines governing the application and enforcement of EU competition law by national courts, particularly about sanctions. Additionally, it is critical to comprehend the overlap between EU and member state competition legislation and to apply the idea of Public Policy in a more restricted manner. Public policy encompasses a broad range of issues and is not confined to EU competition law but extends to other socioeconomic sectors where the welfare of the public interest is a concern.

Initially, the EU's priorities were to build an internal market, adopt a unified foreign commercial strategy, and establish regional policies. The case studies addressed in this study

[253] Case *Tensaccia S.P.A v. Freyssinet Terra Armata S.R.L.*, 4P.278/2005, 8 March 2006. Refer Para 1.2.3.
[254] Case *Tensaccia S.P.A v. Freyssinet Terra Armata S.R.L.*, 4P.278/2005, 8 March 2006. Refer Para 2.1.

give us an insight into Member states' public policy defenses and their interpretation in light of EU law, particularly EU competition law. While the courts in the majority of cases adhered to a restrictive view of public policy, such as the French courts in Case *S.N.F. S.A.S v. La Chambre de Commerce Internationale*, the *Eco Swiss* case is a classic example of a broad interpretation of public policy and serves as a precedent for future cases. However, following the *Eco Swiss* case, the Dutch courts adopted a more restrictive interpretation of public policy, denying enforcement in all but the most flagrant circumstances. It is rare for domestic courts to interfere in arbitration procedures and there is a clear distinction between local and international arbitration laws.

In light of this, national courts should ensure that their intervention in the arbitration is as little as possible. Each legal system, with identical fundamental rights, recognizes and enforces arbitral awards in line with its evaluation criteria. Therefore, it is critical for parties entering into an arbitration clause to assess the consequences of the governing law and arbitration venue, as well as whether the agreement itself is contrary to EU public policy. Despite the established role of international public policy in the EU competition law and the New York Convention, the scope of review of arbitral awards for competition law violations for setting aside the award remains uncertain. Each country has taken a unique approach to arbitral proceedings. As the world trade and economy grow, the Member States should continue to collaborate on developing an international public policy and enforcing it narrowly.

4.2. Public Policy in Asia

4.2.1. India

The history of arbitration in India dates to as early as the year 1772 in Bengal and was first applied uniformly all across India in 1940.[255] The Arbitration Act of 1940 was replaced by the Arbitration and Conciliation Act of 1996. The Arbitration and Conciliation Act of 1996 did not define the expression "*public policy*" or "*as opposed to public policy*", however, during the 2015 and 2019 amendment acts, the policymakers aimed to narrow down the

[255] "What Is History of Arbitration in India." *Indian Dispute Resolution Centre*, theidrc.com/content/adr-faqs/what-is-history-of-arbitration-in-india#:~:text=The%20relatively%20modern%20and%20first,1772%2C%20during%20the%20British%20rule. Accessed 21 Dec. 2023.

definition of public policy. Public policy of India has the most significant role in the entire process of enforcement of an arbitral award particularly the foreign awards because it involves parties, lawyers, and arbitrators from diverse legal and cultural traditions. Public policy is not the policy of a particular government; however, it connotes some matter which concerns the public good or the public interest.

On various occasions, the Indian courts gave an interpretation of the meaning of public policy in their judgments. For instance, one of the landmark cases that discusses the issue of public policy is the *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd*[256] case. The case refers to the possible meaning of the public policy of India, wherein the Supreme Court of India observed that:

"*It has been repeatedly stated by various authorities that the expression 'public policy' does not admit of precise definition and may vary from generation to generation and from time to time. Hence, the concept of 'public policy' is vague, and susceptible to narrow or wider meaning depending upon the context in which it is used. Lacking precedent, the Court has to give its meaning in the light and principles underlying the Arbitration Act, Contract Act, and Constitutional provisions.*"

Thus, the concept of public policy is always an unsafe and treacherous ground for legal decisions[257]. The Supreme Court laid down the grounds for refusal of enforcement and recognition of a foreign award[258] including that it is contrary to public policy if the award is:

(1) contrary to the fundamental policy of Indian law, i.e., it is "*arbitrary*" or "*whimsical*," as opposed to being fair, reasonable, and objective, or it contains a decision so irrational that no reasonable person would have arrived at it. This includes:

    - The tribunal fails to make its decision following well-accepted principles of natural justice. Therefore, the Supreme Court strongly recommended recording reasons in support of any decision; and

[256] Case *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd.,* AIR 2003 SC 2629.
[257] As observed by Lord Davey in Case *Janson v. Driefontein Consolidated Gold Mines Ltd*., (1902) AC 484, 500.
[258] See Case *Renusagar Power Co. Ltd. v. General Electric Co*., (1994) 2 Arb LR 405: AIR 1994 SC 860, 885, 888: 1994 Supp (1) SCC 644

- The tribunal reaches a decision "*which is so perverse or so irrational that no reasonable person would have arrived at the same*." The Supreme Court went on to state that where "*an arbitral tribunal takes into account something irrelevant to the decision which it arrives at; or ignores vital evidence in arriving at its decision, such decision would necessarily be perverse*."

(2) contrary to the interest of India, i.e., it affects India's relations with other countries. The Supreme Court gave little guidance as to the interpretation of this term, beyond noting that the term "*concerns itself with India as a member of the world community in its relations with foreign powers*."

(3) contrary to justice and/or morality, i.e., it "*shocks the conscience of the court*," or it relates to an immoral contract. In the Supreme Court's view, an award would be set aside on grounds that it is contrary to justice and morality "*only when it shocks the conscience of the court*." An award would be contrary to justice such as where an arbitrator awards more than the sums claimed for by the party. An award would be contrary to morality where it furthered sexual immorality or where it relates to "*such agreements as are not illegal but would not be enforced given the prevailing mores of the day*."

(4) Patently illegal, i.e., it contains a ruling which contravenes the law of India, or it contravenes the provisions of the Act, or it is based on an interpretation of the terms of a contract that no fair-minded or reasonable person would adopt. The Supreme Court held that an award would be set aside for being patently illegal under three circumstances:

- the award contravenes the substantive law of India. The Supreme Court further elaborated that "*illegality must go to the root of the matter and cannot be trivial*." The Supreme Court held that this is in effect a restatement of Section 28(1)[259] of the Arbitration Act which requires that where an arbitration is seated in India, the tribunal must decide per the substantive law in force in India;

[259] See The Arbitration and Conciliation Act, 1996.

- the award contravenes the Arbitration Act itself; for instance, where an arbitrator gives no reasons for an award in contravention of section 31(3) of the Arbitration Act.[260]

- the tribunal fails to decide the dispute per the terms of the contract. The court held that this is in effect a restatement of Section 28(3) of the Arbitration Act which again only applies where arbitration is seated in India.[261] Therefore, an award cannot be refused unless the tribunal interprets a contract in a manner "*no fair-minded or reasonable person could do*". Simply adopting a different interpretation from that to a court's perception does not provide a substantive basis to set aside an award.

This decision by the Supreme Court was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdictions such as the United States and France. However, the narrow interpretation of public policy was interpreted in a broader context in many other cases. In the *Renusagar* case, the courts interpreted that "*to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India*." The courts agree that an arbitration award should not be lightly set aside and that a court can only investigate the matter if there is some illegality or immorality that is more than a mere misstatement of the law.

Over the years, the Indian judiciary has given conflicting views on public policy. Such conflicting interpretation of the concept is a debatable topic as to whether public policy was a judge-made test or not. Due to a lack of concrete statutory definition, the judges have given it different interpretations which might be the result of their interpretations or attitude while deciding upon the case. Nevertheless, the landscape of Indian law is undergoing continuous developments and the Law Commission of India in its 246th Report proposed amendments to the Arbitration and Conciliation Act of 1996. These proposed changes aimed to refine the scope of public policy.[262] The Law Commission of India in its report attempted to restrict the interpretation of public policy by introducing explanatory statements and clarifications, which were later adopted in the 2015 amendment act. The explanatory statements[263]

[260] See The Arbitration and Conciliation Act, 1996.
[261] See The Arbitration and Conciliation Act, 1996.
[262] Law Commission of India, Report No. 246 on Amendments to the Arbitration and Conciliation Act 1996, August 2014.
[263] The 2015 Amendment to the Arbitration and Conciliation Act, 1996 includes the following Explanations in Section 34 (Application for setting aside arbitral award) for domestic awards, and Section 48 (Conditions for

articulates the conditions under which an arbitral award is deemed to be in contravention of the public policy of India, only if:

1. the award is induced by fraud or corruption, or in violation of sections 75 or 81 of the Arbitration and Conciliation Act of 1996.[264]
2. the award is in contravention of the fundamental policy of Indian law.
3. an award is in conflict with public policy if it goes against the fundamental notions of morality or justice.

The explanation further explains that while evaluating any violation of the fundamental policy of Indian law should not include a substantive review of the merits of the case.

The policymakers aimed to make recognition and enforcement of arbitral awards to be less intricate in courts, by defining the concept of public policy. However, even after the 2015 and 2019 amendments, the courts have stepped in on numerous occasions with varying interpretations. In a 2015 judgment[265], the Supreme Court of India introduced the possibility of a merits review during the enforcement stage, diverging from the pro-enforcement as outlined in the recent amendments. It is still unclear how courts interpret the explanations as outlined in the 2015 and 2019 amendments and bring back some of the challenging grounds that the Law Commission of India intended to eliminate.

4.2.2. China

China ratified the New York Convention in 1987, enforcing the rules for the recognition and enforcement of foreign arbitral awards. The general rules of arbitration are found in the Civil

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enforcement of foreign awards) for foreign awards under the New York Convention, and Section 57 (Conditions for enforcement of foreign awards) for foreign awards under the Geneva Convention:
"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."

[264] Section 75 of the Arbitration and Conciliation Act, 1996 on Confidentiality mandates confidentiality in conciliation proceedings, and Section 81 on Admissibility of evidence in other proceedings restricts the admissibility of certain elements in arbitral or judicial proceedings arising from conciliation.

[265] Case *National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A.,* AIR 2020 SUPREME COURT 2681.

Procedure Law (CPL) of the People's Republic of China 1991, applicable to both domestic and foreign arbitrations. The foreign awards in China are divided into 3 major parts: Convention awards, non-convention awards, and awards made outside the defined jurisdiction of Mainland China (i.e., Hong Kong, Taiwan, and Macau).[266]

The Supreme People's Court of China in 1995 detailed that, "*a lower court cannot refuse to enforce a foreign-related or foreign arbitral award or deny the validity of an arbitration agreement in foreign-related or foreign arbitration proceedings without the prior examination and confirmation of the Supreme People's Court*."[267] If an award conflicts with China's sovereignty, the award will violate the public policy of China. The foreign arbitral awards are enforced in China following the New York Convention, nevertheless, the enforcement is established on the mindset of the domestic courts.[268]

The Supreme Court of China has introduced several judicial interpretations concerning the application of arbitration law. The role of the Supreme Court of China has been crucial in the development of arbitration law in the country. Not just this, a phenomenon of guiding cases has been introduced especially for the local lower courts for the ease of arbitrators when arbitrating in China. Other than this, the 2017 amendment to the Chinese Arbitration Law resulted in the establishment of China's two International Commercial Courts, which is one of the one-of-a-kind initiatives taken by any country. These courts created within the domestic legal setting will not only serve to resolve cross-border commercial matters but also provide a comprehensive two-way dispute resolution mechanism.[269]

In the case of *Hemmofarm v. Yongning*[270], the Chinese Supreme People's Court refused to enforce an award on the grounds of public policy. The Court held that "*the competent courts in China had heard the disputes"* between both parties and that the foreign arbitral award which contradicted the previous Chinese court's judgment "*is a violation of China's judicial*

[266] Bermann, George A., 2014.
[267] Kun, Fan. "Salient Features of International Commercial Arbitration in East Asia: A Comparative Study of China and Japan." *Am. U. Bus. L. Rev.* 5 (2015): 447.
[268] Yu, Meng. "Judicial Review of Arbitral Awards in China: How Courts Apply Public Policy?" *China Justice Observer*, 15 Sept. 2019, www.chinajusticeobserver.com/a/judicial-review-of-arbitral-awards-in-china-how-courts-apply-public-policy.
[269] Tao, Jingzhou, and Mariana Zhong. "China's 2017 Reform of Its Arbitration-Related Court Review Mechanism with a Focus on Improving Chinese Courts' Prior-Reporting System." *Journal of International Arbitration* 35.3 (2018).
[270] Case *Hemofarm DD and others v. Jinan Yongning Pharmaceutical Co., Ltd*., [2008] Min SiTa Zi No. 11.

sovereignty and the jurisdiction of its judiciary."[271] However, in other cases, the Chinese Courts showed a pro-arbitration approach while dealing on the grounds of public policy. In the *Mitsui case*[272], the Supreme People's Court opinionated that a violation of the laws of the People's Republic of China does not necessarily mean a violation of the public policy of China. The recent arbitration case laws in China have reflected a positive outlook on arbitration decisions by narrowing the scope of public policy. The Courts have refused to set aside an award by deciding on the merits of the case, and that the public policy should only be interpreted based on the "*fundamental principle of Chinese law, the sovereignty, the safety of the society, or the good social customs, where the public interest is manifestly involved.*"[273] China's pro-arbitration attitude is not only going to be beneficial for itself and the economic (commercial) agreement it is going to have in the future but also gives a signal to the international arbitration community about China's evolution into an arbitration-friendly environment in the country, and within the public policy.

4.2.3. The Intersection of Public Policy and Patent Illegality

4.2.3.1. Oil and Natural Gas Corporation Ltd. v. Saw Pipes

In one of the most controversial Indian judgments *Oil and Natural Gas Corporation Ltd. v. Saw Pipes*[274], the Supreme Court widened the scope of public policy. The Oil and Natural Gas Corporation (ONGC) had placed an order on Saw Pipes for the supply of equipment for offshore exploration to be procured from approved European manufacturers. The delivery was delayed due to a general strike of steel mill workers in Europe. Disputes arose as Saw Pipes was not able to conform to the delivery time and the strike went on for 2 months. ONGC deducted a considerable sum from the bills on account of the delay as Liquidated damages were caused. The matter was referred to arbitration and an award was passed in the favor of Saw Pipes. ONGC challenged this award the Supreme Court concluded that ONGC was justified in deducting the amount and the arbitrators were wrong in awarding the amount

[271] Xing, Xiusong. "Foreign Arbitral Award Refused Recognition and Enforcement on Public Policy Grounds." *Lexology*, Global Law Office, 4 Feb. 2010, www.lexology.com/Commentary/Arbitration-ADR/China/Global-Law-Office/Foreign-arbitral-award-refused-recognition-and-enforcement-on-public-policy-grounds#enforcement.
[272] Case *Mitsui Corporation (Japan) v. Hainan Textile Industry General Corporation,* [2001] Min Si Ta Zi No. 12.
[273] Case *Castel Electronic Pty Ltd. v. TCL Air Conditioner (Zhongshan) Company Ltd.,* (2012) 201 FCR 209; (2012) 287 ALR 297; [2012] FCA 21.
[274] Case Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629.

with interest and setting aside the award. The Court found that "*the subject matter of the dispute is not capable of settlement by arbitration under the law for the time being in force and the arbitral award is in conflict with the public policy in India.*" The Court held that any arbitral award which violates Indian statutory provisions is *patently illegal* and contrary to public policy of India. The Hon'ble Court interpreted patent illegality as meaning any violation of the substantive law in force in India or as an award opposing the terms of the contract.

The ONGC case's decision was widely criticized by the international community. Three years later the Supreme Court had an opportunity to refer the matter to a larger Bench which it did not though it accepted that ONGC's case had invited considerable adverse comments. The Saw pipes gave the defense of *force majeure*[275] which was acceptable, but the arbitral Tribunal rejected this defense. While reviewing the merits of the ONGC case the court failed to consider the labor strike in the entire European continent, something which was neither under the control nor could be predicted by Saw Pipes. This aspect has been overlooked by the court.

The decision of the two judges' Bench in ONGC has bypassed the ruling of the three judges' Bench of the Supreme Court in the *Renusagar* case. That shows both judicial indiscipline and violation of the binding precedent of a larger Bench. The Bench in the Renusagar case held that the term *public policy of India* was to be interpreted in a narrow sense, the Division Bench in the ONGC case went ahead unmindful of the prior precedent and expanded the same to such an extent that arbitral awards could now be reviewed on their merits. This is a huge step backward in laws relating to ADR in the era of globalization.

The Supreme Court in the ONGC case held that "*Illegality must go to the root of the matter and if the illegality is trivial it cannot be held that the award is against public policy. The Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void*." The Court added the ground of *patent illegality*, thereby considerably widening the scope of judicial review on the merits of the decision. Patently illegal contains a ruling that contravenes the law of India, or it contravenes the provisions of the Act, or it is based on an

[275] Force Majeure literally means "greater force." When used in a contract, the Force Majeure clause is one of several boilerplate clauses, which are clauses normally written using standard, universal language. The intention of the Force Majeure clause is to excuse liability of a party because of uncontrollable outside events.

interpretation of the terms of a contract that no fair-minded or reasonable person would adopt. The Indian Supreme Court held that the ground of public policy was required to be given a wider meaning than in the *Renusagar case* because the concept of public policy connoted matters which concerned public good and public interest. However, the Government of India decided to take certain initiatives to bring about legislative changes to address the problems created by these decisions.

4.2.3.2. Penn Racquet Sports v. Mayor International Ltd.[276]

Penn Racquet Sports ("*Penn*"), a company incorporated in Arizona, USA entered into a Trademark Licensing Agreement with Mayor International Ltd ("*Mayor*"), a company incorporated in New Delhi, India. The agreement gave license to the mayor to use its trademark in return for *annual royalty*. The agreement contained an arbitration clause for the settlement of disputes which may arise in the future. The parties agreed to resolve the dispute under the ICC Paris with Austrian Law as the governing law. The royalty was agreed to be paid at the beginning of each year, payable in quarterly installments. However, the Mayor failed to pay the installments, and therefore in June 2006, Penn terminated the contract and appointed another license holder, Nebus Loyalty Limited ("*Nebus*").

Penn invoked the arbitration proceeding against the Mayor before ICC, Paris to seek the appointment of an independent arbitrator. However, the Mayor argued that Penn breached the license agreement by granting the license to Nebus for Europe. Penn contended that it did not breach the agreement by granting license to Nebus, since such grant was permitted under the Agreement. The mayor failed to participate in the arbitration. An ex-parte award was passed in favor of Penn. Penn filed for enforcement of an arbitral award in Delhi High Court. However, the Mayor challenged the award on the ground that the award was contrary to the public policy of India and not per the principles of natural justice.

The Court observed that "*merely because a monetary award has been made against an Indian entity on account of its commercial dealings, would not make the award either contrary to the interests of India or justice or morality*." The award should be opposed to the fundamental policy of Indian law, for the Courts in India to deny recognition and enforcement of a foreign award. The Court distinguished between enforcement of domestic

[276] Case *Penn Racquet Sports v. Mayor International Ltd*., 2011 (1) Arb LR 244 (Delhi).

awards and foreign awards. It held that public policy for Section 48[277] of the Act, has a narrow meaning as compared to the same expression under Section 34[278] of the Indian Arbitration Act.

