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The Position and Problem of Public Policy in Indian Arbitration and Conciliation Act 1996

Saber Habibisavadkouhi and Sadegh Habibisavadkouhi
Research scholars in International Trade Law, Department of law, University of Mysore, INDIA

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Abstract

The public policy as an inconsistent, unpredictable and dynamic political tool is against the enforcement of awards in judicial activity's framework. The unambiguous and uncertainty of public policy, clearly run the big risk of impinging upon Indian arbitration as an effective method of dispute resolution. Due to this fact, Indian legislator should dispel many of doubts with regard to the scope of public policy and a transparent distinction should be made among all types of public policy. Probably, it would have been safer if the phrase "rules of morality" had not been in the Indian legal system, in order to avoid any controversy over its interpretation. The methods which are used in this study are descriptive and comparative research methods. The sources of this paper are based on the most recent commentary, research articles, books, international institutional and court decisions that were reported and referenced in selected international and regional journals.

Keywords: Public policy, the Arbitration and Conciliation Act 1996, India, Arbitration, Model Law, New York convention.

Introduction

India has high potential to become a key gate for international transactions or a first financial class hub in Asia region even of the world with its inexpensive human resource, vast population, continental dimensions and geopolitical situation in Asia but lack of certainty and quick judicial system for settling disputes especially commercial disputes in reasonable time, can be a serious difficulty to development of international transactions and particularly foreign investment in India.

Unfortunately, it has long been perceived as a state that can be problematic or difficult for enforcement of arbitral awards especially foreign awards[1]. The main reason for aforesaid problem is uncertainty and ambiguous of the Act particularly in public policy(PP). Such ambiguities might dissuade foreign parties from recourse to arbitration to settle their prospective disputes with Indian parties. This study tried to make a clear picture the position and problem of PP in Indian Arbitration and Conciliation Act 1996.

Development of Arbitration law in India

Although India has only recently experienced a major expansion into the areas of arbitration and conciliation but it is not a new concept for India[2]. The modern legal context in India with a long and vibrant history has been influenced by at least three strands of legal tradition.Without resorting to a rigid scale of measurement arbitration in India since today can be divided in to three phase : Ancient (Pre-British) Period; British period; and Independency Period.

In ancient times, long before the courts of law were established in India, disputant parties often voluntarily submitted their disputes to a group of wise men of a community-closely related to modern-day arbitration called the *Panchayat*—for a binding resolution[3]. The *Panchayats* have now got a constitutional recognition under Articles 243 to 243 O of Indian Constitution (Seventy Third Amendment Act 1992) which was inserted as Part IX of the Constitution of India[4].

The lack of a single homogeneous legal system in the state and the incapacity for self rejuvenation of the major legal systems (Hindu and Muslim) coupled with the break down and fragmentation of central political authority (the Mughal Emperor at Delhi) presented a confusing vacuum in the rule and legal judicial system at the time of the advent of the British[5]. Like most Indian laws, the law relating to arbitration in India is also based on the English arbitration law[6].

During the British colony, their regime had introduced various laws closely relating to arbitration which were applicable either to a part of the country or subsequently to the whole nation. Ultimately in 1940, The Indian Government base on the English Arbitration Act 1934 opened an important chapter in the history of the law of arbitration in British period as in this year was enacted the Arbitration Act, 1940.

After independency in 1947, with increasing emphasis on arbitration there was more and more judicial grist exposing the infirmities, shortcomings and lacunae in the Arbitration Act of 1940. As the Act of 1940 was largely unsatisfactory, India opened a new chapter in its arbitration law when it enacted the Arbitration and Conciliation Act, 1996. It has two main parts

about arbitration and part III of the Act on the base on UNCITRAL Conciliation Rules, 1980 is only about Conciliation.

