Public Policy as a Defining Force: Examining its Role as a Ground for Nullification of Awards in Arbitration

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Original Article

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Abstract

Public policy stands as a cornerstone of legal systems worldwide, embodying fundamental societal values and principles. In the realm of arbitration, the concept of public policy serves as a defining force, shaping the boundaries within which arbitral awards are recognized and enforced. This research delves into the intricate interplay between public policy and arbitration, with a specific focus on its role as a ground for nullification of awards. Through an extensive examination of case law, scholarly literature, and international conventions, this study scrutinizes the application and interpretation of public policy principles in arbitration proceedings. Furthermore, it explores the nuances and complexities surrounding the invocation of public policy as a basis for challenging arbitral awards, considering its implications for the integrity and efficacy of the arbitral process. By shedding light on this critical aspect of arbitration law, this research aims to provide valuable insights for practitioners, academics, and policymakers navigating the interface between public policy and arbitration in contemporary legal landscapes.

Keywords: Public Policy, Arbitration, Nullification of Awards, Legal Systems, Societal Values

Introduction

Court may decline to enforce and recognize a foreign award on its own motion on the basis of public policy, even though any party against whom the award has been announced, has not invoked the jurisdiction on this ground.

Public policy is a traditionally a blunt instrument, with which the courts of a state are equipped to set aside a foreign award seeking enforcement in such a state. Courts view that the municipal law of a state cannot be changed with the municipal law of another state and organization. Hence a public policy provision is incorporated almost in every international convention or treaty to cater such issues. In this regard, New York Convention has a very solid stance as authority enforcing or recognizing the foreign arbitration award, may refuse to do so if it finds that doing such an act would hit the public policy of such a state. (Article V (2) (b). This principle also applies in Pakistan.

In HUBCO vs. WAPDA (Hubco, 2000) Supreme Court declared that any allegation as to corruption or illegal actions in a commercial transaction by the officials of state shall be decided by the courts in Pakistan, under the doctrine of public policy. Moreover, this action could not be decided by arbitrators. This decision is contrary to the approach other jurisdictions, where the issue would be left to the tribunal to decide as a matter arising in connection with a contractual dispute.

Indian Supreme Court in National Thermal Power Corporation v. Singer Company (AIR, 1993) has held that: “The award will not be enforced by a Court in India if it is satisfied that… the enforcement of the award is contrary to the public policy.”

Concept of Doctrine of Public Policy: "Wind Field defines public policy under the following words "a principle of judicial legislation or interpretation founded on the current needs of the community" (Murlidhar, 1974).

Public policy suggests some state of matter that will represent the best public interest and goodness as which shall not be injurious or harmful to the public interest. Moreover; public policy of state may vary from time to time [4] (Central Inland, 1986). It is an open-ended concept and Case law developments in England have explored that judge have declined to enforce the same in domestic law. Norms of public policy are not stagnant in any given community, but these may vary from time to time, culture to culture and generation to generation, and even in the same country. Public policy concept shall be useless if it does not adopt modifications and changes from time to time (Murlidhar, 1974). Its variable nature shall be in the best interest of the welfare of the community. Now the question arises, how the courts shall ascertain the public policy? In this regard it is argued that the judges can be trusted to interpret the law in the best interest of public and their country. Two approaches have been adopted to interpret the doctrine of public policy and its limitations.

Narrow Approach

Under this approach the court define new heads of public policy. In Gherulal Parkash V. Mahadeoudao [6] (Parkash, 1959), the Supreme Court of India has favoured the narrow approach in the following words, "Though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is admissible in the interest of stability of society not to make any attempt to discover new heads in these days".

Wider Approach

This approach enhances the powers of the superior courts to make the contents of public policy (Renusagar, 1994). According to this approach the Court of competent jurisdiction has the power of judicial review to interpret the principle of public policy keeping in view the prevalent circumstances, therefore, in later cases the Courts of diverse jurisdiction have leaned towards the broad view. The interests of the whole public must be taken into account; but it leads in practice to the paradox that in many cases what seems to be in contemplation is the interest of one section only of the public, and a small section at that. The explanation of the paradox is that the courts must certainly weight the interests of the whole community as well as the interests of a considerable section of it, such as tenants, for instance, as a class as in this case. If the decision is in their favor, it means no more than that there is nothing in their conduct, which is prejudicial to the nation as a whole. Nor is the benefit of the whole community always a more tacit consideration. While the courts ought to have to expressly balance between the community and sectional interests.

Arguments on Scope of Public Policy Doctrine

The judges are vested with powers of interpretation according to law of the land. Although the duty of judges is difficult in this matter, yet one cannot relieve judges from their liability to this effect. While concluding their remarks, judges do not adopt conventional approach. Judges must have to go outside the ambit of conventional approach. The judges must base their decision according to the approaches and thinkings of a reasonable man.