In support of an expansive interpretation of this expression, the court relied on its previous decision in Saw Pipes, where a wider scope was assigned in the context of setting aside a domestic award. It may not have been brought to the attention of the court that the decision in Saw Pipes had recognized that the scope of intervention for foreign awards should be much less than that for domestic awards, and hence wider meaning should be assigned to the definition of public policy in Section 34 alone and not to that in Section 48. The Delhi High Court had also taken the view that public policy carried a narrower meaning under Section 48 of the act than that under Section 34(ii)(b).

The other objection raised by the mayor was against the ex-parte decision passed by ICC. However, the Delhi High Court observed that the mayor was given a reasonable opportunity to be heard and comply with arbitration procedures such as submission of defense on time which the mayor failed to do. Therefore, the High Court passed a judgment in favor of Penn and rejected the challenge of enforcement of the award ordering the mayor to deposit the awarded amount. The interest of an Indian company was not enough to qualify as working against the public policy of India.

A foreign award brought to India for enforcement may be based on a substantive law other than Indian law. Thus, under the amorphous concept of patent illegality, the Indian courts may be called on to rule on a foreign award by applying a foreign legal system, leading to inevitable complexities and delays in the process of enforcing a foreign award in India.

[277] Section 48 of the Arbitration and Conciliation Act, 1996 enables the court to refuse the enforcement of foreign awards on specified grounds. Section 48(2)(b) provides that enforcement of a foreign arbitral award may be refused if the court finds that "*the enforcement of the award would be contrary to the public policy of India*."

[278] Section 34 of the Arbitration and Conciliation Act, 1996 enables the court to set aside an arbitral award on specified grounds. Section 34(b)(ii) provides that the award may be set aside if the court finds that "*the award is in conflict with the public policy of India.*"

4.2.4. The Intersection of Public Policy and Fundamental Policy of Country

4.2.4.1. Palmer Maritime Inc. v. China Animal Husbandry Industrial Co. Ltd.[279]

Palmer Maritime Inc ("*Palmer*") entered into a lease agreement with China Animal Husbandry Industrial Co. Ltd. ("*CAHIC*"), which held the bill of lading. However, in 2015, CAHIC raised concerns about damaged goods upon the ship's arrival at Huangpu Port, China, leading to a dispute between both parties over indemnification of the goods damage.

In 2016, CAHIC initiated a lawsuit against Palmer at the Guangzhou Maritime Court seeking indemnification against indemnification against damaged goods. Palmer objected to the court's jurisdiction referring to their arbitration agreement, however, in 2017, the Guangzhou Maritime Court deemed the arbitration clause to be invalid and therefore, dismissed Palmer's objection. This decision was later affirmed by the Guangdong High People's Court in an Appeal filed by Palmer in 2018.[280]

Palmer had also initiated an arbitration dispute in London, England over the bill of lading, its arbitration clause, and the obligations of CAHIC resulting in an award by sole arbitrator Patrick O'Donovan in favor of Palmer in 2016. In 2017, Palmer sought the recognition and enforcement of an arbitral award against CAHIC before the Tianjin Maritime Court.

The Tianjin Maritime Court did not recognize and enforce the final arbitration award between Palmer and CAHIC issued in London on September 9, 2016, citing potential violations of public policy. The Tianjin Maritime Court cites Article 283 of the CPL and Article 5 (2) (b) of the New York Convention. The Tianjin Maritime Court contends that the contradictory judgments compromise the unity and consistency of the national legal values of China given that the Guangzhou Maritime Court has already given its judgment and found the arbitration agreement invalid, asserting that public policy considerations go beyond a strict interpretation of the New York Convention.

This case stands out as a landmark example where an arbitral award was refused on the grounds of public policy after the *Hemmofarm v. Yongning*[281] case. However, due to the

[279] Case *Palmer Maritime Inc. v. China Animal Husbandry Industrial Co. Ltd*., Tianjin Maritime Court, 11 July 2018. Case study referenced and translated from https://newyorkconvention1958.org/index.php?lvl=notice_display&id=6514&opac_view=6.
[280] Yu, Meng. "China Refuses to Recognize a Foreign Arbitral Award on the Grounds of Public Policy for the 2nd Time in 10 Years." *China Justice Observer*, 18 Jan. 2020, www.chinajusticeobserver.com/a/china-refuses-to-recognize-a-foreign-arbitral-award-on-the-grounds-of-public-policy-for-the-2nd-time.
[281] Case *Hemofarm DD and others v. Jinan Yongning Pharmaceutical Co., Ltd*., [2008] Min SiTa Zi No. 11.

growing arbitration industry in China, there are more efforts to build an arbitration-friendly environment.

4.2.5. Key Lessons and Implications from Patent Illegality and Fundamental Policy cases in Asia

Courts always face a dilemma while deciding upon an arbitral award, whether it is void and violates public policy or not. Where parties to the contract are choosing the mode of arbitration for solving the legal dispute, it shows the intention to avoid litigation procedure. Arbitration proves to be a more flexible and time-saving option. However, the contrary judgments of various courts of the country are frustrating the purpose of arbitration and it has become a threat to international commercial arbitration. It is easier to get an arbitration award, but the real problem lies within the recognition and enforcement of arbitral awards.

Both the judgments show the diverse and contrasting nature of the court's judgment. The decision of the Supreme Court was widely criticized by the public for widening the scope of public policy, however, in the *Penn Racquet Sports v. Mayor International Ltd* case[282], the Supreme Court narrowed the sense of public policy. Public policy has had varied interpretations across the globe. The courts have interpreted it keeping in mind their morals and laws. All the courts have tried to narrow down and limit the scope of public policy. Very few options are available for widening its scope, for the judiciary does not encourage the same. Public Policy is "*a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you to the sound law. It is never argued at all but when other points fail.*"[283] Public policy is a functional and broad concept. It is particularly difficult to give a uniform definition of it. Though it is a common law concept, in civil law systems references to good faith and good morals, as well as to public policy as a bar to parties' freedom are incorporated in codes.

It is tricky to understand the underlying motive of judges while passing a judgment. As it is clear from the above cases, the same issue can be dealt with in two completely contrasting ways. Both judgments deal with the same issue of public policy. One gives it a narrow interpretation, while the other gives it a broader interpretation facing wide criticism. The

[282] Case *Penn Racquet Sports v. Mayor International Ltd*., 2011 (1) Arb LR 244 (Delhi).
[283] Case *Richardson v. Mellish,* (1824) 2 Bing 229, 130 E.R. 294.

judges sometimes favor their national laws neglecting the other side. Many national courts tend to apply domestic public policy rather than international public policy.

There is a critical role of values in constructing facts and opinions. Any problem includes human relations with time, nature as well as basic motives and the nature of humans. The solutions are limited; however diverse cultures and different jurisdictions have different preferences among them. For example, legality over one thing can be illegal in another state. The public policy of every state is dependent on their culture, customary practices, rules, and regulations.

The value-based orientation of judges plays a different role in it. The law does not define public policy which makes it difficult for the judiciary to limit its interpretation. The criteria forming the basis of the determination as to whether public policy is judge-made or not, it is observed that apart from their motive and attitude, these decisions reflect that judges consider the fundamental principles of morality and justice, from which no derogation can be allowed. It also depends on their legal practice and the law of the land. If it goes against the public, judges do not favor those awards. There have been some decisions that are not in tune with the letter or spirit of the arbitration award enforcement.

Any definition of public policy, or any limitation of the scope of the public policy exception, should represent a proper balance between respecting arbitral finality and party on the one hand and stopping unjust, biased awards on the other hand. It should maintain an equilibrium between isolationism and moderation, as well as between narrow-mindedness and globalism. A review of the cases shows that the concept of public policy has created serious mischief in judicial systems, and it is important to harmonize the arbitration system while seeking enforcement of foreign awards.

4.3. Public Policy in the United States[284]

Any arbitral award has to go through several stages to assess it following the domestic laws before enforcement. This was initially called a double exequatur, a phenomenon not accepted by the United States or Russia after the Second Great War. But as international

[284] This section relies on the findings published in Nirwal, Gauri. "The Public Policy Exception and Refusal of Foreign Arbitral Awards in International Commercial Arbitration in the USA." *Jura: A Pecsi Tudomanyegyetem Allam-es Jogtudomanyi Karanak Tudomanyos Lapja* (2021): 111.

trade increased, so in 1958 New York Convention was signed by the United States and Russia, being the primary signatories of the agreement. Later, the agreement was ratified by over 150 countries in the world to regulate the process of arbitration domestically.[285] The convention provides the way forward for the acknowledgment and implementation of commercial or other arbitral awards in an alternate signatory state. The convention set forth certain conditions for the refusal of the implementation of foreign arbitral awards. These incorporate invalid arbitration arrangements, or the gatherings involved, an improper notice of the appointment of the arbitrators, an arbitration award falling outside the scope of arbitration terms, the ill-advised creation of the arbitral tribunal, and non-final or non-binding arbitral honors. The most important clause of the New York convention was on public policy that an arbitral award or understanding will be refused if its acknowledgment and authorization conflict with the public policy of the nation. The convention accepts the public policy which includes the national laws and public procedures and policies as a refusal to implement arbitration. The US is the only country in the world that enforces arbitration awards through a treaty i.e., New York Convention as discussed here.[286]

Public policy is one major ground used by the parties to resist the enforcement of arbitral awards.[287] One of the reasons behind this is the approach adopted by the local courts to deal with public policy and commercial arbitration together. The New York Convention did provide a clause that an arbitral award could be rejected or refused if it goes against public policy or domestic laws but fails to address the procedure of refusal. This leaves it up to the discretion of the national laws on what procedure they opt for refusing arbitral awards to from being enforced in their countries particularly. Interpretation and public policy are generally in favor of arbitral honors like in the US and China. This demeanor itself is called public policy.

For a dispute to be referred to arbitration in the United States, the parties involved in the dispute have to mutually agree to submit their case to arbitration. The parties majorly do this when any conflict arises or pre-decide it while getting into a contract with each other. In the US, arbitration is referred to as a much speedier process as compared to litigation due to its slow nature. Arbitration agreements in the United States are enforced through the Federal

[285] McClendon, J. Stewart. "Enforcement of foreign arbitral awards in the United States." *Nw. J. Int'l L. & Bus.* 4 (1982): 58.
[286] Emre, Yunus. "A refusal reason of recognition and enforcement of foreign arbitral awards: Public policy." *Zbornik radova Pravnog fakulteta u Splitu* 56.2 (2019): 503-522.
[287] Sattar, Sameer, 2011.

Arbitration Act passed in 1925. The act was re-interpreted in the 1980s and 1990s by the US Supreme Court to allow it to cover the full scope of interstate commerce. This was the time when arbitration took the shape of consumer or commercial arbitration. In 1983, under the case of *Moses Memorial Hospital vs Mercury Construction*[288], the Congress of America made a "*declaration of a liberal federal policy favoring arbitration agreements*." The country has separate commercial arbitration laws, particularly for the enforcement of arbitration awards related to commerce. The states have embraced the Uniform Arbitration Act of 1955 which was advanced by the officials of uniform state laws just as the American Bar Association. Under the 1955 act, the judicial enforcement of commercial arbitration is provided. It calls the arbitration decision irrevocable under the common law. This is a modern concept of harmonizing international arbitration law with national laws to involve local institutions in the enforcement of arbitration agreements.

Anusornsena (2012) in her article says that though the FAA provides legal safeguards to the process of arbitration uncertainty or arbitration still occurs even after its promulgation.[289] Even after the amendment of 1955 and the agreement to the New York Convention, public policy remained an important obstacle in restricting arbitration in the US. The FAA does not provide a proper procedure on what to do with the arbitral awards if they are invalid to be implemented or violate public policy but requires the courts to put the proceedings to stay. Later under the convention, the courts were given the chance to deny the enforcement of arbitral honors on the off chance that they negated the country's public policy.

4.3.1. Recognition and Enforcement of Foreign Arbitral Awards under the Federal Arbitration Act

Arbitration legislation exists at both the federal and state levels in the United States since it is a federal system. The FAA was enacted by the government to ensure the legitimacy and implementation of arbitration agreements in arbitrating maritime transactions and commerce, as well as to ensure the "*validity, irrevocability, and enforceability*" of a provision in any marine transaction or contract reflecting a commercial transaction to solve

[288] Case *Moses H. Cone Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 103 S. Ct. 927 (1983).
[289] Anusornsena, Veena. "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: the United States, Europe, Africa, Middle East and Asia." (2012).

any subsequent dispute arising from a violation of an arbitration agreement.[290] For years, the legal system in the United States has interpreted the FAA in different ways to safeguard the interests of society.

Each State has enacted arbitration legislation at the State level, which governs that specific territory. Since the United States has a common law system, arbitration law is based not only on legislation but also on court decisions. The FAA creates a strong federal responsibility for implementing arbitration agreements. The FAA specifies the processes to seek enforcement of an arbitral award for the winning party and seek vacation of the award for the non-winning party.[291] On the application of any party to the arbitration, the district courts in the United States have the authority to issue an order vacating the arbitral award on the following basis:

> "*(1) where the award was procured by corruption, fraud, or undue means;*
> *(2) where there was evident partiality or corruption in the arbitrators, or either of them;*
> *(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or*
> *(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made*."[292]

The powers of the courts have been described as "*the narrowest known to the law*" as the court's authority to examine the arbitration rulings is restricted.[293] The refusal of a court to implement an arbitration decision on the grounds of public policy is a "*more general doctrine, rooted in the common law*", that a court may refuse to enforce contracts in

[290] 9 U.S.C. § 2 (2012): United States Code, Title 9 - Arbitration, Chapter 1 - General Provisions, Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate.
[291] 9 U.S.C. § 9 (2012): United States Code, Title 9 - Arbitration, Chapter 1 - General Provisions, Sec. 9. Award of arbitrators; confirmation; jurisdiction; procedure; and 9 U.S.C. § 10 (2012): United States Code, Title 9 - Arbitration, Chapter 1 - General Provisions, Sec. 10. Same; vacation; grounds; rehearing.
[292] 9 U.S.C. § 10 (2012): United States Code, Title 9 - Arbitration, Chapter 1 - General Provisions, Sec. 10. Same; vacation; grounds; rehearing.
[293] Case *ARW Exploration Corp. v. Aguirre*, 45 F.3d 1455 (10th Cir. 1995).

contradiction to the public policy of the State.[294] In an appeal from the United States District Court for the district of Kansas, the Denver Rio Grande Western, a railroad company, filed a motion to overturn the arbitrator's decision claiming that "*it violated Kansas' public policy prohibiting indemnification for acts of gross negligence*". The Court stated that "*once a dispute is properly before an arbitrator, the function of the courts in reviewing the arbitrator's decision is quite limited*."[295]

In another case, the United States Court of Appeals for the Fifth Circuit noted that there are circumstances where the courts need to interfere and not allow any agreement that is contrary to public policy. However, public policy "*must be well defined and dominant*" and must be established "*by reference to the laws and legal precedents and not from general considerations of supposed public interests*."[296] The FAA has always promoted a narrow interpretation of the term public policy based on the New York Convention. The FAA encourages independence to arbitration courts; however, the courts sometimes conclude that an arbitration result may be annulled for violation of public policy, refusing to give effect to unlawful rulings, making it difficult to provide complete autonomy to the arbitration bodies. Only under the circumstances specified in the FAA may a court vacate an arbitration award "*or for a handful of judicially created reasons that include violations of public policy*."[297]

The United States Courts have interpreted the public policy defense on numerous occasions and have provided reassurance consistently by limiting the powers of the judicial courts. The FAA provides for international arbitral awards made in other countries enforceable in the United States courts. The FAA provides recognition and enforcement of Foreign Arbitral awards based on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the New York Convention), and the Inter-American Convention on International Commercial Arbitration, 1975 (the Panama Convention). The scope of the Panama Convention is a multilateral treaty limited to some American States; however, the New York Convention has been ratified by a majority of nations worldwide. The FAA has codified both conventions and provides for the applicability of the New York Convention and the Panama Convention. The Panama Convention must apply if most of the parties to the arbitration proceedings are (i) citizens of a State or States that have ratified or consented

[294] Case *Paperworkers v. Misco, Inc*., 484 U.S. 29, (1987).
[295] Case *Denver & Rio Grande Western Railroad v. Union Pacific Railroad*, 119 F.3d 847, 849 (10th Cir. 1997).
[296] Case *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)
[297] Case *Sheldon v. Vermonty*, 269 F.3d 1202, 1206 (10th Cir. 2001).

to the Panama Convention, and (ii) members of the Organization of American States. In all other instances, the New York Convention must apply.[298]

The Panama Convention is said to be modeled after the New York Convention, but it still has several peculiarities, which come from the Latin American countries' approach toward international arbitration.[299] However, both Conventions provide for the defense of public policy. The recognition and execution of an arbitral award may also be rejected if the competent authority of the country in which the recognition and enforcement are sought determines that it would be prejudicial to that country's public policy or *ordre public*.[300]

The District Court for the District of New Jersey noted that the New York Convention does not permit judicial review of an arbitral award, as the whole purpose of the arbitration is undermined by these types of judicial interventions, exhausting the fundamental principles of arbitration. The case involved a German shipowner and a United States company, where the German shipowner received an arbitral award against the United States company. On seeking enforcement in the United States, the losing party contended that the award must be set aside as adverse to public policy and that the arbitrator disregarded a time restriction imposed by maritime law. The District Court ruled that in such circumstances, the meaning of public policy must be construed "*strictly and narrowly*" based on the New York Convention.[301] Between the FAA and the New York Convention, the grounds for challenging and rejecting an award are quite similar. The adoption of globally accepted norms under the FAA has increased the parties' confidence and familiarity with the arbitration procedure.

The US courts have opted for quite a *conservative approach* to the issue of public policy and refusal or enforcement of international arbitral awards. Before adapting to the New York Convention, the US courts had a very narrow view of interpreting arbitral awards following Article 5 (2b) of the FAA, the country was more inclined towards protecting national interests. This is visible in some of the important cases of the arbitration including the *Wilko*

[298] 9 U.S.C. § 305 provides for the "Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958"
[299] Marcovici, Sandra. "The Panama Convention: Similarities and Differences to the New York Convention." *Rom. Arb. J.* 12 (2018): 6.
[300] Article V(2)(b) of the New York Convention, 1958 and Article 5(2)(b) of the Panama Convention, 1975.
[301] Case *KG Schifffahrtsgesellschaft MS Pacific Winter MBH & CO. v. Safesea Transport, Inc Civil Action*, No. 19-4869 (CCC) (SCM) (D.N.J. Sep. 26, 2019).

v. Swan case[302] where the arbitral awards were refused as it challenged the United States security laws and came in conflict with federal statute hence it was non-arbitrable. In another case of *Breman v. Zapata Offshore Company*[303], the companies agreed to resolve the dispute through arbitration, but their contract included an exculpatory clause that conflicted with the public policy.