The new Act is mainly inspired by UNCITRAL Model Law 1985 and New York Convention 1958. Its primary objectives of the Act were to achieve twin goal in arbitration as a cost effective and quick mechanism with the minimum court intervention for the settlement of commercial disputes. The Act 1996 is barely 17 years old and what is the Indian experience is obvious by the fact the Act not met the purpose for which the Act was passed.

Defining Public Policy

For better understand when the PP exception can be valuable used as a protective device, it is crucial to define its precise meaning. But unfortunately, there is no certain view and consensus on the meaning of the phrase PP in the legal communities. As result of that, some legal writers and researchers vigorously fear an immoderate abuse of the clause[7]. No doubt it is for this particular reason a well-known criticism, Judge Burrough in *Richardson v. Mellish* (an old famous English case) described that, *"it (public policy) is an unruly horse and once you get astride it, you don't know where it will carry you"*[8].

Concerning an attempt of defining the meaning despite the arising serious difficulties, the important thing, there is not a global definition or uniform understanding of PP. This is not the main point. Thus, it is even serious challenging to attribute an unambiguous definition to the provision. Because of a lack of a universal definition, each state has to be analyzed independently with regard to how it interprets the phrase[9]. That means; the PP of on state may not be the same as the PP of another state[10].

Another actual reason why it is so difficult to approach the phrase of PP is its character of a value terms.[11] Defining value phrase are on the edge of unattainable. Firstly, the priority of values phrase differs from state to state and time to time. What might be irrelevant in one state might be of great importance and interest in another state. For instance, an international transaction for importation of Liquor in to Muslim states such as Saudi Arabia or Iran may be illegal on PP grounds applicable in aforesaid states, but such a transaction would not be contrary to transnational PP.

Secondly, a value phrase indicates being temporary or dynamic. Hence, the basic base of a PP rule alters from place to place and time to time. Something that was considered acceptable in the past might become generally unsuitable in the present or in the future and conversely. Because of the changes the national courts are forced to redefine the term of PP any time a disputant parties attempts to invoke it[12].

According to Section 328 (4) of German Civil Procedure Code, Zivilprozessordnung, a court has to refuse enforcement of the judgments or arbitral awards in cases which a breach of the basic values or fundamental principles of German state policy or of German mandatory rule of laws is threatened.[13] It emphasized that the enforcement of a foreign arbitral award may not touch upon the fundamental values and the basic principles of German monetary rule or when enforcement of that arbitral award would be intolerable[14]. Such a serious difficult situation would mainly arise if the enforcement of the judgments or arbitral awards would violate basic principles and fundamental rights[15].

Under English law, if the face of a foreign arbitral award points towards or even involves committing a crime against fundamental English concepts of humanity and liberty or a tort or a breach of mandatory rule of law, it would be considered as being contrary to PP[16]. Also, some particular acts such as a commercial contract dealing with slavery ,drug trafficking, pedophilia, terrorism, prostitution, fraud and corruption in international trade, or whatever is contrary to basic principle of morality and justice are regarded as against PP[17]. Practically, English law, it is strongly recommended that the PP grounds be applied narrowly[18].

A similar case can be found in the USA jurisprudence. Under US law, it is contrary to PP to breach safety regulations, commit sexual harassment frequently, and commit medical negligence persistently[19]. In *Somportex Ltd. v. Philadelphia Chewing Gum Corp* (318 F. Supp. 161, 169 (E.D. Pa. 1970), the USA Federal Court has to refuse enforcement of a foreign order or award if such enforcement *'injures the public morals, the public health, the public confidence in the purity of the administration of the law, or undermines that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel'*[20]. And also, in case *Parsons and Whittemore Overseas Co. Inc. v. Societe General de l'Industrie du Papier (RAKTA)(* 508 F 2d 969 (2d Cir. 1974) , the USA Federal Court held that an arbitral award is against P.P, if its enforcement would breach most fundamental notions of justice and morality of the forum country[21]. International convention or bilateral Treaty obligations of a state are also regarded as an integral part of its PP.