"In other words, the judges will have to look beyond the jurisprudence and that in so doing, they must consult not their own personal standards or predilections but those of the dominant opinion at

a given moment, or what has been termed customary morality. The judges must consider the social consequences of the rule propounded, especially in the light of the factual evidence available as to its probable results. Of course, it is not necessary that ordinary men are expert persons to try action relating to public policy." Judges are not supposed to conclude their finding on the basis of referendum or inquiry as to the prevailing moral practices in the society.

It is worth wide note that Section 23 of the Indian and Pakistani Contract Acts have used the words "opposed to public policy" but said law does not define the extent, scope and nature of expression public policy. Infect said proposition can not be defined with precision. Moreover; public policy although settled by the government yet it shall not reflect the sole agenda of the government in time but the same shall reflect interests of public of the country. Many things which were against the public policy shall be considered to be in the best interest of public, so public policy may change from time to time. A previous public policy may be upheld by court in future.

If any matter does not cover the public policy, then the Courts shall adopt, the public conscience and in keeping with interest of public, and declare such practice to be opposed to public policy.

The case law highlighted that the English, Indian, USA and Pakistani Courts have declined to enforce and recognize any right or obligation arising under foreign law. As adopting foreign law instead of domestic law, shall be against the interest and wishes of public.

Court's Jurisprudence on Public Policy

Consideration and purpose of public policy cannot be defined easily, but certain strict approach must be adopted to construe the exact meanings of public policy. While setting aside the foreign award, it must be shown that there is any illegality, or the award is injurious to public interest, or any offence may be committed while enforcing the award.

"In Parsons& Whitetnore Overseas Co. Inc. v. Societe Generale De.L. Industrie Du Papier (Rakta) and Bank of America (Richardsonv, 1824), Court of Appeals has rightly held that the general pro-enforcement bias informing the Convention and explaining its super-session of the Geneva Convention points toward a narrow reading of public policy defense. An expansive construction of this defense would vitiate the Convention's basic effort to remove pre- existing obstacles to enforcement. We conclude, therefore, that the convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the Forum State's most basic notions of morality and justice."

In Fritz Scherk v. Alberto Culver Co, Supreme Court of United States of America has rejected the narrow-minded approach of the courts of a country to prejudice the enforcement and recognition of an award. Court also stated that courts must not stick with the concept of settlement of dispute under the domestic law. "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our Courts."

In Oil & Natural Gas Corporation Ltd. v. Sazv Pipes Ltd., Court, while making the interpretation of Section 34 of the Act, described the meaning "public policy of India, the term "public policy of India needs the judicial review of the said topic". "The court has to interpret the scope of public policy in the context of the jurisdiction of the Court where the validity of award is challenged on the ground of public policy before it becomes final and executable. The concept of enforcement of the award after its attaining finality is different and the jurisdiction of the Court at that stage could not limited. Similar is the case of execution of a decree. It has been defined in Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on

limited grounds such as the decree is against want of jurisdiction or nullity in itself. Ian an appeal against a judgment or a decree, the court shall have wider powers."

"On the basis of said arguments it can be assumed that, in a case of enforcement or recognition of an award, the court should not ascribe the narrower meanings to the term public policy of India. On the contrary, wider meaning is required to be given so that the patently illegal awardpassed by the Arbitral Tribunal could be set aside. If narrow meaning is given, some of the provisions of the Arbitration Act would become nugatory."

"In the said judgment the Apex Court summed up, that an award is if against the static provisions of law or of the agreement, then it shall be considered to be an act with out having the force of law, and the court shall find a considerable jurisdiction to determine the same under Section 34 of the Act. In Vijaya Bank v. Maker Development Services Pvt. Ltd., the Supreme Court of India reviewed the challenging of the enforcement of award under the Act of 1996, where it suggested that statement of objects and reasons stated in the Act of 1996 were to curtail the powers of court in this regard. said Act is intended to reduce to the barest minimum the legal challenge to arbitral awards."

"This Court held that the use of the non obstante clause in section 5 and the embargo on judicial intervention except as provided and the repeated use of the word only in section 34 puts the matter beyond cavil. In this case reliance was placed on, Olympus Superstructures Pvt. Ltd. v. Meena Vijay Khetan (Olympus, 1999) where the Supreme Court held that the scope for a challenge to an award under the Act of 1996 is considerably less than under the Arbitration Act of 1940 and in Konkan Railway Corporation Ltd. v. Mehul Construction Co., where the Supreme Court held that the 1996 Act had limited the intervention of the Court with the arbitral process to the minimum and that in interpreting the provisions of the Act, it was not open to the Court to ignore the object and purpose of the enactment."