The United States has a strong bias in terms of the enforcement of arbitral awards. It started developing a favorable view towards arbitration with time. It is observed that there are several defenses available in the United States other than public policy exceptions for acknowledgment and implementation. Yet so far, no case has ascended under the New York Convention and FAA that the courts in the states have declined to enforce or recognize. Several cases in the arbitration history of America highlight the pro-arbitration public policy of the country. The revolutionary attitude of the United States can be observed in cases such as that of *Scherk vs Alberto Co*.[304] The Supreme Court while enforcing the arbitral award put forth an important point stating that, "*we cannot have trade and commerce in the world market and waters based on our terms and laws*." This first makes it essential to acknowledge the international laws and also to recognize the arbitration agreements for the smooth working of the commerce and economy majorly. The US courts again showed a pro-arbitration attitude in the case of *American Construction Machinery v. Mechanized Construction of Pakistan Ltd*[305]. Regarding public policy and the authorization of arbitral awards, In *Parsons's case*[306], it was made clear that arbitral awards can be refused in case "*it violates the basic notion of morality and justice in the country*."[307] The *Parsons case* proved to be a landmark case that set a standard for dealing with future arbitral awards by narrowly construing public policy. The US courts have been very restrictive when it comes to the public policy defense of the arbitral agreements. The courts have made sure that the public policy interference by the national courts on international arbitration should be

[302] Case *Anthony Wilko v. Joseph E. Swan*, et al, 346 U.S. 427, 74 S. Ct. 182 (1953).
[303] Case *The Bremen v. Zapata Off-Shore Co*., 407 U.S. 1 (1972).
[304] Case *Scherk v. Alberto-Culver Co*., 417 U.S. 506 (1974).
[305] Case *American Const. Machinery & Equipment Corp. v. Mechanised Const. of Pakistan*, 659 F. Supp. 426 (S.D.N.Y. 1987).
[306] Case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) and Bank of America*, 508 F.2d 969 (2d Cir. 1974).
[307] Sattar, Sameer, 2011.

negligible and that the public policy protection under the New York Convention should be deciphered explicitly.[308]

Though the United States has adopted a pro-arbitration attitude, one thing is notable here: the foreign judgment or award cannot be enforced in the United States if it goes against the set standards and procedures by the country itself.[309] One of the key issues that lack due process is the language in which the proceedings or award is received or sent to the state where it has to be enforced. The law of the state is quite well established as stated above when it comes to the enforcement of foreign agreements. The decline or refusal only comes in the case where international agreements or awards vary in quality and effectiveness. This issue has been addressed in the *Julen vs Larson case*[310] where the Swiss judgment was not enforced in the state of California because the service of the process was in German without English translation provided to the defendant to satisfy the due process. This was one major occasion where the court stopped the enforcement of default judgment because Swiss courts did not provide the defendant with adequate time to satisfy the requirements of due process of the law and just aimed at imposing the arbitration decision on him. In another case *Qingdao Intl. Trading vs P and S Intl.* (2009)[311], the latter could not understand the documents issued by the former related to the arbitration proceedings, which led to the absence of P and S from the proceeding resulting in the issuance of the default arbitral award against them. The award was declared to be unenforceable because P and S Intl. did not receive the due process of the arbitration. From this perspective, it is noticeable that there exist similarities between the United States arbitration law and the New York Convention concerning the refusal of authorization of arbitral honors.

Kuck and Nelson in their article state that US courts are very prompt and efficient while enforcing arbitral awards.[312] They keep in focus all safeguards to domestic laws and policy while doing so. The United States companies while entering into cross-border agreements

[308] McLaughlin, Joseph T., and Laurie Genevro. "Enforcement of arbitral awards under the New York Convention-practice in US courts." *Int'l Tax & Bus. Law.* 3 (1985): 249.
[309] Lu, May. "The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: analysis of the seven defense to oppose enforcement in the United States and England." *Ariz. J. Int'l & Comp. L.* 23 (2005): 747.
[310] Case *Julen v. Larson*, 101 Cal. Rptr. 796 (Cal. Ct. App. 1972).
[311] Case *Qingdao Free Trade Z Genius Int'l Trading v. P&S Intl*, No 08-1292-HU, (D Or 16 September2009).
[312] Nelson, Timothy G. "Enforcing International Arbitration Awards: US Courts Achieve Prompt and Efficient Enforcement, with Safeguards." *Skadden*, Skadden, Arps, Slate, Meagher & Flom LLP and Affiliates, 21 Jan. 2020, www.skadden.com/insights/publications/2020/01/2020-insights/enforcing-international-arbitration-awards.

add the clause of arbitration as an easier and faster way to deal with any dispute that might arise. The New York Convention is enshrined in the FAA, and America follows it religiously which is why in many recent cases the courts have rejected the attempts by the losing parties to resist enforcement of foreign awards. The pro-arbitration limits and conditions were further demonstrated in 2019 in the case of *Al-Qarqani vs Chevron US Corporation*[313]. Here it was argued that the arbitration proceedings and the tribunal must not violate the arbitration agreement to get it enforced once decided. Otherwise, US courts may decline to enforce the arbitral award. Keeping this in focus, the *Hague Convention on the Recognition or Enforcement of Foreign Judgments in Civil and Commercial Matters* was set to open for signature but received close to no adherence afterward.[314] Appadoo (2013) lists down various reasons that have also become the chief ground of the international commercial arbitral awards are being refused. US courts have, in recent years, declined the arbitral awards because they lacked personal jurisdiction.[315] It is the primary requirement of the enforcement for the courts or circuits to demonstrate personal or quasi-in-rem jurisdiction. Also, the doctrine of *forum non conveniens*, a non-legislative requirement, bars the enforcement of the arbitral awards. These two notions oppose the idea of harmonization of international commercial arbitration while also going against the New York Convention which stresses the fact of unifying the local standards for enforcing arbitral awards.

Commercial arbitration remains the most widely used dispute resolution in the United States besides public policy refusal especially when it comes to resolving business disputes. This is mostly because of the easy arbitration and enforcement process after the New York Convention. The United States public policy is clear and straight when it comes to the recognition, refusal, and interpretation of international arbitral awards. The country itself has created specific laws solely responsible for the proper implementation of the agreements so they may not contradict both domestic and foreign laws. Every enforcement that has to take place within the United States has to be in harmony with the public policy and domestic laws for which the American courts are trying their level best.

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[313] Case *Al-Qarqani, et. al. v. Chevron Corporation et al*, 4:18-cv-03297.

[314] "Issues Relating to Challenging and Enforcing Arbitration Awards: Grounds to Refuse Enforcement." *Norton Rose Fulbright*, Aug. 2019, www.nortonrosefulbright.com/en/knowledge/publications/ee45f3c2/issues-relating-to-challenging-and-enforcing-arbitration-awards-grounds-to-refuse-enforcement. Also Refer Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (HCCH 2019 Judgments Convention).

[315] Appadoo, Krishnee. "Enforcement of International Commercial Arbitral Awards: Redress Mechanisms in the Event of Non-Compliance." *Available at SSRN 2244872* (2013).

4.3.2. Public Policy and Basic Notion of Morality and Justice

The *Parsons Case*[316] is a landmark case in international arbitration because it established a limited interpretation of public policy. In 1962, Parsons & Whittemore Overseas ("*Overseas*") and Societe Generale de l'industrie du Papier ("*RAKTA*") engaged in a one-year contractual agreement to build, run, and oversee a paper mill facility in Egypt. The project was supported by an American Agency for International Development ("*Agency*") by providing funds to RAKTA to acquire letters of credit in favor of Overseas. A few years later, tensions between Arabs and Israelis prompted a significant part of the Overseas work crew to leave Egypt in May 1967, as the project approached its completion stage. Egypt's government terminated all diplomatic relations with the United States in June 1967, expelling all Americans. However, an exception was made for Americans owning special visa status, or to apply for one. The parties had agreed with the arbitration clause and force majeure. Overseas notified RAKTA that it had temporarily abandoned the project arguing that the delays were justified by the force majeure provision. RAKTA, on the other hand, asserted an opposite viewpoint and sought damages for the breach of contract. RAKTA invoked the arbitration clause when Overseas refused to settle and referred the case to the *three-man arbitral board* (the "*tribunal*") under the rules of ICC.

- <u>Arbitration proceedings</u>

The tribunal established that Overseas's force majeure defense applied only for about the first month after the cessation of operations, i.e., from 28 May to 30 June 1967. The tribunal determined that Overseas made "*no more than a perfunctory effort*" to obtain special visas and restart the project; and that the Agency's notice that it would withdraw financial support did not excuse Overseas' one-sided choice to terminate the project. Overseas was found responsible to RAKTA and the tribunal awarded damages of $312,507.45 in breach of the contract and $30,000 in expenses, in addition to three-fourths of the arbitrator's remuneration of $49,000.

[316] Case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) and Bank of America*, 508 F.2d 969 (2d Cir. 1974).

As a result of the final decision, RAKTA enforced the award against Overseas in the District Court of the United States. RAKTA attempted to collect the award via a letter of credit provided by Bank of America at the request of Overseas. The letter of credit was created to assess any future penalties determined by the tribunal. RAKTA alleged that the arbitral award satisfied the letter's demand for penalties and that the decision of the tribunal should be confirmed. The District Court denied the request and granted a judgment in favor of RAKTA, to which Overseas filed an appeal with the United States Court of Appeals for the Second Circuit (the "*Court of Appeals*").

- Main Arguments raised by Overseas
  - **Violation of the public policy of the United States:** Overseas contended that the enforcement of the award would violate the public policy of the United States. Article V(2)(b) of the New York Convention empowers the court seeking enforcement of a foreign arbitral judgment to deny enforcement if doing so would be detrimental to the country's national policy. The interesting thing to note is that, although the United States was absent from the original New York Convention of 1958, it nevertheless agreed to it in 1970, thus, the Geneva Convention of 1927 was replaced by the New York Convention of 1958. The Geneva Convention placed the burden of proof on the party seeking enforcement of a foreign arbitral award, and at the time of signing the Overseas-RAKTA agreement, the Geneva Convention was the governing regulation for foreign arbitral awards. However, since the United States subsequently joined the New York Convention in 1970, the burden of evidence shifted to the party seeking enforcement of a foreign arbitral award. Additionally, the Convention provided limited grounds for declining to recognize and enforce arbitral judgments.[317]

    According to the Court of Appeals, the public-policy argument should be interpreted *narrowly* to avoid creating a significant gap in the Convention's enforcement mechanism. The Court further stated that, "*to deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement*,"[318] and that the enforcement of foreign

[317] Article V(2)(b) of the New York Convention, 1958.
[318] Case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) and Bank of America*, 508 F.2d 969 (2d Cir. 1974).

arbitral awards may be refused "*only where enforcement would violate the forum state's most basic notions of morality and justice*."[319]

- **Non-Arbitrability:** Overseas disputed that the award represents an arbitration of matters not appropriately decided by arbitration. Simply because a national security issue may arise in the course of resolving a breach of contract claim does not preclude the dispute from being arbitrable. The Court of Appeals said that Overseas erroneously stressed that the national interest is at risk in resolving the issue, although there is no compelling national interest in resolving the issue that justifies the judgment in this judicial rather than arbitration procedure.

- **Denial of Adequate Opportunity to present case before Tribunal:** Overseas argued before the Court of Appeals that one of its witnesses was unable to testify before the tribunal owing to a previous obligation to speak at an American university. Additionally, it argued that it was a matter of "*a matter of fundamental fairness*," and that the tribunal declined to adjourn hearings to enable their witness to present its case. Overseas, relied upon Article V (1)(b) of the Convention which states if a party believes that he has been insufficiently informed or is otherwise unable to present his case effectively, the award may be declared unenforceable. However, the tribunal ruled in favor of RAKTA clarifying that Overseas had sufficient means to present its witness before the tribunal, and the witness testified via an affidavit in which he included all pertinent facts and details.

- **Jurisdictional Issues:** It was disputed by Overseas that the award granted by the tribunal was conditioned upon addressing conflicts that were beyond the scope of the contractual agreement to arbitrate and were impacted by the state's national interest. This provision is more explicit under the FAA, 9 U.S.C. 10(d), which provides for the rejecting of an award if the arbitrators exceeded their jurisdiction. The tribunal, however, interpreted the provision to imply that it did not rule out jurisdiction in this instance, and the same interpretation was upheld by the District Court and the Court of Appeals.

[319] Case *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA) and Bank of America*, 508 F.2d 969 (2d Cir. 1974).

- **Disregard of Law:** While this argument against execution of judgments made in *manifest disregard* of law, the additional arguments by Overseas do not offer a sufficient foundation for refusing the foreign arbitral award. However, Overseas effectively contended to the Court of Appeals to interpret the defense of manifest disregard as permission to examine the arbitral award for factual or legal mistakes, which the Court of Appeals refused. [320]

➢ Decision and Analysis

The Court of Appeals upheld the District Court's decision and confirmed the award. The Parsons case is widely regarded as a landmark in the arbitration community. Even though the case goes back to the 1970s, it established the standards for using the public policy defense. This case exemplifies the distinction between national and international law, as well as the court's approach to separate national and international public policy.

4.3.3. Public Policy and the Precedence of Primary-State Authority

The *TermoRio Case*[321] captures the essence of limitations on secondary states in overruling arbitral awards made by primary states. TermoRio S.a E.S.P ("*TermoRio*") was founded in 1957 to offer energy services in Barranquilla, Colombia. Electrificadora del Atlantico S.a. E.S.P. ("*Electranta*") entered an agreement with TermoRio under which TermoRio committed to generate electricity and Electranta agreed to purchase it. In anticipation of the agreed deal, TermoRio invested more than $7 million in the building of a power plant. The problem arose when Electranta violated the Agreement when it failed to purchase electricity from TermoRio as stipulated in the signed agreement. It was in 1998 that the Republic of Colombia announced a plan to privatize all of its Atlantic Coast utilities, including Electranta, and began privatization by establishing a new company *Electrocaribe* to purchase and maintain the assets and liabilities of Electranta. In the end, Electranta was left with contractual commitments to buy electricity, but it lacked the means to fulfill those obligations.

[320] The Court of Appeals referred to the judgment made in Case *Anthony Wilko v. Joseph E. Swan*, et al, 346 U.S. 427, 74 S. Ct. 182 (1953).
[321] Case *Termorio S.a. E.s.p. and Leaseco Group, Llc v. Electranta S.p., et al.,* 487 F.3d 928 (D.C. Cir. 2007).

➢ Arbitration proceedings

On December 21, 2000, the Arbitration Tribunal decided that Electranta was in breach of the agreement and ordered Electranta to pay TermoRio a total of USD 60.3 million as a result of the award. The agreement stated that any disagreement between the parties would be handled through arbitration in Colombia per the Rules of Conciliation and Arbitration of the ICC.

Electranta filed for an *extraordinary writ* in a Colombian District Court shortly after the Tribunal announced its decision. Meanwhile, the Columbian Council of State[322] declared the arbitration award null and void because the arbitration provision in the parties' Agreement violated the public policy of the Republic of Colombia. According to the Council of State, the arbitration had to be conducted in conformity with Colombian law, and Colombian legislation in force at the time of the Agreement did not explicitly authorize the application of ICC procedural standards in arbitration.

➢ Main Arguments

TermoRio first filed a complaint in the District Court alleging four causes of action, i.e., fraudulent conveyance, expropriation, an action to enforce the arbitration award, and breach of contract.[323] However, only the last two reasons were asserted before the District Court. The District Court rejected TermoRio's case for lack of a *forum non conveniens*.[324] The United States Court of Appeals for the District of Columbia Circuit ("*Court of Appeals*") stated that "*the arbitration award was made in Colombia and the Council of State was a competent authority in that country to set aside the award as contrary to the law of Colombia*".[325] Since the Columbian courts annulled the enforcement and recognition of the arbitral award, TermoRio has no cause of action in the United States. The applicability of the New York Convention and the FAA does not affect the annulment of the award under Columbia Law.

TermoRio argued based on various case laws which stated that the arbitration award does not violate the public policy of the United States, and to give effect to the arbitral award, the

[322] The Council of State of Colombia, also referred to as "Consejo de Estado" de Colombia is the supreme tribunal with jurisdiction over administrative issues in Colombia.
[323] Case *Termorio S.a. E.s.p. and Leaseco Group, Llc v. Electranta S.p., et al.,* 487 F.3d 928 (D.C. Cir. 2007).
[324] Case *Termorio S.a. E.s.p. and Leaseco Group, Llc v. Electranta S.p., et al.,* 487 F.3d 928 (D.C. Cir. 2007).
[325] Case *Termorio S.a. E.s.p. and Leaseco Group, Llc v. Electranta S.p., et al.,* 487 F.3d 928 (D.C. Cir. 2007).

United States must exercise its discretion to recognize and enforce an arbitral award.[326] TermoRio claimed that the decision of the Council of State was in violation of both domestic and international laws, and against the United States policy, and was merely an excuse to deny enforcement of an award. The Court of Appeals, on the other hand, stated that the District Court of Columbia was correct in observing that "*this matter is a peculiarly Colombian affair*," as the parties agreed to be bound by the Columbian Law. The Court of Appeals further noted that the "*Columbian Court of State is the final expositor of Colombian law, and we are in no position to declare that court's decision unlawful*."

- Decision and Analysis

For the above-mentioned grounds, the Court of Appeals upheld the Columbian District Court's decision to deny TermoRio's request for enforcement of the arbitration award. The Court of Appeals specifically mentioned the concept of *second-guessing* decisions of foreign courts. The Court of Appeals noted that neither the New York Convention nor the FAA empowers *secondary* states to overrule arbitral awards made by *primary* states acting in their authorized authority to either enforce or refuse to enforce an award. The judges in this case took the precedence of the Second Circuit Court of Appeals in the *Baker Marine Case*[327], where the court affirmed the Nigerian court's decision not to recognize the arbitral award, since the agreement was made in Nigeria, and the parties had agreed that their disputes would be resolved through arbitration under the Nigerian law.

4.3.4. Key Lessons and Implications from cases in America

The United States courts have continued to follow a narrow approach while interpreting the meaning of public policy. In Parsons's case, it was made clear that arbitral awards can be refused in case it violates the basic notion of "*morality and justice*" in the country.[328] The Convention's *general pro-enforcement bias* explains its supersession of the Geneva Convention, which helped in limiting the interpretation of the public policy argument narrowly. The courts are always tempted to use domestic public policy criteria in determining the legality of an award, but decisions, such as the Parsons case, have shown

[326] Refer Cases *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas*, 335 F.3d 357, 369(5th Cir. 2003), and *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 931 (D.C. Cir. 1984).
[327] Case *Baker Marine Ltd. v. Chevron Ltd,* 191 F. 3d 194 (2d Cir. 1999).
[328] Sattar, Sameer, 2011.

that public policy has a limited reach. The case is an excellent illustration of harmonization between local and international rules, as well as the United States court's minimal intervention approach. The *TermoRio Case* clearly distinguished the difference between primary and secondary state positions while interpreting foreign arbitral decisions. While this case received much acclaim, it also received some negative comments from different authors. The revocation of an award by Columbian courts based on their application of ICC principles has been described as "*fundamentally mistaken*".[329] However, this showed a very different approach from the United States courts, affirming that a secondary court cannot enforce an annulled award that has been legally set aside by a competent body, unless the procedures were corrupt, or the decision was inaccurate.