Practically, the national courts of the states use different wording structure in their definitions. Each country might even delimit the scope of PP measures differently[22]. Because of this, there is no single uniform definition. However, the most of these different 'definitions' indicate many resemblances. The main noticeable similarity is that all states seem to require a breach so profoundly in its scope that it would entirely violate basic principles and fundamental rights in case of an enforcement of the judgment or award. Therefore, it has been relatively easy to abuse or exploit the concept of PP in order to uphold the basic interests of nationals of the forum state. For example, Lucy Reed claims that Turkish Courts, in some cases, unjustifiably have taken advantage of the issue of PP to deny enforcement of foreign arbitral awards that were to the disadvantage of Turkish disputant parties[23].

Types of Public Policy

With understanding the important of the meaning of PP, it can divide into four major types:

Domestic Public Policy (DPP): When arbitral award is connected with a certain state, just that state's domestic policy will be considered by the enforcing state court[24]. The court analyzes whether enforcement of the judgments or arbitral awards would contravene the norms (standards) and the well established fundamental principles of that state's justice and morality[25].

The DPP is expressed by the mandatory rules of that certain country and its judicial practices and procedures. Although if the local court or the disputants involved can raise a very strong case that enforcement of the judgment or award would violate the DPP, fraud in the arbitration agreement or due process violations for instance(such as corruption), then enforcement of that judgment or award will be refused.

International Public Policy (IPP): The IPP is an especial confusing expression. According Hunter and Guido '*the term International Public Policy is a 'red herring', because it tends to confuse the casual observer into thinking that it involves supra-national element*[26].' When arbitration has an acceptable international character and different states' mandatory rule of laws are involved, the enforcing court should not only consider its own PP but also that of interested nations and the needs of international transaction or bussines[27]. There is a sort of balancing of great interest and depending on the case at hand and the interests of the involved states a determination is made as to which state's policy will prevail. IPP is generally interpreted more liberal than that of its domestic equivalent[28]. Thus most legal regimes specifically made a clear distinguish between Domestic and IPP. For instance, USA Federal courts in case *Parsons and Whittemore Overseas Co. v. Societe Generale del L'Industrie du Papier*, *(*508 F. 2d 969 (2d Cir. 1974) emphasized that "*International public policy (IPP) cannot be identified to that of the domestic one, but needs to be given supra-national emphasis*"[29]. Also in case Mitsubishi, 473 U.S. 614, 636 (1985). *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc*. (105 S. Ct. 3346 (1985), federal courts suffered from the fatal disease of sluggish moving in invoking the PP grounds out of "*concerns for international comity, respect for foreign law and arbitral tribunals and the advancement and smooth functioning of international commerce*" [30].

Regional public policy (RPP): Basic values or fundamental principles of a particular political or economic region as its actual content are one of the indispensable characteristics [31]of this type of PP. Most principles of RPP closely relevant to arbitration are drawn from the international agreements giving birth to the regional entity. Instances of an embryonic RPP can be found in the states of the European Union (UE), The Organization for the Harmonization of Business Law in Africa (OHADA), Mercosur agreement(it is an economic and political agreement between particular states in American continental), North American Free Trade Agreement (NAFTA), and perhaps in the near future, amongst the states of Asia with the development to of regional agreements such as the proposed East Asia Community (*EAC*) Or the South Asian Association for Regional Cooperation (SAARC). The law of the EU serves as a best model of this type of PP.

Transnational (Truly) Public Policy (TPP): Some researchers and legal writers suggest a new classification, namely transnational public policy (TPP). Most significant contribution in to development of this new theory was made by Dr *P. Lalive* in his report to VIII International Congress on Arbitration, ICCA in 1986[32]. Since that time debate over TPP has been intensified, because it is seriously vague and difficult to apply.