"In Renusagar Power Co. Ltd. v. General Electric Co. (Renusagar, 2001) the observations of the Supreme Court urged that the expression public policy has a wider scope in the context of a domestic award as distinguished from a foreign award. This Court decided that irrespective of whether the expression public policy has to be given a wider or restricted meaning, it cannot carry the meaning of a contravention of law simplicitor."

"However, one thing which does emerge from this judgment of the Division Bench is a categorical finding that whatever be the width of the expression "public policy", it does not include a mere contravention of law. The binding principle that therefore emerges from the decisions of the Supreme Court that the approach of the Court when face any matter regarding the arbitral award, the court shall keep in mind the legislative intention of the law makers."

"Although the concept of public policy is recognized by courts being an elusive concept, which is difficult to define and capable of interpretation both in narrow as well as in broad terms, yet it would not call the Courts to extend their role in arbitral awards beyond the restricted sphere envisioned by Parliament. The above examination of the cases of various jurisdictions, we are no able to conclude that public policy is a concept that associates with the public good and to public interest.

In Central Inland Water Transport Corporation Ltd. v. Brojo Nath Ganguli (Central Inland, 1986) the Supreme Court while striking down a hire and fire clause contained in employment contracts of a public sector corporation held that the concept of what is for the public good or in the public interest

or what would be injurious or harmful to the public good or, public interest has varied from time to time.

In Reimsagar (supra), Chief Justice Venkatachaliah, the Supreme Court held that the doctrine of public policy is open- textured and flexible in nature and warrants both the narrow and broad view. In its narrow sense the Courts cannot set up new heads of policy, while under broader sense, as accepted by the Supreme Court in later cases, is that heads of public policy are open for judicial interpretation."

"This judgment further supplements that the ground of public policy is capable of being invoked where the enforcement of an award would contravene some moral principle as:

i) Where the fundamental conceptions of natural justice are disregarded;

ii) Where conceptions of morality are superseded;

iii) Where a transaction prejudices the interest of a nation or its good relations with foreign powers;

iv) where the foreign law or status offends conception of human liberty and freedom of action as provided in the constitution."

It may be to the best to refer Smita Conductors Ltd. v. Euro Allays Ltd (Samita, 2001) wherein

"Relating to the context of the enforcement of a foreign award under the Foreign Awards (Recognition and Enforcement) Act, 1961, the Court held that the expression" public policy of India" would 'mean that a foreign award cannot be recognized or enforced if it is contrary to (i) the fundamental policy of Indian Law; (ii) the interests of India; (iii) justice or morality."

Distinction between Domestic and International Public Policy

In arbitration issues, the distinguishing of Domestic and International Policy is gaining much, more importance. An issue which is the subject of domestic public policy may not be the subject of international public policy." In domestic public policy, there are a number of issues, which require considerable consideration. While International public policy may cover only few issues (Sanders, 1975) "In USA, Court has held that a disputes arising out of securities transactions is not subject of arbitration if the contract is of domestic nature, while disputes arising out of such transactions can be arbitrated if the contract is of international nature."

"Under the French Law, an international arbitration award can be set aside if the recognition or execution is against the public policy. In doing so it recognizes the existence of two sorts of public policy i.e. national public policy, that shall concerned with pure local issues, and the international public policy, that is less deterring in its applicability (Fritz, 1974).

"International Public Policy can be best defined as a mode whereby the setting aside or the suspension of an award may be prevented under the consideration of domestic public policy."

Public Policy under the relevant laws of India, Pakistan and U.K act as defensive instrument, which can be used against the foreign arbitral awards.

Conclusion

In conclusion, the examination of public policy as a defining force in arbitration sheds light on its crucial role in shaping the boundaries of enforceability and legitimacy of arbitral awards. Through a comprehensive analysis of case law, scholarly literature, and international conventions, this research has provided valuable insights into the complexities and nuances surrounding the invocation of public policy as a ground for nullification of awards. The findings underscore the significance of public policy as a safeguard against arbitral decisions that contravene fundamental societal values and principles. While public policy serves as a vital tool for maintaining the integrity and legitimacy of the arbitral process, its invocation requires careful scrutiny to ensure consistency and predictability in outcomes. Moreover, the examination of public policy in arbitration highlights the dynamic nature of legal systems and the evolving societal norms that underpin them. As legal landscapes continue to evolve, stakeholders must remain vigilant in safeguarding the integrity of arbitration while balancing the need for flexibility and adaptability. Moving forward, practitioners, academics, and policymakers must engage in constructive dialogue and collaboration to refine the application and interpretation of public policy principles in arbitration. By doing so, we can enhance the effectiveness and credibility of arbitration as a preferred method for resolving disputes in an increasingly interconnected world.

In essence, the study of public policy in arbitration underscores the importance of striking a delicate balance between preserving autonomy and safeguarding fundamental values. Through ongoing research and advocacy, we can navigate the complexities of public policy and arbitration, ultimately fostering confidence and trust in the arbitral process.

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