4.4. Harmonizing Domestic and International Arbitration Laws[330]

Arbitration is a private dispute resolution process where the parties in conflict agree to give authority to a few credible individuals to decide on their case after listening to both ideas and gathering enough evidence. It is a procedure where disputes are resolved outside the courts. Once decided, the arbitration award (decision) is binding on both sides involved and also has to be enforced by the courts. The process of arbitration might seem similar to that of litigation but is different mainly because here the cases are privately decided while litigation calls for procedures in public. Due to the arbitrations mostly revolving around commercial issues, a separate branch of international arbitration emerged which solely deals with disputes arising from commercial transactions between private parties. Generally, commercial arbitration was utilized in settling debates between traders in fairs and commercial centers in England and the rest of Europe.[331]

The scope of commercial arbitration broadened after the national courts were allowed to enforce the party's agreement to arbitrate. Though there exist international arbitration laws to regulate dispute resolution through arbitration each country has its domestic arbitration regime as well for the implementation of arbitration awards following the country's local

[329] Bird, Robert C. "Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention." *NCJ Int'l L. & Com. Reg.* 37 (2011): 1013.
[330] This section relies on the findings published in Gauri, Nirwal. "Harmonization of Arbitration Laws in some Asian and European Countries." *Pro Futuro* (2020): 68.
[331] Domke, Martin. "arbitration". *Encyclopedia Britannica*, 1 Dec. 2023, https://www.britannica.com/topic/arbitration. Accessed 12 January 2024.

laws and policies. As arbitration is an alternative way of dispute resolution for the parties who do not prefer to go to court then there exist chances that a country's national laws and the undesired involvement of local bodies might hinder the enforcement. This calls for an effort to harmonize the law and practice to remove any sort of peculiarities.[332] But harmonization of international and national arbitration laws is not easy and one of the chief reasons behind this is the opposition of states themselves. Besides, public policy has also remained quite possibly the most discussed and touchy idea in the enforcement of arbitral awards. The public policy serves the role of a defense tool and challenges the enforcement of commercial arbitral awards nationally. This is a matter of real concern as it is not only impacting the parties involved but the overall credibility of international commercial arbitration.

With increasing globalization and international trade, many non-judicial alternatives are gaining popularity like arbitration, conciliation, negotiation, mediation, adjudication, etc. However, the procedure is not efficient enough to solve complicated issues. International commercial arbitration has gained the most popularity because of its diverse character. Arbitration is one of the procedures of dispute resolution alongside commonly used procedures of negotiations and mediation. It is a way to resolve disputes outside the courts. The decision on the dispute is given by one or more people (commonly arbitrator or arbitral tribunal) in the form of the arbitration award, which is binding on the parties involved, and enforceable by their courts. More than solving political disputes, arbitration is used to resolve commercial disputes linked to mercantile law mainly in the context of international transactions.

International contracts are an essential tool governing parties to the contract. However, there are circumstances when the public policy rules that certain types of contracts cannot be enforced in the jurisdiction.[333] This is the result of the disparate nature of the commercial arbitration laws among countries as well as their legal procedures. Many efforts have emerged to harmonize international commercial arbitration. However, the basic character of the arbitration remains uncertain. There is no clear definition of arbitration laws in

[332] Brazil-David, Renata. "Harmonization and delocalization of international commercial arbitration." *J. Int'l Arb.* 28 (2011): 445.
[333] Posner, Eric A. "Arbitration and the harmonization of international commercial law: A defense of Mitsubishi." *Va. J. Int'l L.* 39 (1998): 647.

international or national legal systems, relying on the interpretation of the courts.[334] To build trade relations, many national and international communities have progressed in the direction of developing a balanced worldwide regulatory structure.[335] Whereas arbitration is usually seen as a focal point for many jurisdictions with different cultural and social standards[336], the complexity and variation in arbitration laws bring many inconsistencies in arbitral decisions. Most recently, the United Nations has encouraged a movement for the harmonization of commercial arbitration in international treaties, regional agreements, and national laws. [337] This is to ease the process of resolution and enforcement of solutions. It also adds to the efficiency and effectiveness of international arbitration practice.

4.4.1. Integration of International Arbitration Laws into National Arbitration Laws

With the advent of globalization, and increasing trade and investment activities between countries, there has been a significant increase in international commercial transactions.[338] The enactment of many international commercial codes has paved the way for the worldwide harmonization of arbitration laws. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 has proved to be the most effective instrument in enforcing arbitration rules and regulations, with 165 Contracting States including jurisdictions.[339] Ottoarndt Glossner (1983) contended that "*international arbitration cannot be responsibly conducted unless there is a certain link with the surrounding legal terrain, because it cannot exist without.*"[340] Even though international arbitration treaties are adopted by different jurisdictions, international laws cannot co-exist without national laws, leading to non-uniform arbitration practices all over the world. The enforcement of the arbitration laws is directly associated with the practice of domestic courts. Some arbitration disputes are not at all enforceable in certain countries, based on the

[334] Vynokurova, L. "Procedure for Dispute Resolution in the International Commercial Arbitration Court." *Law Ukr.: Legal J.* (2011): 91.
[335] Cremades, Bernardo M., and Steven L. Plehn. "The new lex mercatoria and the harmonization of the laws of international commercial transactions." *BU Int'l LJ* 2 (1983): 317.
[336] Kun, Fan, 2015.
[337] "Secretary-General's Address to International Council for Commercial Arbitration Congress." *United Nations*, 9 May 2016, www.un.org/sg/en/content/sg/statement/2016-05-09/secretary-generals-address-international-council-commercial.
[338] Kun, Fan, 2015.
[339] "Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention')." *United Nations*, uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2. Accessed 14 Jan. 2024.
[340] Glossner, Ottoarndt. "International commercial arbitration." *Int'l Bus. Law.* 11 (1983): 9.

defense of the state's public policy.[341] The defense of Public Policy is one of the most debated reasons for the refusal of the enforcement of arbitral awards. Both UNCITRAL Model Law and the New York Convention provide that an award may be refused if it is contrary to or in conflict with public policy in the Enforcement State.

Jurisdictions that restrict the use of public policy as a defense and give it a narrow understanding are considered arbitration-friendly, whereas jurisdictions that fail to do so are seen as arbitration-unfriendly and need to change their commercial practices to be in line with the laws.[342] Many times in the past, ambiguity and irregularities concerning the interpretation of public policy by domestic courts have encouraged the losing party to rely on the defense of public policy to resist or delay its enforcement of the award. There is no integrated standard of public policy. Even though the basic idea of public policy is the same globally, the concept of public policy has been interpreted and applied differently from country to country. It all depends on the political, religious, social, cultural, and economic systems. Each State is influenced by different public problems and issues such as Import laws, Subsidies, and Regulations. Contemporary trends in the interpretation of the defense of public policy by lawmakers and domestic courts clearly show that major jurisdictions are converging in the practice of adopting a narrow interpretation of public policy defense. Most developed jurisdictions have similar conceptions of Public Policy. But then what differs is the implementation part from one country to another.

The arbitration laws in Asian Countries have usually adopted a conservative approach when it comes to the enforcement of arbitral awards. The domestic court's intervention in the enforcement of arbitral awards has always been a controversial area. Many Asian jurisdictions are now a part of international codes and conventions, adopting their principles to be in line with International Arbitration standards. India has an incredibly old institution of arbitration laws.[343] One of the major established legislations to govern the arbitration laws in India was the Arbitration Act of 1940. Nonetheless, the Act was only applicable to

[341] Okekeifere, Andrew I. "Commercial Arbitration as the Most Effective Dispute Resolution Method-Still a Fact or Now a Myth." *J. Int'l Arb.* 15 (1998): 81.

[342] DSouza, Nihal. "A Case against Taming the Public Policy Exception in the Context of 21st Century International Arbitration." *Cambridge International Law Journal*, Edward Elgar Publishing, 7 Feb. 2017, cilj.co.uk/2017/02/07/a-case-against-taming-the-public-policy-exception-in-the-context-of-21st-century-international-arbitration/.

[343] The Law Commission of India in its Seventy-Sixth Report on Arbitration Act of 1940 stated that Indian Arbitration practices dated back to the time of ancient smritis (legal texts) and digests. Apart from the decisions taken by the King Courts, other tribunals were recognized for dispute resolution. Law commission report available at https://ibclaw.in/76th-report-on-arbitration-act-1940-law-commission-of-india-nov1978/.

domestic arbitration proceedings. The Foreign Awards (Recognition and Enforcement) Act was enacted in 1961, which applied to foreign awards.[344] India also ratified the New York Convention, 1958, and the UNCITRAL Model Law, 1985 which laid the background for the Arbitration and Conciliation Act, of 1996 (the "Act"), of which the Preamble stated that the act was enacted with the purpose "*to consolidate and amend the law relating to domestic arbitration, international commercial arbitration and enforcement of foreign arbitral awards*". It was the first major step taken by the Indian legislature to harmonize the domestic and international arbitration laws in the country. The act was divided into two parts - Part I applicable to all domestic and international arbitrations where the place of arbitration seat is in India, and Part II for enforcement of certain foreign awards under the New York Convention and Geneva Convention.[345] The provisions of Part I and Part II of the Act lays down special grounds for refusal of the enforcement of an arbitral award including the refusal of awards if contrary to the public policy of India.[346]

The Indian courts have a long history of refusing arbitral awards on the grounds of public policy. However, the Indian judiciary is now on the path of aligning the application of the generally accepted notion of public policy, that the exception must be construed narrowly.[347] The developments made in the area of arbitration law were an attempt to create India as an arbitration-friendly jurisdiction. In 2015, the Arbitration and Conciliation (Amendment) Act came into force after two decades of dealing with the conventional attitudes of the domestic courts. Contrary to the current public policy in India, the domestic courts need serious grounds for intervention to refuse to enforce an award. In such circumstances, the nation assumes control of the arbitration proceedings for the sake of the protection of public order and justice; and domestic laws serve as the basis of international proceedings leading to disparities in the final enforcement judgments. The Indian Supreme Court in a judgment noted that "*the legislative intent of the Arbitration Act is to harmonize domestic and international commercial arbitration with the UNCITRAL Model Law, the New York*

[344] Section 4 of the Foreign Awards (Recognition And Enforcement) Act, 1961 specified that a foreign award would be enforceable in India "*as if it were an award made on a matter referred to arbitration in India*".
[345] Refer the Arbitration and Conciliation Act, 1996 of India.
[346] Section 34 of the Arbitration and Conciliation Act, 1996 of India states that an award is not enforceable if it is contrary to the public policy applicable on domestic awards. Section 48 and 57 states that a foreign award may be refused if it is contrary to the public policy of India or the law of India.
[347] Case *Cruz City 1 Mauritius Holdings v. Unitech Limited,* [2017] EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015, 151/2016, 670/2016.

Convention, and the Geneva Convention."[348] In the case of *Shri Lal Mahal Ltd (2013)*[349], the Supreme Court of India reduced the interference of courts in the enforcement of foreign arbitral awards.

Countries all across the globe are reacting towards the movement of harmonization of commercial arbitration. Some countries like China do not refer to the public policy on its own and provide that enforcement of a foreign award should be refused if it goes against "*social and public interest.*"[350] However, China as an emerging economic giant has also shown signs of adapting to the current trend of harmonization.[351] One of the reasons behind making the domestic laws in line with the international commercial arbitration procedures is China's gigantic program of economic expansion- the One Belt One Road Initiative (OBOR). The decision through arbitration is to be enforced and interpreted by the local courts, national laws just serve as a supplement to the decision. However, as China initially had no arbitration laws at the national level, it had to face many difficulties in the implementation of transitions.[352] China's Supreme People's Court is relentlessly committed to reforming China's Arbitration regime. The reforms related to reviewing processes, application, and enforcement of arbitral awards and related to the validation of arbitration agreements have remained the chief focus which also made Chinese arbitration practices align with international arbitration procedures.[353]

The European Union member states have adopted a more progressive approach by adopting the European Convention on International Commercial Arbitration, 1961. Apart from the New York Convention, the European Union has also adopted the UNCITRAL to further balance the controversial approach of member states while recognizing and enforcing an arbitral award. Although the European Union laws bind the member states at the international level with various conventions and court judgments, the member states have their own set of rules and regulations governing arbitration. Many arbitration cases have

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[348] Case *Chloro Controls (I) P Ltd v. Severn Trent Water Purification Inc,* [2012] 9 SCALE 595.
[349] Case *Shri Lal Mahal Ltd v. Progetto Grano Spa*, [2014] 2 SCC 433.The Supreme Court overruled the decisions set previously in cases *Phulchand Export Ltd v. OOO Patriot,* [2011] 10 SCC 300 and *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd., AIR 2003 SC 2629* which held that an arbitral award which is 'patently illegal' violates the public policy of India, widening the scope of public policy exception.
[350] Refer Article 260 of Chapter 28 of the Law of Civil Procedure (1991) of China.
[351] Shouzhi, Zhang. "Arbitration Procedures and Practice in China: Overview." *Thomson Reuters Practical Law*, 1 Aug. 2022, uk.practicallaw.thomsonreuters.com/3-520-0163?contextData=(sc.Default).
[352] "New Developments in Commercial Arbitration and Mediation." *Law.Asia*, China Business Law Journal, 18 Oct. 2019, law.asia/arbitration-mediation/.
[353] Farina, Anne Judith. "Talking Disputes into Harmony China Approaches International Commercial Arbitration." *Am. UJ Intl'l L. & Pol'y* 4 (1989): 137.

demonstrated the pro-enforcement approach of the European nations to harmonize and align international practices with domestic ones.

German laws very well elucidated the application of public policy exceptions for refusing to enforce international commercial arbitration awards. The interpretation of public policy adopted by the German courts is based on a narrow interpretation of its limitations of the fundamental principles of justice.[354] The courts noted that the defense of public policy would be applied only when there is a "*gross violation of the fundamental principles of German public and economic life*."[355] A similar approach was followed by the French Courts strongly indicating that the review on the merits of the case must not be allowed.[356] The Court in the case of *Thales v. Euromissile* decided that the public policy might be applied only when the breach is "*flagrant, effective et concrete (flagrant, effective and concrete).*"[357] The enforcement legislation in France and Portugal refers to "*order public international*" or to "*the international public policy*."[358] The European Court of Justice in the *Eco Swiss* case first described the restrictive approach towards public policy exception. The ECJ stated that, "*it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognize an award should be possible only in exceptional circumstances.*" Each country has a different understanding of public policy, and the present shift in the approach of domestic courts in defining the public policy exception is an example of *evolving consensus*[359] and an approach towards the harmonization of international commercial arbitration. The concept of international public policy must be separated from the national public policy.

Similarly, the views of the United States courts in the matter of arbitrarily seem to be very narrow. At the same time, the states have limited their public policy and national laws to provide arbitration a wider ground to operate. The approach of the American courts has not changed since the Parsons case and continues to give the public policy defense a narrow

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[354] Mistelis, Loukas. "International law association-london conference (2000) committee on international commercial arbitration" keeping the unruly horse in control" or public policy as a bar to enforcement of (foreign) arbitral awards." *Int'l LFD Int'l* 2 (2000): 248.
[355] Movsesian, Mark L. "International Commercial Arbitration and International Courts." *Duke J. Comp. & Int'l L.* 18 (2007): 423.
[356] Junita, Fifi. "Public Policy Exception in International Commercial Arbitration-Promoting Uniform Model Norms." *Contemp. Asia Arb. J.* 5 (2012): 45.
[357] Refer Case *Thales Air Defence BV v. GIE Euromissile and others*, November 18, 2004, J.D.I. (2005) 357.
[358] Refer Articles 1498 and 1502 of Title V of Code of Civil Procedure, 14 May 1981 of France.
[359] Zhang, Shu. *The Public Policy Exception in the Judicial Review of International Commercial Arbitral Awards: Lessons from and for China*. Springer Nature, 2023.

room for interpretation. The scope of public policy is gradually and slowly decreasing. The scope of public policy is gradually and slowly decreasing. The domestic courts need to find a careful balance between resolving agreements on the defense of public policy and safeguarding the interest of society. The idea here is not to discourage parties from applying the defense of the public policy, instead, it is to encourage parties to adhere to arbitration decisions and make the enforcement process go more smoothly, rather than pursuing frivolous arguments in an attempt to avoid arbitral award decisions. It is believed that, within the next few years, the United States will also opt for the UNCITRAL Model Law and doctrine of harmonization of international commercial arbitration with domestic laws.

4.4.2. Analysis

The unification of domestic laws and international laws is still subject to judicial involvement and practice for setting aside arbitral awards. Gu Weixia and Robert Morgan[360] in their 2005 review commented that "*the effectiveness of international commercial arbitration, however, ultimately depends on whether the arbitral award can be enforced against the losing party, nothing frustrates business parties more than to discover, after prevailing in a hard-fought and costly battle, that the result cannot be enforced.*" The prospect of non-enforcement still prevails in certain jurisdictions leading to inefficiency in dispute resolution mechanisms.

There is intense pressure on the application of public policy exceptions and various attempts are being made to follow a uniform approach in the enforcement of arbitral awards. There is a great necessity for a delocalization movement across nations and the unification of domestic laws and international laws. As expressed by Theodore C. Theofrastous in his referred article, "*more the autonomy, more the predictability*,"[361] the interference of the domestic courts must be minimized while recognizing and enforcing a foreign award. The similar approaches followed by the different legal systems can help boost the dispute mechanism system at the international level, serving as the basis for international rules and regulations.[362] Not only do different public policies impact the decisions of the courts, but the decisions are also affected by economic situations and the nature of judges.[363] The

[360] Weixia, Gu, and Robert Morgan. "Improving commercial dispute resolution in China." *Asian Disp. Rev.* 7 (2005): 6.
[361] Theofrastous, Theodore C. "International commercial arbitration in Europe: Subsidiary and supremacy in light of the de-localization debate." *Case W. Res. J. Int'l L.* 31 (1999): 455.
[362] Brazil-David, Renata, 2011.
[363] Kun, Fan, 2015.

unsolicited interference of the domestic courts acts as a major hindrance in the enforcement of the arbitral awards.

The wider interpretation of this under Indian Law has been subject to a lot of criticism. Such interpretation has led to the courts reviewing the merits of awards as if the arbitrators were a lower tier of the court system. To take defense of the public policy, the enforcement of the award must invoke something more than the violation of the law of India. This pro-arbitration attitude of national courts is most apparent in developed arbitral jurisdictions such as the USA and Europe. Arbitration is opted for its neutrality, speed, economy, and privacy, and not as a method to avoid mandatory laws. The concept of public policy is quite broad and open to misinterpretation. The Courts need to strict down the policies and there should be minimum intervention of courts in enforcement of arbitral awards in different jurisdictions. However, recent judicial rulings are helping India to shed its anti-arbitration image and emerge as a favorable jurisdiction for the enforcement of international arbitral awards.