Fundamental values and basic of mandatory rule of laws, basic ethical standards, the during moral consensus, customs and usages of the international business community are to be applied without inquiring if the dispute is related to any certain state or taking into account the PP of the interested states[33]. New commentators vigorously believe that this has diverse benefits like flexibility and uniformity and that this kind comes into play when arbitration is governed by the principles of *Lex Mercatoria*., The Swiss Federal Supreme Court in the famous case *Westland-Helicopters* v. *F and V*, has held that the order public (public policy) under Article 190(2) (e) of Private International Law (PIL) is limited to transnational values.

Practically, the TPP is highly controversial because of the lack of any distinguishing features of IPP. Both the international and transnational Public Policies are cross-border in nature and have extra-territorial scope with foreign element; sometimes they are used interchangeably[34]. The absence of crystal clear instructions as to what constitutes transnational principles and its broad resembles with IPP raises questions as to its very existence[35].

Public Policy under Indian Law

We have clearly noticed that the concept of PP plays an integral part in arbitration, particularly when the court intervenes, whether in reviewing or enforcing an award. Hence, it is necessary to explore the issue of PP, under Indian Law, more closely. We have already seen that the legal concept of PP shows the existence of a general interest or a supreme value fundamental for a society. Generally, PP is an ambiguous and complex legal issue. Various arbitration legal regimes may adhere to different concepts of general interest and consequently PP. The latter is closely linked to mandatory rules of law, and, more specifically, to certain mandatory rules expressing fundamental values or interests in a state. In Business law, PP can be about subject matters such as trademarks, industrial property rights, bankruptcy, contract between a foreign firm and a local distributor, certain construction contracts or public

works, for instance, urbanization or general utilities programs. It may also contain economic mandatory prescriptions, such as exchange regulations and rules for upholding certain groups of people such as tenants, the employees, the consumers, commercial agents or distributors. In arbitration procedure, like the appointment of arbiters, or the substance of an arbitration award, may be considered as PP issues.

Notwithstanding this literal point, the term PP is not clearly defined, as there is no provision defining or enumerating matters considered as PP issues. Nor is any case law to clarify it. There are, nevertheless, some cases to refer to. The Indian SC, the case of *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (*AIR 2003 SC 2629) defined PP as a number of fundamental regulations without agreeing upon which the society cannot survive. These basic regulations that cannot be challenged by the individual cover a gamut of economic and legal issues. Nevertheless, PP is thought as being subject to change from time to time and from one place to another. In the following, some issues regarded as being matters of PP by the Indian courts are considered. In general, PP issues can be classified in four categories:

Those about the economic order of the country: Regarding the first category, for instance, the conditions of owning property in India are determined by PP. So if selling properties in some areas is strongly prohibited by the Indian government, any contract for selling such properties would be void, because of being against PP. Another instance of PP, the law regulates the operation of foreign firms in India. PP also determines the upper limit of interest rates. The Reserve Bank of India's central board of directors is to set interest rates. Hence, an agreement between the parties for the payment of 7.25% interest, in case of any delay in paying a certain amount, was against PP. Working days and hours, wages and holidays are also regulated by PP. Rights secured for a third party by the law is also considered as part of PP. Hence, an insurance policy that purported to exclude cover for third party claims, despite such cover being compulsory by the law, was also ruled to be void on the ground of being contrary to PP.

Those regarding the judicial order: In the second category, a violation of Indian Constitution would be considered as against PP. It would also be against PP to agree to resolve disputes arisen in India or between Indian parties through foreign courts, though referral to foreign arbitration is permitted. In other words, jurisdictional rules of the Indian court are also part of PP to the effect that the court has jurisdiction over Indian citizens, whether in India or abroad, and over foreigners, if they are domiciled or resident in the state, or if the dispute that has arisen relates to assets or an obligation performed or to be performed in India. Thus, for instance, it is authorized to bring an action before the Indian court against a bankruptcy declared in India, or against foreign nationals not resident in India under commercial agency agreements or bills of lading, if there is an element of performance in India, such as the delivery of goods in an Indian port. Such an action is permitted, although the relevant agreement contains a foreign jurisdiction clause.

Those about individual liberties: As to the third category, rights guaranteed by the mandatory rules of law form a part of Indian PP. Certain rights cannot even be waived by the individual or a party to a contract or dispute. For instance, even if the party invoking nullity of an arbitral award by the court waived his right to do so before the issuance of the award, an action for nullity before the court is admissible. Also, a joint venture agreement is void, if it binds the disputant parties for ever.

Religious moral principles: Religious moral principles form the fourth category of PP issues in India. Hence, a breach of the specific religious is considered as a violation of PP in India, particularly those such as India that recognize the most of religious as a source of law. However, the question arises as to whether all religious rules are considered as a part of PP. It has been said that basic or fundamental rules of the each religious are regarded as PP. A rule is considered as fundamental, if it is absolute in the method in which it is proven and in the meaning that it purports. Therefore, a rule stated in the recognized religious book, about whose meaning there is no disagreement among the leader is considered as a fundamental rule that cannot be violated. Prohibition of usury is an example of such a rule in Islam. The serious difficulty is that, however, there are rules with *Quranic* origin about whose meaning there is no consensus, while being considered as fundamental. Moreover, many other fundamental rules have their source in the Hadith (It is the reported speech of the Messenger of Allah*)*, but there is disagreement about the authenticity of their source.

With regard to the impact of Indian PP on arbitration and particularly international arbitration, two approaches may be followed. First, a comprehensive interpretation of PP may be adopted that limits arbitration, and particularly International arbitration. This approach has a tendency towards considering all issues falling within the exclusive jurisdiction of the Indian court as issues of PP. Advocate of this approach, however, usually make a clear distinction between Domestic and International arbitration, with the latter being more affected by P.P. For instance, whereas a wider category of disputes is regarded as arbitrable in India and under IL, fewer issues may be referred to foreign arbitration. Moreover, according to this approach, a violation of any mandatory rule of Indian Law can result in the non-enforcement of a foreign arbitral award.

Second, a restrictive approach that distinguishes between Domestic arbitration, on the one hand, and International and, particularly, foreign arbitration, on the other. According to this approach, the existence of a particular mandatory public law rule does not automatically entail an impact on various aspects of arbitration, particularly International and Foreign arbitration. In other words, even when a general interest is involved, it does not follow that recourse to arbitration is limited by default. If

this is the case, for instance, an arbitral award issued outside India by a tribunal consisting of an even number of arbiters may be enforced, despite being contrary to Article 10(1) of the Arbitration Act of 1996. Also, an arbitral award in which the reasoning behind the decision is not mentioned may also be enforced, in spite of being against Article 31(2) of the Arbitration Act of 1996.

If the second approach is to be followed, it is necessary to distinguish between Domestic and International PP, both in procedural and substantive issues. IPP is not only narrower than DPP, but also distinct from it. The former reflects values fundamental for a national community, while the latter consists of universally held fundamental values and internationally approved decisions, such as the United Nations Security Council resolutions.

Indian PP should be applicable to Domestic awards, whereas IPP should be applicable to foreign awards. Depending on the case, international awards made under Indian Law should be subject to either set. A violation of IPP of India may justify the vacation or non-enforcement of an award, although under the applicable law to the arbitration no violation may have occurred. Finally, it should be mentioned that since, under the Arbitration Act of 1996, the disputant parties are allowed to choose procedural and substantive law applicable to their disputes, the decree, as a whole, cannot be considered as of PP nature, though some parts of it may be so.

An Arbitral Award Being Against Public Policy

If an award is contrary to "the public policy" of India, the court may nullify it, under Article 34(2) (b) (iii), the Arbitration Act of 1996. In this context, arbitral awards can be voided on the basis of the above Article, only if its consequences contradict the basic principles of Indian Law. The Indian SC in *Venture Global Engineering v. Satyam Computer Service Ltd. and other* (AIR 2010(8) JT 583 (SC) observed that explanation of Section 34 of the Arbitration Act, 1996 is like a stable man in the saddle on the unruly horse of PP.