Despite different national laws and approaches, many jurisdictions are showing an effort towards harmonization of international arbitration laws with the national courts playing the role of a supervisory.[364] Harmonization is the only solution to the expanding diversity in the international commercial arbitration laws which do not comply with national judicial systems. It is pretty evident that disputes even though similar submitted for arbitration from various places will not generate similar outcomes due to the difference in provisions of domestic laws of the places where arbitration is taking place. The arbitral award of one case is not applicable on the other hence harmonizing international laws with domestic laws and public policy becomes an indispensable reality.

4.5. Conclusion

The comprehensive examination of the public policy exception about international commercial arbitration and the recognition and enforcement of arbitral awards facilitates a comparative analysis of pro-arbitration and anti-arbitration positions as further detailed in Chapter 6. Furthermore, the detailed case studies shed light on the different approaches taken

[364] Malviya, Dr. Mukesh Kumar. "Jurisdictional Issues in International Arbitration with Special Reference to India." *Manupatra*, Bharati Law Review, 2017, docs.manupatra.in/newsline/articles/Upload/03D471A1-CEC8-46DC-8E27-A42DC5D09E7C.pdf.

by local courts in the European Union, Asia, and the United States and the diverse interpretations and applications of public policy exceptions in these jurisdictions. The ongoing efforts to harmonize domestic and international arbitration laws have led to integrating international frameworks into national legislations, therefore, revealing continued challenges and potential advantages associated with the harmonization of the recognition and enforcement of arbitral awards.

5. VARIOUS INTERPRETATIONS OF PUBLIC POLICY IN THE LIGHT OF RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

Public Policy is the most widely used ground or exception to avoid enforcement of arbitral awards when it comes to international commercial arbitration. It remains a highly debated and controversial topic. The purpose of public policy is to protect the fundamental principles of the society. Each nation has a different standard to apply its land laws and precedents to tackle arbitration disputes. It takes elements from various disciplines such as public administration, sociology, economics, history, and the importance of cultural practices and customs. It is a concept that is adapted from time to time to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions. Since no clear definition of public policy exists, it is widely agreed that states have the ultimate power to refuse to enforce an arbitral award on public policy grounds.

One of the most successful international accords in arbitration is the New York Convention which has contributed significantly to the development of international commercial arbitration.[365] Article V (2) of the Convention prohibits a country from recognizing or enforcing an arbitral award if the subject matter of the dispute is not arbitrable under that country's legislation and the award would be contrary to that country's public policy.[366] A French delegate recommended that the Convention be amended to eliminate the defense of arbitrability, but the proposal was rejected. He argued that compliance with international public policy would suffice for an award under what is now Article V (2)(b). Additionally, while the basis for rejection given forth in article V (2)(a) may occasionally overlap with that outlined in article V (2)(b), it does not always do so, and hence the drafting committee opted to handle it separately.[367] Certain jurisdictions have stressed the link between public policy and national sovereignty through the notion of public policy.[368]

[365] Tosun, Huseyin Alper, 2019.
[366] Article V (2) of the New York Convention, 1958.
[367] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), 2016 Edition, available at: available at: https://newyorkconvention1958.org/pdf/guide/2016_Guide_on_the_NY_Convention.pdf
[368] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 2016.

According to the researchers, public policy encompasses all government acts, beginning with the intention to perform a specific action and ending with the outcome of that action.[369] Public policy is interconnected with public administration and other fields of study, such as political science and law.[370] If we believe that state politics have full influence over bureaucracy, we may assume that the implementation process starts when policy is turned into action. The early research on the subject focused on bureaucracies since the concept aligned with Max Weber's paradigm. It included concepts from the goal-setting and rational decision-making processes.[371] It is up to a government to decide how precisely it wants to define the essence of its public policy in a particular sector and how "*vast, qualitative, and complicated*" might the public policy be in nature. [372] The broad interpretation of public policy presents difficulties in the field of arbitration, thus defeating the objective of arbitration. However, a shared understanding of public policy can be gained by referring to practices from many other countries. Assuming the current legal disparity between jurisdictions in defining public policy, the research question can be phrased as follows:

When the defense of a public policy is invoked in arbitration, what are the reasons for refusing to recognize and enforce arbitral awards, and what could be done to increase arbitration's efficacy as a dispute-resolving method?

The core intention of this Chapter is to summarize the public policy reasons for refusing arbitral awards such as violation of competition laws, anti-suit injunctions, and the moral, political, and economic order of the country, etc. The review of arbitral awards by courts at the setting aside or enforcement stage may seem to raise a greater tension between various areas of law involved. The research aims at identifying court judgments and such public policies or practices according to which the public policy defense is used to refuse to serve a judgment of an anti-suit injunction, competition laws, insolvency disputes, fundamental policies, etc. While this Chapter primarily centers around international commercial arbitration with a specialized focus on business-to-business (B2B) disputes, it is pivotal to understand the unique challenges in business-to-consumer (B2C) arbitration, such as violation of rules on consumer protection which may violate the public policy of the country. This will contribute to a holistic understanding of arbitration in both B2B and B2C disputes

[369] Cairney, Paul. *Understanding public policy: theories and issues*. Vol. 2. Bloomsbury Publishing, 2019.
[370] Hogwood, Brian W. "Public policy." *Public Administration* 73.1 (1995): 59-73.
[371] Hogwood, Brian, and Lewis Gunn. "Why 'perfect implementation'is unattainable." *Policy Process*. Routledge, 2014. 217-225.
[372] Sunday, Nicholas. *Law and public Policy: Policy made simple*. GRIN Verlag, 2013.

in an international landscape. Public policy defense indeed is one of the impediments to the growth of international arbitration. Thus, the study focuses on the public policy exceptions and problems pertinent to international commercial arbitration and does not promise to be exhaustive.

5.1. Violation of Competition laws / Anti-trust laws

The increasing intricacies of cross-border transactions have led to an increase in multiparty transactions, significantly challenging the applicable laws. However, the competition laws of Europe or any other jurisdictions completely ignore the arbitration process. Since arbitration is the formation of private autonomy, arbitration and competition laws are naturally contradicting and incompatible.[373] The Cambridge Dictionary defines competition law as "*the laws that are intended to make sure that there is fair competition between businesses*,"[374] and arbitration promotes increasing commerce and competition amongst jurisdictions at the international level. Competition laws are designed to promote and protect competition in the marketplace, and to prevent anti-competitive practices that could harm consumers or other businesses. According to Alexander Schaub, a former Director General of DG Competition, the public interest must be promoted to eliminate market inefficiencies.[375] Competition law is an essential component of judicial systems that needs to be meticulously regulated, and it thus constitutes part of public policy. On the other hand, legal challenges against arbitral awards at the stage of recognition and enforcement may appear to aggravate the conflict between the principles of the appearance and reality of the law in question.

Today, European laws and international arbitration laws have become more intertwined. However, public policy is narrowly understood in many areas of the European Union. Violation of competition laws could arise in many ways in arbitration cases, such as one party alleging that the other party engaged in anti-competitive behavior, such as price-fixing, market allocation, or abuse of a dominant market position. Such allegations could lead to claims for damages, injunctions, or other remedies under competition law. Invoking the

[373] Komninos, Assimakis. "Arbitration and EU competition law." *Available at SSRN 1520105* (2009).
[374] "Competition Law." *Cambridge Business English Dictionary*.
[375] Monti, Giorgio. "EC Competition law: the dominance of economic analysis?." *The Development of Competition Law*. Edward Elgar Publishing, 2010.

defense of public policy is the most common way for an EU Member State to justify an apparent breach of arbitration norms. In the case of *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit,* the ECJ has ruled that EU competition policy may be interpreted in the context of public policy in annulling and enforcing national arbitral awards.[376] The ECJ, in another case, considered anti-competitive agreements or decisions to be important to perform the responsibilities vested by the European Union and particularly for the operation of the internal market to be a public policy concern, within the meaning of Article V(2)(b) of the New York Convention.[377] On the one hand, it is a basic idea of arbitration law that awards are in principle final and should enjoy a status akin to a final decision of a state court and can be set aside or denied enforcement only on exceptional grounds. On the other hand, competition law is a fundamental underpinning of modern legal systems that must be vigorously enforced and is thus part of public policy.

The TFEU regulates European competition law, and the EU competition law was governed by EC Treaty Articles before being renamed as TFEU. Article 101 TFEU (ex-Article 81 TEC, ex-Article 85 EC) prohibits anti-competitive agreements between two or more independent market operators[378] and Article 102 TFEU (ex-Article 82 TEC, ex-Article 86

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[376] Case C-8/08 *T-Mobile Netherlands BV et al. v. Raad van bestuur van de Nederlandse Mededingingsautoriteit*, EU:C:2009:343.

[377] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055. Refer Paras. 37-39.

[378] Article 101 TFEU reads as: *"1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as their object or effect the prevention, restriction, or distortion of competition within the internal market, and in particular those which:*

- *(a) directly or indirectly fix purchase or selling prices or any other trading conditions;*
- *(b) limit or control production, markets, technical development, or investment;*
- *(c) share markets or sources of supply;*
- *(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- *(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.*

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- *any agreement or category of agreements between undertakings,*
- *any decision or category of decisions by associations of undertakings,*
- *any concerted practice or category of concerted practices,*

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- *(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
- *(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."*

EC) prohibits abusive behavior by companies holding a dominant position on any given market.[379] It also declares any "*agreements or decisions*" void if found anti-competitive and against the provisions of this article. As confirmed by the ECJ on numerous occasions, the EU competition law is an example of public policy within the scope of the New York Convention. There is no worldwide criteria or definition to define the meaning and scope of public policy, therefore, the EU Member States may refuse to recognize or enforce a foreign arbitral award contrary to public policy owing to violations of EU competition laws. According to the ECJ, the competition regulations must be interpreted from the perspective of greater EU goals. The broad notions of Member States may be different; however, the general notions may appear similar.

Author Giorgio Monti listed three questions about the European Commission's power to let agreements that affect competition but also serve the public interest: i) What factors in public policy are important to look at, ii) how do public policy issues come up in competition cases, and iii) are all public policy factors looked at the same way, or do some count more than other factors.[380] All EU Member States are parties to the New York Convention, therefore, all European legislations have adopted the same provision on the defense of public policy[381] as Article 1502-5 of the French Code of Civil Procedure states that "*Appeal of a court decision granting recognition or enforcement is only available on the following grounds: 5. if recognition or enforcement is contrary to international public policy*."[382] The ECJ reviewed the ability of a national court to invoke Article 85 or 86 EC on its motion in the combined cases of *Van Schijndel and Van Veen*.[383] The court determined that each case that raises the question of whether a national procedural regulation makes it more difficult to

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[379] Article 102 TFEU reads as *"Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:*

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets, or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[380] Monti, Giorgio. "Article 81 EC and public policy." *Common Market Law Review* 39.5 (2002).

[381] Article V (2) (b) of the New York Convention, 1958 reads as *"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."*

[382] Article 1502-5 of Code of Civil Procedure, 14 May 1981 of France.

[383] Case *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, C-431/93,C-430/93, 14 December 1995.

apply EU law must be examined and also in terms of the characteristics of national courts' proceedings at various levels.

While the ECJ is largely responsible for defining and steering the EU public policy, author Nitu Florian has widely regarded objectives and practices that contribute to the shaping and implementation of the EU's public policy framework, including the direct impact of EU law, the internal market, and economic freedoms, as well as the horizontal impact on fundamental rights and EU law's general principles. [384] The concept of public policy is not only limited to basic morals and fundamentals but according to ECJ judgments, the same also extends to competition and anti-trust rules, consumer protection rules, export import-related regulations, etc. which broadens the scope of public policy in the EU region. The English courts defined public policy as the legal concept that no person may legitimately conduct anything that has a likelihood to be detrimental to the public or opposed to the public good.[385] Through the analysis of case laws, the study refers to the approach of national courts in various Member States concerning public policy and EU competition regulation.

Author Luca G. (2011) in his article discusses balancing public policy and the effectiveness of arbitration in cases of competition law breaches. He explains that if a breach of competition law occurs, resulting in the annulment or refusal of enforcement, it must be a "*serious, effective, and concrete breach*"[386] and the court should carefully review the situation to ensure arbitrators' decisions align with public policy and competition policy goals without giving either party an unfair advantage. In the case of *Thales v. Euromissile*[387], the arbitration tribunal passed an award against Thales to pay certain damages to Euromissile, however, none of the parties alleged before that the arrangement violated EU competition law. Thales objected that the award be set aside because inter alia it violated EU competition law, and the award that gave effect to their agreement violated public policy. The French court dismissed the request citing Eco Swiss[388] and public policy concerns. The court ruled that the exemption from public policy may only be invoked where the execution would violate French law or a basic legal norm. The erroneous application, and even the non-application, of competition law by the arbitrators are not by themselves breaches of

[384] Nitu, Florian. "EU Public Policy in International Commercial Arbitration." *Rom. Arb. J.* 10 (2016): 11.
[385] Case *Egerton v. Brownlow,* [1853] 4 HLC 1.
[386] Radicati di Brozolo, Luca G. "Competition Law and Arbitration." *Competition L. Int'l* 7 (2011): 12.
[387] Case *Thales Air Defence BV v. GIE Euromissile and others*, November 18, 2004, J.D.I. (2005) 357.
[388] Case C-126/97 *Eco Swiss China Time Ltd v. Benetton International NV*, 25 February 1999, NV [1999] ECR 1-3055.

public policy. An obvious example of a breach of public policy is an award condoning a hardcore restriction of competition law, imposing the perpetuation of anti-competitive behavior, or deliberately and unjustifiably ignoring competition law.

In the case of *Chromalloy Aeroservices v. the Arab Republic of Egypt*[389], the DC Circuit Court of Appeals refused to enforce an arbitral award that required the Egyptian company to pay damages for breach of contract, as the award was based on an illegal price-fixing agreement, and recognizing and enforcing the decision of the Egyptian court would violate the public policy of the United States. In such cases, public policy considerations play a significant role in the outcome of the arbitration decisions. An arbitrator must balance the interests of the parties with the public interest. However, in promoting and protecting competition, an arbitrator may be required to consider a variety of factors, such as the impact of the alleged anti-competitive behavior on consumers, the competitive structure of the relevant market, and the potential benefits and harms of any proposed remedies.

The infringement of competition law in court proceedings is an important public policy matter. Therefore, it is important to note that the arbitral tribunals carefully balance the interests of the parties and the public interest to promote and protect competition, considering several factors in determining the appropriate outcome of a dispute. The arbitral tribunal must take into consideration the potential consequences of competition law proceedings and take appropriate steps to ensure that their conduct complies with all applicable competition laws and regulations.

5.2. Fraud

Article V of the Convention includes a short and thorough list of grounds for refusing to recognize and enforce an award, including *fraud*. Most jurisdictions have adopted a narrow understanding of public policy, limiting its scope and interpretation. The courts need to take a flexible approach and identify whether the public policy would be damaged by the enforcement of the arbitration award.[390] The English courts have taken a restricted understanding of public policy *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*.,[391]

[389] Case *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.2d 737 (D.C. Cir. 1991)
[390] Case *Patel v. Mirza,* [2016] UKSC 42.
[391] Case *RBRG Trading (UK) v. Sinocore International,* [2018] EWCA Civ 838.

where RBRG and Sinocore signed a sale contract in which RBRG committed to buy steel coils from Sinocore. The contract included an arbitration clause regulated by Chinese law and required RBRG to make payments via an *irrevocable letter of credit*. The issue began when RBRG unilaterally changed the shipping date on the letter of credit. The goods were loaded onto a ship in China and the bills of lading were issued. Sinocore, however, forged bills of lading with a modified date due to a change in the letter of credit's shipping time. However, the Netherlands court issued an injunction preventing the bank from paying against the forged letter of credit. Meanwhile, Sinocore resold the products to a third party at lower prices and claimed RBRG for breaching the contract. The matter was moved to an arbitration court in China with RBRG claiming a breach by Sinocore for forging the bills of lading. On the other side, Sinocore contested that RBRG breached the contract unilaterally and the award was passed in favor of Sincore. RBRG requested to set aside the arbitral award on the grounds of public policy, but the Court of Appeal interpreted the definition of public policy in a narrow sense.

In another French case, the French Supreme Court overturned the Court of Appeal's decision that had rejected an annulment application, when the Paris Court of Appeal found that the award was obtained by fraud.[392] The court noted that by the basic principle of law, fraud is an exception to all norms (*fraus omnia corrumpit*), and such provisions violate French international public order and must thus be repealed. Such fraud was committed by submitting to the arbitral tribunal a detailed list of costs certifying that it had incurred them in the course of its contract when it had not and that this fraud had a necessary influence on the arbitral tribunal's decision, not only on the assessment of damages. Because there were no expenses, the arbitral tribunal was compelled to conclude that the deal under review could only be classed as a fraudulent contract. The Paris Court of Appeal has many times overturned an award, claiming that enforcing it would be against public policy because the investment was made fraudulently. The Court of Appeals recently dismissed an ICC award because it was against public policy since the tribunal based its decision on forged documents, namely a memorandum of understanding that exempted the obligation to pay US$12.5 million.[393] Most EU courts have interpreted the public policy exemption narrowly,

[392] Case *Société European Gas Turbines SA v. société Westman International Ltd*, Cour d'appel de Paris (1Ch. C), 30 September 1993.
[393] Case *Société MK Group v. S.A.R.L. Onix et Société Financial Initiative*, Cour d'appel de Paris, 16 January 2018, No. 15/21703.

per the European viewpoint. As a result, challenges to the enforcement of awards on that basis have seldom been successful.

5.3. Bribery and Corruption

Bribery and corruption are the two illegal practices that can have profound consequences in arbitration, as in any other legal proceedings, and the prohibition of both is an essential element of nearly every country's public policy. Various international organizations such as the United Nations and the Organization for Economic Co-operation and Development (OECD) have developed international guidelines to combat corruption and bribery.[394] Today most countries have local legislation prohibiting bribery and corruption in judicial proceedings and ADR including arbitration conducted within their jurisdictions. For example, the Arbitration and Conciliation Act, of 1996 of India allows setting aside of an arbitral award if the award conflicts with public policy affected by corruption.[395] In this respect, at the transnational level, Article V2(b) of the New York Convention allows an award to be set aside by judicial bodies that have the effect of corruption. Corruption is seen as one of the major transgressions that many legal systems do not accept in both national and international settings and may have a substantial impact on the outcome of an arbitration proceeding, as it can undermine the impartiality and independence of the proceedings.

In a recent case, *Alstom v. Alexander Brothers*[396], significant circumstantial evidence of corruption prompted the annulment of an arbitral award. On 28 May 2019, the French Court of Appeals concluded that, after receiving extensive comments from the parties on these issues, there was sufficient circumstantial evidence that enforcement of the award would result in the execution of a corrupt transaction. The Court then proceeded to deny execution of the award on the grounds of corruption. While investigating accusations of corruption, the Paris Courts have repeatedly ruled that it has the power to assess the arbitral award based on facts and legal components. It is uncommon for courts to investigate the facts of an

[394] United Nations Convention against Corruption 2003, the Organization for Economic Co-operation and Development (OECD) - Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

[395] Section 34 on "*application for setting aside arbitral awards*" of the Arbitration and Conciliation Act, 1996 of India.