To understand the phrase PP and its implication it is necessary to consider the case of *Oil and Natural Gas Corporation Ltd. v. SAW Pipes Ltd.* (AIR 2003 SC 2629).In which the Supreme Court laid down the law on the point. The court explained that the phrase 'public policy of India' is not required to be given a narrow meaning. The said phrase is susceptible of narrow or wide meaning depending upon the object and purpose of legislation. Hence the award passed in contravention of the existing provisions of law is liable to be set aside. The totality of the grounds for PP has been presented by the SC in above case in the following chart; "*The court can set aside an award: The reasons stated in Section 34 (2) (b) (ii) on ground of conflict with the public policy of India, that is to say, if it is contrary to:Fundamental policy of Indian Law ; or The interest of India; or Justice or morality; or If it is penalty illegal*."

The concept of PP connotes some issue which concerns public interest and public good. What is for public interest or in public good or what would be injurious or harmful to the public interest or public good has varied from place to place and time o time. The SC in *Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguly,* (AIR 1986 SC 1571) observed that there is no immunity to law which deals with the PP . It keeps changing from time to time as per requirement.

Similarly, the ML (Article 34(2) (b)(ii)) provides that an award in conflict with "The Public Policy" of the forum state may be vacated. The term of public order is as ambiguous as the term PP is; and both need to be clarified. In the case of setting aside awards on the ground of being contrary to PP, Indian Law is explicit that the court can do so on its own initiative.

A provision stipulated in the ML (Article 34(2) (b)(i)), and also, in the Indian Law, is that if the dispute is not capable of being settled through arbitration, the award issued about it may be set aside[42]. For instance, an arbitration agreement that refers a non-arbitrable dispute to arbitration may be regarded as invalid; and therefore the award rendered on its basis may be set aside. Also, making an award about a non-arbitrable dispute is against the applicable law, if it is the Arbitration Act of 1996; and thus may be vacated.

It worth mentioning that, in most arbitration legal regimes, certain disputes are not arbitrable, because they are closely related to PP. However, it is not adequately justifiable to vacate an award, if the dispute in question is merely related to PP. It would be more justifiable to set aside an award, if it is against PP. It was best if the Indian legislator has wisely avoided mentioning non-arbitrability of a dispute expressly as a ground for the vacation of the award, and instead has emphasized being against PP as a ground for doing so.

Conclusion

Indian arbitration has been subjected precisely to unusual experience with a long and vibrant history from ancient to independency period. It passed many regulations and laws particularly in this subject. The Arbitration and Conciliation Act 1996 was last light a fresh hope but it is still far away from the ideal one. In other words, it is much lower than universally accepted standards and practice.

The India judicial system is impaired by inexplicable and inordinate delays. Many a time disputant parties suffer because of uncertainty and ambiguous of the Act particularly in PP. Because of that, Certainty of PP is significant for a judicial system like India which suffered from the fatal deficiencies of uncertainty and sluggish move in practice.

Unfortunately, so far there is no comprehensive enactment in India to meet the present requirements to settle domestic and

international commercial disputes amicably through arbitration machinery[43] and also there is not any law case to clarify the above ambiguous and complex issues in Indian law, and it is expected that when such questions arise in the context of a legal case, there will not be an easy solution, because there is not any certain image and consensus on the meaning of the phrase of PP in the legal communities. Based on the recognized problems, the following suggestions can be made: Indian legislator should dispelled many of doubts with regard to the scope of public policy ; A transparent distinction should be made among all types of PP; Indian Supreme Court should narrowly interpret the scope of PP; Probably, it would have been better if the phrase "rules of morality" had not been in the Indian legal system, in order to avoid any controversy over its interpretation; and The need to reform the law sections related to arbitration seems to be necessary and urgent.

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