[396] Case *Alexander Brothers Ltd. v. Alstom Transport S.A. et Alstom Network UK Ltd*., Court of Appeal of Paris 16/11182, 28 May 2019.

arbitration decision, as the two functions are distinct; nevertheless, the Paris Court of Appeal has been pretty stringent in dealing with claims that awards gave effect to corrupt investments or contracts.

In a similar 2019 judgment, the Hague Court of Appeal threw aside an international arbitration decision in *Bariven S.A. v. Wells Ultimate Service LLC*[397] because enforcing a contract obtained by corruption contradicts Dutch public policy. Wells Ultimate Service LLC ("*Wells*"), a subsidiary of Venezuelan state-owned energy company PDVSA entered into a contract with Bariven S. A. ("*Bariven*") to sell equipment to Bariven, to which Bariven refused to pay which led to arbitration proceedings. During the arbitration proceedings, Bariven contended that the contract was obtained through corruption and thus, violated Dutch public policy. However, ICC found that Bariven had failed to provide clear evidence of corruption, and thus awarded Bariven to pay an amount of USD 11.7 million and interest and costs to Wells for failing to adhere to the 2012 contract for the purchase of two equipment used on drilling platforms.[398] The ICC also found that even if the contract was procured by corruption and the contract was void or voidable under Dutch law, Bariven was still obliged to pay the contract price of the goods that Wells delivered. Therefore, in 2018, Bariven applied to the Hague Court of Appeal to set aside the award on the grounds of violation of Dutch public policy. The Hague Court of Appeal set aside the ICC award because enforcing a contract procured through corruption is against the law and violates Dutch public policy. The judgment passed by the Hague Court of Appeal was later quashed by the Dutch Supreme Court in 2021, reinstating the arbitral award passed by the ICC Hague tribunal.[399] However, the decision by the Hague Court of Appeal raised many questions from an international perspective as different jurisdictions have different approaches to contracts obtained through corruption. The relatively low evidentiary standard set by the Hague Court of Appeal could also lead to frivolous contentions of corruption in cases where it cannot be proven through criminal investigations or convictions.

In another case, the Swiss Federal Tribunal ruled that bribery is against Swiss public policy but agreed with the arbitrators that the charge was not properly established.[400] While bribery

[397] Case *Bariven S.A. v. Wells Ultimate Service LLC*, 22 October 2019, ECLI:NL:GHDHA:2019:2677.
[398] "The Dutch Supreme Court Reinstates Arbitral Award That Was Set aside on Corruption Allegations." *Houthoff*, 16 July 2021, www.houthoff.com/insights/news/favourable-ruling-by-the-dutch-supreme-court-that-reinstates-arbitral-award.
[399] English translation available at: https://www.houthoff.com/-/media/3fe9689d743b4fa5b7b147a82cf14e13.pdf
[400] Bundesgericht (Swiss Federal Court), 17 January 2013, 4A_538/2012, Para. 6.2.

and corruption are against international public policy and hence grounds for annulment in substantially all jurisdictions, their validity has been questioned in practice. Bribery and corruption are serious issues that may affect the fairness and impartiality of arbitration proceedings and thus violate the public policy of that country. Arbitration institutions also adhere to their own set of rules and regulations for dealing with allegations of bribery and corruption and play a vital role in preventing such practices. For example, the ICC has Rules on Combating Corruption[401] which apply to enterprises and public bodies, and the LCIA has Arbitration Rules 2020 stating bribery or corruption as a *prohibited activity*.[402] However, the parties to an arbitration need to be aware of these issues and ensure that arbitration proceedings are conducted fairly and impartially.

5.4. Patent illegality

Patent illegality is a component of public policy, as many Indian court decisions have stated. For a lengthy period, the defense of patent illegality was extensively used in Indian courts, resulting in expanding the scope of public policy definition. Initially, the Indian Arbitration Act had no provision for setting aside a domestic award or refusing to enforce a foreign award on the grounds of patent illegality. The Indian Supreme Court in the landmark judgment of *Renusagar Power Co Ltd v. General Electric Co*[403] established that an arbitral award may be set aside on public policy grounds and defined public policy with the following three criteria: (i) the fundamental policy of Indian law; (ii) public interest; and (iii) justice or morality.[404] However, the definition did not include patent illegality as a ground for refusing arbitral awards. Following the decision in Renusagar, the term patent illegality first arose in the case of *ONGC. v. Saw Pipes Limited*[405] wherein the Supreme Court redefined the term *public policy*. The Supreme Court held that an award was patently illegal if it violated governing law or the contract's terms, broadening the scope of judicial review

[401] ICC Rules on Combating Corruption, 2023.
[402] Article 24.9 of the LCIA Arbitration Rules 2020.
[403] See Case *Renusagar Power Co. Ltd. v. General Electric Co*., (1994) 2 Arb LR 405: AIR 1994 SC 860, 885, 888: 1994 Supp (1) SCC 644.
[404] See Case *Renusagar Power Co. Ltd. v. General Electric Co*., (1994) 2 Arb LR 405: AIR 1994 SC 860, 885, 888: 1994 Supp (1) SCC 644.
[405] Case *Oil and Natural Gas Corporation Ltd v. Saw Pipes Ltd.,* AIR 2003 SC 2629.

to the decision's merits. Despite widespread criticism of the *ONGC. v. Saw Pipes Limited* ruling, the Indian judiciary has applied it in a variety of cases.

However, the Arbitration and Conciliation (Amendment) Act, 2015 amended Section 34 of the Arbitration and Conciliation Act, 1996, and with effect from October 23, 2015, this amendment removed a broad definition of public policy as it was understood and applied by Indian courts.[406] The amended clause reads as:

"*Section 34 (b) the Court finds that--*

(ii) the arbitral award conflicts with the public policy of India.

[Explanation 1.—For the avoidance of any doubt, it is clarified that an award conflicts 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 of 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.]

"[(2A) An arbitral award arising out of arbitrations other than international commercial arbitrations, may also be set aside by the Court if the Court finds that the award is vitiated by patent illegality appearing on the face of the award.

Provided that an award shall not be set aside merely on the ground of an erroneous application of the law or by reappreciating evidence.]"[407]

It is important to note that the threshold for establishing patent illegality is high, and the Indian courts have advised against a liberal and broad interpretation of this ground. The words "*other than international commercial arbitrations*" in the 2015 amendment of the Indian Arbitration Act elucidates that the issue of patent illegality is only applicable to

[406] Refer 2015 Amendment to the Arbitration and Conciliation Act, 1996.
[407] Section 34 (b) (ii) of the Arbitration and Conciliation Act, 1996

domestic arbitrations, and not to international commercial arbitrations, thus narrowing the scope of the use of patent illegality. The error should be so severe that it affects the foundation of the arbitral award, not simply a wrong interpretation of the legal regulations.

5.5. Impartiality of the Arbitrator

Public policy refers to principles and values that are considered important for the public good, and the impartiality of the judge is considered central to ensuring the fairness and justice of the judicial process. The parties agree to submit their dispute to a neutral third-party arbitrator, who will make a binding decision based on the evidence and information presented by both parties, and the parties expect that the judge will be fair and impartial and will decide only on the merits of the case. The impartiality of the arbitrator is a fundamental aspect of the integrity of the arbitration process, and it is often considered a ground of public policy in arbitration. On one hand, all arbitration statutes are silent and on the other hand, courts have questioned if the public policy might be affected by concerns about the impartiality and arbitrator appointment. Arbitration has been regarded as the greatest ethical institution in labor relations society, with arbitrators utilizing their ethical faculties to determine the right and the wrong.[408] The arbitrator's adherence to professional ethics and regulations is crucial to the arbitral institution's reputation. When making a decision, an arbitrator must be impartial to protect the integrity of the process. The arbitral institutions and legislative organizations such as UNCITRAL, ICC, ICSID, etc. emphasize the importance of impartiality and independence in their rules and codes.

An arbitral award rendered by Tbilisi's Chamber of Arbitration was rejected by the Court of Appeals because of a conflict of interest involving one of the company's founders who owned 67% of the shares and the arbitral tribunal's founder who owned 16.65 % of the shares, which raised serious questions about the arbitral tribunal's impartiality.[409] The two most often used provisions of the New York Convention are alleged arbitrator partiality or nondisclosure or public policy violation. The lines between public policy and national

[408] Marx, Herbert L. "Arbitration as an Ethical Institution in Our Society." *ARBITRATION JOURNAL* 37.3 (1982): 52-55.

[409] Jajanidze, Nino. "Public Policy as a Ground for Refusal of Recognition and Enforcement of Arbitral Awards with Special Focus on Georgia." (2014).
Refer Case *Debt Recovery and Management Group v. Alliance Group Capital*, Case No. 2b/2130-11 (Tbilisi Appeal Court, July 20, 2011).

arbitration law standards for impartiality are blur. However, the courts considering the public policy exemption to the New York Convention typically refer to the definitions of impartiality and independence arbitration in their legislation.[410]

If the impartiality of the arbitrator is questioned, it may undermine the integrity of the arbitration process and shake the public's trust in the legal system. Therefore, arbitration laws require arbitrators to disclose any conflicts of interest that could affect their impartiality.[411] Moreover, the arbitrator's duty of impartiality is also an essential consideration while deciding whether an arbitration award ought to be enforced or not. It highly depends on the arbitrators to make a fair and impartial decision, and any appearance of bias or lack of impartiality may undermine the credibility of the arbitration process.

5.6. Fundamental Notions of morality, justice, and order of the country

Public policy is used as the moral, social, and/or economic considerations that are applied by courts as grounds for refusing enforcement of an arbitral award. In civil law systems references to good faith and good morals, as well as to public policy as a bar to parties' freedom are incorporated in codes. In common law references to public policy are mainly included in judicial practice, but also in legal documents. The House of Lords of England in early 1853 explained that public policy is a "*principle which does not permit the doing of anything that could harm the basic principles of any society.*"[412] It is greatly portrayed by European Courts where national courts are unwilling to intervene with valid arbitral

[410] Rogers, Catherine A. "The ethics of international arbitrators." (2008).

[411] International arbitration bodies such as UNCITRAL, ICC, and ICSID emphasize the significance of impartiality and independence of arbitrators in their regulations and codes and are the most prominent international groups that lay down guidelines for arbitration. UNCITRAL has the UNCITRAL Arbitration Rules, which give an extensively identified framework for international commercial arbitration. Article 11-13 of the UNCITRAL Arbitration Rules (Disclosures by and challenge of arbitrators) requires arbitrators to be independent and independent and to disclose any instances that would doubt their impartiality or independence. The ICC has also published its very own policies for arbitration, which consist of provisions concerning the impartiality and independence of arbitrators. Article 11 of the ICC 2021 Arbitration Rules states that "*Every arbitrator must be and remain impartial and independent of the parties involved in the arbitration.*" ICSID has its guidelines for arbitration, called the ICSID Convention Arbitration (2022 Rules). Article 14 of the ICSID Convention calls for the arbitrators to be independent and unbiased, and not have any nationality of the state party to the dispute. These organizations recognize that the integrity and impartiality of the arbitration process depend on the arbitrator's ability to make impartial decisions and ensure that the highest ethical and professional standards are maintained during the international arbitration process.

[412] "Public Policy as a Limit to the Enforcement of Foreign Arbitral." *Law Teacher*, 23 June 2019, www.lawteacher.net/free-law-essays/international-law/public-policy-as-a-limit-to-the-enforcement-of-foreign-arbitral-law-essay.php?vref=1.

judgments on grounds of public policy. Similarly, the *Renusagar Case* has always been the beginning point for considering public policy grounds which maintained that national courts should only intervene with arbitral awards in extraordinary situations. This ruling followed private international law and conformed with most developed European jurisdictions. Domestic public policy is commonly believed to refer to the underlying moral and legal principles that a government chooses to apply strictly to conflicts within its authority. Public policy is a concept that is adapted periodically to meet the changing societal needs, including political, social, cultural, moral, and economic dimensions. Since it works under a variety of social, political, and economic circumstances, the public policy process is said to be "*dynamic*" in nature.[413] Therefore, it is important for the arbitrators to make certain that the outcome of the arbitration process is not only legally correct, but morally and ethically correct as well.

5.7. Violation of Consumer Protection laws

Since the commercial landscape is dynamic, businesses often engage in both B2B and B2C transactions. Therefore, it is important to recognize and acknowledge the evolving nature of B2C transactions and its implications on society. Consumer protection laws are designed to protect consumers from fraud and unfair business practices. These laws are usually enforced through local legislation and may also give consumers the right to take legal action against businesses that violate consumer protection laws. Arbitration agreements between consumers and businesses may include provisions that allow disputes to be resolved through arbitration rather than litigation, and if a business violates consumer protection laws, the same may conflict with the public policy of the country. Usually, public policy is about protecting the public interest and promoting the greater public good, and if a consumer agreement conflicts with public policy, the court may refuse to enforce the same to protect the public interest.

There have been instances where domestic courts have refused arbitral awards on the grounds of public policy. The case of *Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*[414] is a significant judgment in the context of EU consumer law, in particular concerning

[413] Simon, Christopher A., 2023.
[414] Case *C-168/05 Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*., ECLI:EU:C:2006:675.

unfair terms in consumer contracts. The dispute relates to certain conditions of the contract between Mostaza Claro and the Spanish mobile operator Centro Movil Millennium S.L. relating to the early termination charges on the mobile phone contract. The ECJ in its 2014 ruling held that once the contract between a buyer and seller or supplier has "*unfair term to the consumer's detriment*", causes disparity in the parties' rights and obligations.[415] The Advocate General A. Tizzano in his Opinion delivered on 27 April 2006 specified that, "*the system for the protection of consumers established by Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts requires that, in a case such as the present one, a national court seised of an action for annulment of an arbitration award be able to determine that an arbitration clause is unfair and to annul the award on the ground that it is contrary to public policy, even if that defect was not contested by the consumer in the course of the arbitration proceedings and is raised for the first time in the application for annulment*."[416] It outlines the principle of consumer protection in the EU Directive and emphasizes the power of national courts to review the validity of arbitration clauses in consumer contracts. It also underlines the power of courts to deem such claims unfair and contrary to public policy, even if the consumer did not raise these claims in the court proceedings.

In another case, *Asturcom v. Rodriguez Nogueira*[417], Asturcom entered into a mobile phone subscription contract with Mrs. Rodriguez Nogueira in 2004 and the contract contained an arbitration clause requiring dispute resolution by the Association Europa de Arbitraje de Derecho y Equidad (AEADE) in Bilbao. Mrs. Rodriguez Nogueira failed to make many payments and terminated the contract before the contract completion date. Therefore, Asturcom commenced proceedings against Mrs. Rodriguez Nogueira, resulting in a fine of €669.60. Mrs. Rodriguez Nogueira did not contest the arbitral award, thus, the award was finalized in favor of Asturcom. Asturcom sought enforcement of arbitral award in the Court of First Instance[418] in Bilbao in 2007, however, the Court of First Instance rendered a decision in favor of the customer, ordering the telecommunications company to pay damages

[415] Case *C-168/05 Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*., ECLI:EU:C:2006:675, opinion of Advocate General Tizzano, para 23, delivered on 27 April 2006, available at: https://curia.europa.eu/juris/liste.jsf?num=C-168/05.
[416] Case *C-168/05 Elisa Maria Mostaza Claro v. Centro Movil Milenium SL*., ECLI:EU:C:2006:675, OPINION OF ADVOCATE GENERAL TIZZANO, Conclusion, delivered on 27 April 2006, available at: https://curia.europa.eu/juris/liste.jsf?num=C-168/05
[417] Case C-40/08 *Asturcom Telecomunicaciones SL v. Rodriguez Nogueira*, [2009] E.C.R. I-9579 (06 October 2009).
[418] Case C-40/08 *Asturcom Telecomunicaciones SL v. Rodriguez Nogueira*, [2009] E.C.R. I-9579 (06 October 2009).

for breach of contract and violation of consumer protection laws. The Court of First Instance opinionated that:

- the costs of traveling to the arbitration tribunal were greater than the disputed amount.
- non-indication of the location of the arbitration tribunal and the distance between the arbitration tribunal and the customer's residence resulted in high transportation costs.
- the company drafts the contracts itself used by similar telecommunications businesses and may impact the judgment of the arbitration cases.[419]

Therefore, the Court of First Instance ultimately refused to enforce the arbitral award, concluding that the award violated Spanish consumer protection laws. This case highlights the importance of consumer protection legislation in arbitration proceedings and the potential for such circumstances to be used to challenge arbitral awards. In this case, the Spanish courts were willing to set aside the award to protect the rights of the consumers to ensure that the telecommunications company complied with Spanish laws on consumer protection.

If a business violates consumer protection laws, the factor of public policy may make it difficult to enforce an arbitration agreement that seeks to empower consumers to pursue their legal rights. Today, the dynamic nature of public policy influenced by globalization has broadened the scope of public policy to environmental, labor, consumer protection, and other factors, and this shift is shaping the concept of public policy in arbitration.[420]

Ultimately, whether an arbitration agreement conflicts with public policy will depend on the particular facts and circumstances of the case, as well as applicable consumer protection legislation and governing law of that particular state.

5.8. Conclusion

This Chapter summarizes the concept of public policy by analyzing court judgments and practices used to refuse arbitral awards on the grounds of public policy. Because of the ever-

[419] Case C-40/08 *Asturcom Telecomunicaciones SL v. Rodriguez Nogueira*, [2009] E.C.R. I-9579 (06 October 2009). Refer Para 25.
[420] Gibson, Christopher S, 2008.

changing nature of public policy, it has always been difficult to establish a standardized framework for arbitration, and what is legal in one country may be unlawful in another. The concept of public policy is not limited to the country's policies, and it also encompasses other issues such as corruption, bribery, fraud, violation of competition laws and anti-trust regulations, violation of morality and justice, the role of the arbitrator's impartiality, etc. that are detrimental to public policies of that country. The Chapter focuses on the convincing justifications embedded in public policy exceptions, each constituting an evident side of public policy. Exploring the interactions between both B2B and B2C transactions may contribute to more robust and adaptable arbitration frameworks. The study of various interpretations of public policy involved in enforcing arbitral awards benefits understanding the complex relationship between public policy defense and fundamental values of the society.

6. CONCLUSION

6.1. Summary of Key Findings

6.1.1. Variations in the enforceability of arbitral awards across different legal systems

One of the foremost critical and contentious exclusions to the authorization of arbitral decisions is the public policy exception in recognizing and enforcing arbitral awards. It engages courts to enforce an award even if in case it would be unfavorable to the concluding state's ethical, moral, and legitimate values.[421]

The study looked at the public policy defense in some Asian, European, and American jurisdictions in the light of international commercial arbitration. And concurring with the findings of the study, there are considerable differences in how different jurisdictions execute the public policy exception, both in terms of the grounds for non-enforcement and the standard of review.

a) *Europe*

The execution of arbitral decisions in Europe is represented by the 1961 European Convention on International Commercial Arbitration. Arbitration has ordinarily been upheld by European courts, which have passed judgments conforming to the requirements of arbitration treaties and laws. In any case, in other circumstances, courts have declined to execute arbitral decisions on the premise of public policy or a breach of European law, however, European jurisdictions frequently decipher the public policy exclusion more barely than China or India. There are few contrasts among European countries. The local courts within the United Kingdom and France, for illustration, are more inclined than courts in Germany or Austria to uphold arbitral decisions.[422]

b) *Asia*

In Asia, the author covered India and China as the main jurisdictions. In India, public policy defense is considered to be more extensive than in other jurisdictions

[421] Moura Vicente, Dario. "Requirements for the Enforceability of Arbitral Awards: A Comparative Overview." *Judicial Control over Arbitral Awards: Scope, Vacation, and Public Policy, Forthcoming* (2019).
[422] Drahozal, Christopher R. "Enforcing Vacated International Arbitration Awards: An Economic Approach." *American Review of International Arbitration* 11 (2000): 451.

such as the United States. The Arbitration and Conciliation Act of 1996 controls the execution of arbitral judgments in India. Arbitration has ordinarily been backed by Indian courts, who have kept up the authorization of arbitral decisions. Nevertheless, on the argument of public policy, the local courts on many occasions have refused to enforce arbitral awards. The courts have the specialist to deny upholding a judgment if it abuses the *fundamental policy of Indian law* or *morality or equity*. This model remains or may be prohibitive, but it permits courts more breathing space to deny implementing awards.[423]

In China, the People's Republic of China's Arbitration Law of 1994 governs the execution of arbitral decisions. Arbitration has regularly been upheld by Chinese courts, who have kept up the requirement of arbitral decisions. In certain circumstances, courts have declined to execute arbitral decisions based on public policy or a breach of Chinese law. The judges in local courts have denied upholding an award if it violates Chinese law, social arrangement, or open interface. This gives courts some flexibility in refusing to implement arbitral awards, and the public policy argument is used to defend the Chinese laws at the cost of international parties.[424]

c) *The United States*

The FAA of the United States provides a robust system for the requirement of arbitral decisions. Arbitral awards are not continuously enforceable, such as when they repudiate public policy or are gotten using extortion or debasement. Within the United States, public policy defense is or may be constrained. As it were in case an award is "*fundamentally offensive*" to American public values can a court refuse to enforce it? This is often a high edge to set up and courts have regularly been reluctant to utilize the public policy contention.[425]

The author observed how different nations actualize the public policy defense changes essentially. This change has the potential to impact the result of the worldwide commercial arbitration debate. Parties to international commercial arbitration agreements ought to be

[423] Kumar, Rahul, and Poonam Rawat. "Scope of 'Arbitrability'and 'Public Policy'As a Ground for Setting Aside An Arbitral Award under Section 34 of the Indian Arbitration and Conciliation Act, 1996." (2022).
[424] Erie, Matthew S., and Monika Prusinowska. "The future of foreign arbitration in the People's Republic of China: current developments and challenges ahead." *Asia Pacific Law Review* 28.2 (2020): 259-278.
[425] Fox, William F., and Ylli Dautaj. "The life of arbitration law Has been experience, not logic: Gorsuch, Kavanaugh, and the Federal Arbitration Act." *Cardozo J. Conflict Resol.* 21 (2019): 1.

mindful of how the public policy defense is connected in an unexpected way in different nations. The dissertation also found that public policy defense is regularly utilized in circumstances including troublesome or petulant subjects like human rights, natural security, and competition law. In certain occasions, the public policy defense is more likely to be utilized to turn around an arbitral administering.

The dissertation also found that in circumstances including abroad arbitral grants, public policy contention is more likely to be raised than in cases including domestic arbitral judgments. This is often because domestic arbitral choices are considered as a strategy to improve the conclusion of arbitration decisions, and the courts are frequently more hesitant to reverse them.

6.1.2. 'Pro-arbitration' or 'Anti-arbitration' Jurisdictions

The defense of public policy within the acknowledgment and implementation of arbitral judgments may be a complicated and inconspicuous point that varies by nation. Regardless, nations can be non-exclusively classified as pro-arbitration or anti-arbitration.

Pro-arbitration jurisdictions have laws and policies that regularly back the utilization of intervention as an implication of dispute settlement. These countries regularly have vigorous lawful structures that empower and energize arbitration agreements and decisions to be upheld.[426] A few of the world's most prominent pro-arbitration locales incorporate:

a) *Europe:* Europe is respected as a pro-arbitration region of the world, with only on a few occasions countries sanctioning vigorous legislative systems that empower and support the application of arbitration laws. A few of Europe's most eminent pro-arbitration countries are:

- Switzerland
- France
- United Kingdom
- Germany
- Hungary
- Belgium

[426] Gojani, Anjezë, and Korab R. Sejdiu. "Kosovo: The Perspective of a Pro-Arbitration Country." *Integration and International Dispute Resolution in Small States* (2018): 279-301.

Furthermore, other countries such as Sweden, Netherlands, Spain, Italy, and many other European jurisdictions are also considered to be pro-arbitration. For example, the ICC in Paris, the Stockholm Chamber of Commerce in Sweden, and the LCIA in London are all well-established arbitration offices in European countries. In common, the European court's understanding of the public policy defense in international commercial arbitration is used in a narrow sense and is reluctant to interfere in arbitral judgments.

b) *United States:* The United States is recognized as a pro-arbitration nation. The FAA of 1925 set up a legislative system that advances arbitration as a strategy of struggle determination.[427] The FAA makes a strong government arrangement in favor of arbitration, and courts are required to uphold substantial arbitration agreements and decisions. Besides, the United States Supreme Court has conveyed an arrangement of decisions that have expanded the enforceability of arbitration agreements and constrained parties' capacity to request refusal of arbitral awards on the grounds of public policy.

The anti-arbitration countries have laws and practices that hinder the application of arbitration as a dispute resolution process. These governments' lawful frameworks for supporting and upholding arbitration agreements and awards may be weaker.[428] A few of the world's most eminent anti-arbitration countries include countries such as India and China.

a) *China:* China has made remarkable progress in building an arbitration-friendly lawful system, however, there are still certain issues that make it less arbitration-friendly than other jurisdictions. Foreign parties have voiced concerns about the impartiality of arbitrators chosen by Chinese organizations in the past. Another source of stress is the Chinese legal system's affinity for delays and inefficiency. The country still contains a tremendous and complicated legitimate framework, and the execution of arbitral decisions can be moderate and unpredictable at times. All arbitration agreements including Chinese parties must be authorized by a Chinese arbitration commission, and this measure may be troublesome and time-consuming

[427] Joelson, Mark R. "The Interplay of International, Federal and State Law in US Arbitration." *Journal of International Arbitration* 24.4 (2007).
[428] Bell, A. S. "The rise of the anti-arbitration injunction." *TheJUDICIAL REVIEW* 14.4 (2021): 287-313.

for the parties.[429] It may discourage outside parties from entering into arbitration agreements with Chinese parties. Besides, in many instances, the Chinese courts have proven to interfere with the enforcement of arbitral awards and decisions on the grounds of public policy. This has caused instability and unpredictability for enterprises locked in at Chinese discretion.[430]

b) *India:* India has well-established arbitration legislation and a system that empowers arbitration. However, there are a few barriers that make India a less pro-arbitration jurisdiction than European nations or the United States. Indian courts, for case, have been known to interfere in arbitration strategies and put off the execution of arbitral decisions. The Arbitration and Conciliation Act of India passed in 1996, was gathered to be pro-arbitration. However, Indian courts have been progressively questioned on the recognition and enforcement of arbitral awards, more likely to interfere with the arbitration processes and deny upholding arbitral awards.[431] In 2015, India affirmed the Amendment to the Arbitration and Conciliation Act 1996 to streamline and move forward the arbitration in the international domain. The Act moreover set up the Arbitration Council of India, which is in charge of cultivating the development of arbitration in India. Despite these advancements, India still goes up against certain challenges with arbitration.[432] The possibility of court inclusion within the arbitral method is one of the essential issues. Due to the interference of Indian courts in the recognition and enforcement of arbitral awards, the arbitration process's proficiency and viability are frequently questioned. Also, due to the overburdened Indian courts with excess cases, it is troublesome for parties to implement arbitral awards.[433]

[429] Article 18, Arbitration Law of the People's Republic of China, 1994 states that "If the arbitration matters or the arbitration commission are not agreed upon by the parties in the arbitration agreement, or, if the relevant provisions are not clear, the parties may supplement the agreement. If the parties fail to agree upon the supplementary agreement, the arbitration agreement shall be invalid."

[430] Garnett, Richard. "Anti-arbitration injunctions: walking the tightrope." *Arbitration International* 36.3 (2020): 347-372.

[431] Alagh, Chetna. "Anti-Arbitration Injunctions-India's Wigwag." *Jus Corpus LJ* 1 (2020): 55.

[432] Pathak, Shreyanshi, and Rajeev Kumar Singh. "EFFECT OF INTERNATIONAL COMMERCIAL LAW IN INDIA: AN ANALYTICAL STUDY."

[433] Raina, Pranav, and Devansh Agarwal. "Institutional Arbitration in India: The Way to the Future." *Supremo Amicus* 19 (2020): 353.

6.1.3. Factors that Influence the Pro-Arbitration/Anti-Arbitration Stance of a Jurisdiction

A jurisdiction's pro-arbitration or anti-arbitration position may vary depending on various circumstances:

- **Legal environment:** In certain countries, arbitration is generally recognized and respected, however in others, litigation is the favored means of dispute resolution due to a more adversarial legal environment.
- **Economic improvement:** Arbitration is regularly more backed in more developed countries since it is thought to be more successful and controlled, also depending on economic factors.[434]
- **Political philosophy**: Distinctive political belief systems unexpectedly strengthen arbitration. For example, governments that put a high need on financial development and free markets tend to be more pro-arbitration.

Thus, the execution of arbitral awards depends on several factors depending upon the jurisdiction in which the award is sought to be executed. It can also be concluded from the study that arbitral awards are more likely to be maintained in pro-arbitration countries than anti-arbitration in light of public policy exceptions.

6.2. Contributions to Jurisprudence in International Arbitration

6.2.1. Enforceability of arbitral awards in diverse legal contexts

This dissertation also commits to distinguishing and analyzing a variety of factors that influence how public policy defense is used. This incorporates components such as the nature of the conflict, the jurisdiction where the arbitration process is resolved, and the perception of public policy. The dissertation also focuses on how courts translate the definition of public policy defense and how ambiguous the courts are structured to interpret the arbitral awards.[435]

The dissertation offers a variety of distinctive practices on the use of public policy defense in extension to local regulations. The study finds that the countries that are against arbitration

[434] Mgbakogu, Ogochukwu J. "IS ARBITRATION REALLY A FAST TRACK MEANS FOR INTERNATIONAL DISPUTE SETTLEMENT?." *Journal of Commercial and Property Law* 5.2 (2018).
[435] Refuveille, Emma. "International Dispute Resolution: When and Why Should Parties Resort to Parallel Proceedings?." *ITA Rev.* 4 (2022): 148.

are more likely to raise the public policy defense than jurisdictions that are in favor of arbitration. The study also reveals that judges in anti-arbitration nations are more likely to apply the public policy defense broadly than courts in pro-arbitration countries.[436] In general, by conducting a thorough and descriptive examination of the defense of public policy within the acknowledgment and authorization of arbitral judgments, this dissertation essentially progresses our understanding of universal commercial arbitration.

6.2.2. Unexpected Trends or Correlations

Concurring with this dissertation's surprise finding, the public policy argument is more likely to be raised in anti-arbitration nations than in pro-arbitration jurisdictions. This is often maybe because judges in countries that preclude arbitration tend to be more attentive to it and more inclined to see it as a risk to the state's sovereignty. The public policy exception is more likely to be used in a broader sense in anti-arbitration jurisdictions than in pro-arbitration jurisdictions, corresponding to another unexpected trend of this study. The courts in anti-arbitration countries are more inclined to see the public policy defense as an instrument to preserve essential fundamental rights and in line with public interest as well as to safeguard the interests of the parties of an arbitration.[437] Concurring with these conclusions, the public policy defense may be a complicated and nuanced concern that will be taken care of in a variety of ways depending on the jurisdiction where its recognition and enforcement are sought. The parties ought to be mindful of these requirements while drafting arbitration agreements.

6.2.3. Critical Analysis

The anti-arbitration countries often use public policy defense as a justification for the need to safeguard the interests of the public. Furthermore, it is asserted that conflicts concerning fundamental rights and concerns of public policy should be viewed in a narrower sense and not interpreted widely by domestic courts. One approach is by simply declining to sign arbitration agreements they do not seem fair; consumers may sufficiently safeguard their interests. However, this approach might discourage foreign investment and make dispute

[436] Ryabinin, Andrey, and Tibor Varady, 2018.
[437] Ryabinin, Andrey, and Tibor Varady, 2018.

resolution between parties more challenging and expensive. Therefore, it is important to understand the possible obstacles of anti-arbitration rules for businesses and investors.

6.3. Implications for Policy and Practice

6.3.1. Harmonization of International Arbitration Laws

The necessity for more international cooperation in harmonizing the enforcement and recognition of arbitral rulings is one of this study's major concerns. According to the study, there are considerable differences in how the public policy defense is used in various jurisdictions. For businesses and investors, this can lead to uncertainty and unpredictability and make it more difficult and expensive to implement arbitral awards.[438] To decrease disparities and improve decision predictability, policymakers should think about standardizing essential elements of arbitration regulations. This might be accomplished by creating international model legislation or uniform arbitration agreements.

6.3.2. Cultural Sensitivity and Cross-Cultural Training in Arbitration

This dissertation moreover has the findings that legal representatives ought to be careful of how social and cultural changes influence arbitration decisions. To better handle such issues, arbitrators and other legal experts must think about including cross-cultural training in their practices.[439] In arbitration proceedings, social contrasts can show up in several ways. Parties from other jurisdictions, for instance, how they correspond, the seat of arbitration, or choice of arbitrators. Arbitrators and other legal experts must be mindful of these changes and be prepared to alter their fundamental methodology and process to accommodate cultural sensitivity.

[438] Nigmatullina, Dilyara. "The Combined Use of Mediation and Arbitration in Commercial Dispute Resolution: Results from an International Study." *Journal of International Arbitration* 33.1 (2016).
[439] Born, Gary. *International commercial arbitration: commentary and materials*. Brill, 2021.

6.3.3. Guidelines for a More Consistent and Transparent Application of the Public Policy Defense

Furthermore, this study makes the case that more thorough guidelines on how to apply the public policy defense are required. The author observed that there is a need for consistency and openness within the way that public policy defense is perceived by courts in different jurisdictions.[440] To form rules for a more uniform and open application of public policy defense, policymakers, and legal experts must collaborate, and factor in the rules and considerations that judges should take when applying the defense of public policy. By executing these undertakings, governments and legal experts may contribute to the enhancement of the efficiency and consistency of international commercial arbitration as well as the global agreement of arbitral decisions.

6.4. Conclusion of Hypotheses

6.4.1. Hypotheses 1: Does the enforceability and applicability of international commercial arbitration differ significantly across legal systems in Asia, Europe, and America?

The author's findings confirm that this hypothesis is true. The enforceability and applicability of international commercial arbitration differ significantly across legal systems in Asia, Europe, and America. The study highlights how complex these distinctions are and there are notable discrepancies in the enforceability and application of international commercial arbitration among legal systems, according to a comparative analysis of the defense of public policy in recognition and enforcement of arbitral decisions.

China and India are two Asian nations with rules and regulations that make it difficult for parties to arbitrate their disputes or to have arbitral rulings enforced. This is frequently brought on by uncertainties about safeguarding parties as well as concerns about the state's sovereignty. Most European countries have vigorous law frameworks that support and maintain the international commerce arbitration process and enforcement of awards. And

[440] Lydgate, Dr Emily. "Is it Rational and Consistent? the Wto's Surprising Role in Shaping Domestic Public Policy." *Journal of International Economic Law* 20.3 (2017): 561-582.

courts in a few European countries are more inclined than courts in others to apply the public policy defense broadly.[441]

The United States is immovably in favor of arbitration. The FAA offers a strong lawful establishment for protecting and maintaining arbitration agreements and awards. The requirement of arbitral awards is subject to certain limitations, such as when the award is decided to be untrustworthy or degenerate.[442]

Businesses and investors may be altogether affected by the differences within the enforceability and application of international commercial arbitration among legal frameworks. When setting up arbitration agreements and attempting to uphold arbitral decisions, businesses should be conscious of these requirements. Generally, they think about approaches that are reliable with the idea that the recognition and enforceability of international commercial arbitration change enormously among Asian, European, and American legitimate frameworks. These differences are complex and affected by a wide run of factors, including the legitimate convention of the principal jurisdiction, the state's concerns, and the interface of the parties.[443]

6.4.2. Hypotheses 2: Is the recognition and enforcement of International arbitral awards often hindered by various challenges, including differences in legal systems, cultural differences, and jurisdictional conflicts?

This hypothesis is true. The recognition and enforcement of International arbitral awards are often hindered by various challenges, including differences in legal systems, cultural differences, and jurisdictional conflicts. International arbitral awards may be difficult to recognize and apply due to differences in legal systems. Because some nations have different definitions of what constitutes public policy, courts in different jurisdictions may come to different judgments regarding whether an award violates public policy or not and, as a result, should not be enforced. Likewise, some nations have differing laws governing the treatment

[441] Tiba, Firew. "The Emergence of Hybrid International Commercial Courts and the Future of Cross Border Commercial Dispute Resolution in Asia." *Loy. U. Chi. Int'l L. Rev.* 14 (2016): 31.
[442] Petsche, Markus A. "Choice of Law in International Commercial Arbitration." *Private International Law: South Asian States' Practice* (2017): 19-37.
[443] Yiannibas, Katerina. "The adaptability of international arbitration: Reforming the arbitration mechanism to provide effective remedy for business-related human rights abuses." *Netherlands Quarterly of Human Rights* 36.3 (2018): 214-231.

of international judgments, which might make it more challenging to uphold arbitral awards made in similar nations.[444]

International arbitral awards may have difficulties in being honored and upheld due to cultural differences. For example, perspectives on the functioning of domestic courts and arbitration in resolving disputes vary between societies. As a result, the arbitral awards may be viewed otherwise by courts in other jurisdictions. The nature of practical obligations and the scope of arbitration agreements may also be misunderstood as a result of cultural differences.

If a domestic court finds the arbitration agreement to be unlawful or against its public policy, it may refuse to enforce and uphold the arbitral ruling. The domestic courts may also decline to accept or uphold an arbitral judgment if they believe that the arbitral tribunal challenged jurisdiction to examine the case.[445] Despite these challenges, the viable process of international arbitration as a dispute resolution mechanism depends on the acceptance and action of international arbitral awards. An outline for the recognition and enforcement of foreign arbitral suppositions is given by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Opinions, which is the most widely accepted treaty. The New York Convention does not, still, completely resolve all issues relating to the recognition and enforcement of foreign arbitral awards.[446]

The conflicts caused by diverse legal frameworks, cultural differences, and jurisdictional issues can be specifically pertinent within the setting of the defense of public policy within the acknowledgment and execution of arbitral awards. Besides the diverse interpretations of public policy defense in different jurisdictions, cultural disparities might result in misconceptions around what a public policy is and how it functions in international arbitration. Conflicts can also happen when a domestic court is required to acknowledge or maintain an arbitral choice that was made in a country with a different public policy.[447]

It is crucial to remember that the defense of public policy is a narrow one excluding these difficulties. It should only be used when the arbitral award violates the cornerstones of the

[444] Nazzini, Renato. "Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel, and Abuse of Process in a Transnational Context." *The American Journal of Comparative Law* 66.3 (2018): 603-638.
[445] Zafarovich, Tojiboyev Sarvar. "Different Approaches in Enforcement of Arbitral Award Annulled at the Place of Arbitration." *Miasto Przyszłości* 25 (2022): 320-323.
[446] Bermann, George A. "'Domesticating'the New York Convention: the Impact of the Federal Arbitration Act." *Journal of International Dispute Settlement* 2.2 (2011): 317-332.
[447] Candel, Jeroen JL, and Robbert Biesbroek. "Toward a processual understanding of policy integration." *Policy Sciences* 49 (2016): 211-231.

legal order of the nation in which recognition and enforcement of an award is sought. Courts should avoid interfering with the arbitral procedure and should respect the arbitral tribunal's ruling.

6.4.3. Hypotheses 3: Is public policy defense a crucial concept in international commercial arbitration and has a significant impact on the enforceability and applicability of arbitral awards?

This hypothesis is true. In international commercial arbitration, public policy defense is a critical theory that greatly affects the enforcement and recognition of arbitral awards. The corpus of law known as public policy embodies a nation's fundamental beliefs and guiding principles. Therefore, the courts of the jurisdiction where enforcement is sought may reject an arbitral decision when it is contested on public policy grounds. This may significantly affect whether arbitral awards may be applied and enforced.[448] The public policy defense in international commercial arbitration has been compared over several jurisdictions, including the United States, some European Jurisdictions, India, and China, in this dissertation. Concurring with the study, there is an impressive contrast between how the public policy defense is seen and utilized in different views. There are, furthermore, certain repeating themes.[449] The narrow interpretation of the public policy defense could be a reiterating point. This suggests that unless the decision appears to go against the foremost cardinal norms and principles of the country's legal frameworks, the courts are reluctant to invalidate an arbitral award on the grounds of public policy. Another repeating theory is that the public interest is shielded by the public policy defense.

The enforceability and application of arbitration decisions can affect public policy defense essentially. The winning party to an arbitration may approach the court of the losing party's jurisdictional court to enforce an award, however, the court may refuse the enforcement of an award if it considers it damages public policy. This may be a genuine difficulty for the arbitration-winning party, thus, the use of public policy defense may discourage parties from using arbitration. If the parties to an international business transaction fear that the arbitral decision would not be upheld due to public policy considerations, they may be less

[448] Akoto, Akosua Serwaah. "Public policy: An amorphous concept in the enforcement of arbitral awards." *Journal of Liberty and International Affairs* 7.1 (2021): 51-69.

[449] Bansal, Chaman Lal, and Shalini Aggarwal. "Public policy paradox in enforcement of Foreign Arbitral Awards in BRICS countries: a comparative analysis of legislative and judicial approach." *International Journal of Law and Management* 59.6 (2017): 1279-1291.

inclined to accept to arbitrate their issues and rather prefer litigation as a way for resolving disputes.

It is significant for protecting the public interest and making clear any doubts that the arbitral proceedings follow the rules and regulations of the country's arbitration laws. To maintain a calculated gap from undermining the legitimacy and application of arbitral awards, the public policy contention should be entirely described.[450]

6.4.4. Hypotheses 4: Does comparative analysis of international commercial arbitration laws across legal systems provide insights into best practices and areas for improvement in the recognition and enforcement of arbitral awards?

This hypothesis is true. The best practices and opportunities for development in the recognition and enforcement of arbitral decisions may be learned through a comparative study of international commercial arbitration legislations across various legal systems. A study of this kind may help to demonstrate commonalities and variations between legal systems and the reasoning used by various jurisdictions to uphold and accept arbitral awards passed by arbitration tribunals. This can therefore offer insightful information on how to expedite and unify the enforcement of arbitral rulings across various legal systems.[451]

The ideal strategies for recognizing and implementing arbitral decisions can be recognized by comparing the rules administering international commercial arbitration. For example, the New York Convention on the Recognition and Execution of Foreign Arbitral Judgments offers a reliable system for the execution of arbitral judgments in more than 150 countries and has been confirmed by a few other jurisdictions. The UNCITRAL Law on International Commercial Arbitration offers an exhaustive system for the conduct of international arbitrations and has also been acknowledged in local laws in various jurisdictions.[452]

Comparative investigation can moreover be applied to identify areas where arbitral award recognition and enforcement may well be improved. For instance, a few countries have more rigorous guidelines than others for arguing arbitral decisions on the defense of public policy. This may result in ambiguity and conflicting application of arbitral awards. Additionally, the

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[450] Emre, Yunus, 2019.

[451] Vial, Gonzalo. "Influence of the arbitral seat in the outcome of an international commercial arbitration." *Int'l Law.* 50 (2017): 329.

[452] Ochulor, L. B. "Multi-Jurisdictional Perspectives to Public Policy Defence in Recognition and Enforcement of Foreign Arbitral Awards-Have the UNCITRAL, ECOSOC and ICC Lived up to Their Traditional Role of Fostering International Trade?." *Transnational Dispute Management (TDM)* 19.5 (2022).

enforcement of arbitral awards reflects changes within arbitration laws and can be more troublesome and time-consuming. As a result, arbitral awards may take longer to be enforced and be less enticing to businesses.[453]

6.4.5. Hypotheses 5: Is the use of international commercial arbitration as a means of dispute resolution likely to continue to increase due to its flexibility and efficiency, despite ongoing challenges related to recognition and enforcement?

This hypothesis is true. In international commercial arbitration, the parties from a few countries can choose to have their issues resolved confidentially, by one or more arbitrators, rather than going and using the local courts. International commercial arbitration has proven to have a few benefits over conventional court cases, including:

- **Flexibility:** The parties are permitted to choose the arbitrators, the applicable rules of arbitration, and the jurisdiction. As a result, parties can adjust the arbitration process to suit their dispute prerequisites.
- **Speed:** Compared to court litigation, arbitration is regularly speedier and more viable. This is often because there are fewer procedural constraints and more procedural control for the parties.
- **Enforcement:** Since the rise in international conventions on arbitration such as the New York Convention of 1958, arbitration awards are commonly enforceable within the majority of countries around the world.

Although there are certain persistent issues with the recognition and execution of arbitral rulings, these issues are not frequent. Additionally, the advantages of international commercial arbitration exceed the disadvantages, making it a feasible option for resolving international conflicts in the future.[454] The conclusion of the hypotheses on the defense of public policy within the recognition and enforcement of arbitral judgments highlighted the following points:

- Public policy influence on the acceptance and application of arbitral decisions.
- The different approaches used by different jurisdictions to protect public policy.

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[453] Okoli, Pontian N. "Corruption in international commercial arbitration—Domino effect in the energy industry, developing countries, and impact of English public policy." *The Journal of World Energy Law & Business* 15.2 (2022): 136-150.

[454] Poorooye, Avinash, and Ronan Feehily. "Confidentiality and transparency in international commercial arbitration: finding the right balance." *Harv. Negot. L. Rev.* 22 (2016): 275.

- The difficulties in reaching a ground between the obligation to hold the autonomy of the arbitral processes and the need to protect fundamental public interests.
- The future of safeguarding public policy in connection to the recognition and enforcement of arbitral decisions.

6.5. Global Perspective

By offering a comparative study of the defense of public policy in the recognition and enforcement of arbitral awards, this study has augmented national borders and contributed to international frameworks on international commercial arbitration. The study has highlighted the need for a facilitated approach to address the issues in this scope on an around-the-world level.[455]

A growing number of components have contributed to the globalization of the world economy, including expanded economic interdependence and trade movements between countries, technological advancements in computer systems and data innovation, global trends toward market economies, and national and international trade agreements. In this instance, international commercial arbitration has developed significantly as a method for dispute resolutions arising from international trade exchanges.[456] However, it might be difficult to recognize and uphold arbitral awards, particularly when the public policy argument is raised. The public policy defense can change based on the judicial system and cultural contexts. As a result, the defense may be applied ambiguously or inconsistently, which may reduce the merits of using international commercial arbitration to settle disputes.

International frameworks are required to form standardized norms for the enforcement and recognition of arbitral awards to overcome the obstacles. The formation of international conventions and treaties, as well as collaboration between national courts and arbitration organizations, may assist in achieving this goal.[457]

The New York Convention is one of the most widely accepted global corporations and greatly respected international treaties on the recognition and enforcement of arbitral awards. The Convention has been integral in upholding the application of continuing application of

[455] Inchakova, Agnessa, and Svetlana Kazachenok. "To principles in the jurisprudence of international commercial arbitration: a comparative study of the London court of international arbitration and the international commercial arbitration court at the chamber of commerce and industry of the russian federation." *J. Legal Ethical & Regul. Isses* 21 (2018): 1.
[456] Vial, Gonzalo, 2017.
[457] Poorooye, Avinash, and Ronan Feehily, 2016.

international commercial arbitration by giving constant guidelines for the recognition and enforcement of arbitral awards. The movement of the IBA in London is another leading global bar association in this area. The IBA has made a variety of recommendations and rules for international commercial arbitration. These suggestions and rules are expected to empower best practices and support arbitrators and judges as they implement the New York Convention.[458]

There is a need for both international collaboration and for national courts to use public policy defense more uniformly and predictably. This might be accomplished by creating precise and definite criteria for the use of the public policy defense as well as by educating and training arbitrators and judges on the public policy defense. The international community can guarantee that international commercial arbitration is a sustainable and efficient method of resolving disputes for companies doing business in the global economy by implementing these actions.

There is an immense potential for international cooperation in the area of international commercial arbitration. For example, international collaboration could be advantageous in the following instances:

- Formation of international conventions and treaties: The promotion of unified standards for the recognition and enforcement of arbitral awards may be aided by the formation of a uniform definition of public policy in international conventions and treaties. This would make it simpler for businesses to enforce their arbitration agreements and would lessen confusion and inconsistent application.[459]
- National courts and arbitration institutions can work together to enhance the effective and efficient recognition and execution of arbitral awards. For instance, arbitration organizations might educate court judges on international commercial arbitration, and courts could exchange information on public policy defense.
- Building the capacity of developing countries: Developing countries may require support in creating their institutional and legal frameworks for international commercial arbitration. In this area, international cooperation might be leveraged to offer developing countries technical help and training.[460]

[458] Zhao, Mary, 2019.
[459] Inchakova, Agnessa, and Svetlana Kazachenok, 2018.
[460] Chen, Joyce W., and Joyce N. Chang. "Public Order and Good Morals in Recognition of Foreign Arbitral Awards-An Overview of Taiwan Courts' Practice." *Contemp. Asia Arb. J.* 13 (2020): 387.

Together, the international community can ensure that international commercial arbitration proceeds to be an effective and productive method for dispute resolution for companies and businesses in the world of globalization.

6.6. Recommendations

From the study, it can be opined that public policy defense has an unpredictable and wide character. Therefore, the author proposes the following suggestions in light of this dissertation's findings:

(a) *Creation of a unified global framework for the recognition and enforcement of foreign arbitral awards:* The international community should collaborate to form a global system for the recognition and enforcement of arbitral awards. A new international convention or settlement may be crafted, or the international conventions may well be amended. The framework should outline precise requirements for the recognition and enforcement of arbitral awards and endeavor to set up uniform standards over different jurisdictions in the light of public policy.

(b) *Development of a unified definition of defense of public policy:* A uniform definition of public policy is required considering the recurrent changes in international commercial arbitration. The current classification of public policy defense is excessively broad and has the potential to jeopardize the uniformity and conclusiveness of arbitral awards in some jurisdictions. A uniform concept of public policy should be more compelled and focused on protecting fundamental principles of public interest and maintaining local legislation.[461]

(c) *Educational initiatives to improve the understanding of arbitration among legal professionals and judges:* There is a necessity to enhance judges' and legal professionals' understanding of international commercial arbitration. This can be fulfilled by creating training courses as well as by spreading informative sources at their discretion. The public policy defense and fundamental concerns regarding recognition and enforcement of arbitral decisions should be the focus of these training and exercises.

(d) *Defining the clear grounds for non-enforcement of arbitral awards:* Jurisdictions

[461] Adreevskikh, Liliia, and Eun-ok Park. "Public Policy Exception under Russian Law as a Ground for Refusing Recognition and Enforcement of Foreign Arbitral Awards." *J. Arb. Stud.* 32 (2022): 47.

should lay down the detailed grounds in their legislation on which courts may refuse to implement arbitral awards based on public policy exceptions. This would contribute to bringing down the instability and concerns included with the wide interpretation of public policy defense.

(e) *Adopting a more limited standard of review:* The public policy exception should receive a more prohibitive standard of review while deciding on recognition and enforcement of awards. This would make it challenging for the domestic courts to overturn arbitral awards on the grounds of public policy.[462]

(f) *Restricting the public policy defense to domestic arbitral awards:* Courts should limit the public policy defense to domestic arbitral awards only, excluding foreign arbitral awards. This would reduce the likelihood of courts using the public policy defense to refuse foreign arbitral awards.

(g) *Establishment of a centralized database of arbitral awards and related case law:* A consolidated database of arbitral awards and pertinent case laws from all jurisdictions will advance transparency and help parties and legal experts in making well-informed choices. An international institution just as the United Nations Commission on International Trade Law (UNCITRAL) may hold this database.[463]

According to the dissertation, the public policy defense could be an essential safeguard against the enforcement of arbitral awards that violate fundamental public policy. The author recommends that the public policy exception should be used selectively and in a way that does not threaten the finality of arbitral awards.

In addition to the recommendations made, it is important to strengthen the use of arbitration and other sorts of alternative dispute resolution (ADR) as a way to settle conflicts arising from cross-border trade exchanges. ADR can be a more convincing and efficient means of settling disputes than court proceedings. The international community may improve international commercial arbitration by implementing these proposals and building a more effective and efficient method of dispute resolution. This would aid global businesses in the international market and encourage economic progress.

[462] Lydgate, Dr Emily, 2017.
[463] Ochulor, L. B., 2022.

6.7. Practical Takeaways and Recommendations to legal practitioners, policymakers, and businesses involved in International Commercial Arbitration

The defense of public policy in the recognition and execution of arbitral judgments has been thoroughly examined in this study. The following are some important takeaways and useful information for readers:

6.7.1. Legal Practitioners

Legal practitioners such as lawyers and attorneys should be prepared to adjust and modify their strategies and arguments to fit the legal and cultural context of the international arbitration process. The public policy defense, which is a subjective term, may vary depending on the judicial system and cultural setting. Therefore, lawyers and legal experts should have a knowledgeable understanding of the distinctive laws and legal precedents in the countries where their clients are involved in arbitration proceedings.[464] The legal practitioners should inform their clients of any potential difficulties they could have while enforcing arbitral rulings, and collaborate with them to come up with practical solutions.[465]

6.7.2. Businesses

Businesses involved in international trade should carefully assess the arbitration agreements and arbitral institutions they use, keeping in mind any potential complications with the enforcement of arbitral awards. The following elements should be taken into account by businesses and corporations when designing arbitration clauses:

- The selection of the arbitral institution: Businesses should pick an arbitral institution with a good reputation and a history of upholding awards.
- The selection of the arbitral seat: Businesses should select an arbitral seat in a country or territory with a supportive legislative framework for the execution of arbitral awards.
- The arbitration clause's scope: Businesses should carefully analyze the scope of the arbitration clause to make sure it covers all potential conflicts that could develop

[464] Chen, Joyce W., and Joyce N. Chang, 2020.
[465] Dickson, Moses Oruaze. "Party autonomy and justice in international commercial arbitration." *International Journal of Law and Management* 60.1 (2018): 114-134.

from their business dealings.[466]

- Choosing the right governing arbitral rules: Businesses should pick the right governing rules for arbitration proceedings after carefully analyzing the importance of geographical impartiality and the rules for recognition and enforcement of awards.

6.7.3. Policymakers

Policymakers are encouraged to use arbitration and other types of ADR as a way to settle cross-border trade transactions. It is hereby recommended that the policymakers work on creating detailed and succinct rules for using the public policy defense and work together at the international level to create a more concise and narrower framework defining public policy and its defense in recognition and enforcement of arbitral awards.

These takeaways may help legal professionals, businesses, and policymakers engaged in international commercial arbitration and contribute to the improvement of arbitration processes as a method of resolving disputes.[467]

6.8. Areas for Future Research

This dissertation suggests some possible research directions. Future comparative studies, for instance, may concentrate on developing nations or legal systems that were not included in this investigation. Such research might offer insightful information on the many applications of public policy defense and how they affect the recognition and enforcement of arbitral awards.[468] Such an examination might reveal patterns and distinctions in how developing nations and anti-arbitration legal systems approach public policy defense. This could aid in creating a more uniform strategy for the acceptance and enforcement of arbitral rulings. Finally, the investigation might look at the public policy defense in more significant detail, as well as how it relates to other thoughts like fundamental rights, the rule of law, and public order. This seems to make the wide-open public policy defense scope and application within the setting of international commercial arbitration more transparent.

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[466] Emre, Yunus, 2019.
[467] Mahantesh, G. S. "Public policy as a ground for refusing recognition and enforcement of foreign arbitral awards." *Issue 4 Int'l JL Mgmt. & Human.* 4 (2021): 3684.
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This dissertation presents a thorough and comparative investigation of the defense of public policy in the recognition and execution of arbitral decisions. Even in the face of persisting difficulties, the research reflects the continuing importance of international commercial arbitration as a flexible and effective method of dispute resolution.[469] The use of the public policy defense might change depending on the legal system because it is a complex and unique notion. However, this research has revealed that there are a few universal ideas and guiding principles that may be recognized by all jurisdictions. For instance, the public policy defense is often only used in exceptional circumstances and is rarely used to overturn arbitral rulings that are just erroneous or unfair. The study has also demonstrated that the public policy argument can be applied in a way that compromises the certainty and finality of arbitral awards. There is a gap in providing precise and strict standards for the use and interpretation of public policy defense to overcome this problem.[470]

By offering a thorough and comparative investigation of public policy defense, this dissertation has significantly advanced the subject of international commercial arbitration and the use of public policy defense in the light of recognition and enforcement of arbitral awards. And the study is anticipated to benefit the legal sector by developing uniform criteria for the enforcement of arbitral awards across different jurisdictions.

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