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PUBLIC POLICY VIS-À-VIS ARBITRATION LAW IN INDIA

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INTRODUCTION

Justice Burroughs once described Public Policy as an Unruly Horse, when once you get astride, you don't know where it would take you. The arbitration and conciliation act of 1996 does not define the term public policy, but exception to set aside an arbitral award by court on grounds of public policy is given in section 34 of the act. Public policy is not a set of rules defined by government of a particular state but, it is a policy that is something in general public interest. The problem with the doctrine of public policy is that, it doesn't have a clear-cut definition, thus setting no limit to interpretation of the doctrine. Thus, different courts can extend the doctrine of public policy to extends suitable to them, which violates the principle of minimal intervention by courts in regard to arbitration. In a globalized world, the interpretation of public policy can be different for different countries and its citizens. For example, an arbitral award passed in London, can have a totally different effect on public policy of India. Hence there is a need for more robust jurisprudence of the term public policy and its interpretation should be limited and a narrower view should be adopted. In regard to public goods, public policy plays a very important role in an arbitral proceeding, there are various times, when an arbitration award is passed in regard to public goods, but its enforcement is barred because the said award, effects the utility of public goods to public. Hence in the present research paper, the researcher has tried to put light on the tussle between the courts and enforcement of arbitral awards in India with regard to public policy in India, the research has also tried to put light on jurisprudence around the term public policy, and how more robust jurisprudence for it. The researched has also tried to relate the

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concept of public goods with arbitration, and how public policy affects the arbitral awards passed with regard to public goods in the present world.

OBJECTIVE OF STUDY

The objective of the present research paper is to identify the role of public policy with regards to enforcement of arbitral awards, also to identify the loop holes in the jurisprudence that governs the doctrine of public policy and its interpretation by courts, the objective is also to establish a relation between public goods and public policy in context of arbitration laws and enforcement of arbitration laws.

RESEARCH QUESTIONS

1. What is your opinion as far as the public policy bar on enforcement of arbitral awards in India goes?
2. In a globalized world is there a need for a more robust jurisprudence around the phrase 'public policy'?
3. What can we learn from the idea of public goods in economics vis-à-vis the question of public policy in arbitration?

RESEARCH METHODOLOGY

The researcher has used doctrinal method i.e., reference from available primary sources like Acts, Rules and Regulations, statues to study the present questions in hand. The researcher has also taken reference from secondary sources like books, articles and newspaper reports to understand the issue regarding public policy.

Chapter I: HOW IS PUBLIC POLICY A BAR ON ENFORCEMENT OF ARBITRAL AWARDS IN INDIA?

The term "public policy" did not appear until the eighteenth century in common law.[2]The Arbitration and conciliation Act, 1996 also does not define the term "public policy". The supreme court in ***Oil and natural gas corporation Ltd v Saw Pipes Ltd***[3] explained that the word "public policy" doesn't not require to be given a narrow meaning to it. According to the *Black's*

2.Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015)
3.Oil and Natural Gas Corp v Saw Pipes, (2003) 5 SCC 705

Law Dictionary public policy is defined as "the collective rules, principles, or approaches to a problem that affect the commonwealth of the public or affect the general good."[4]Public policy should be non-rivalrous and non-excludable. In the case of ***Renusagar Power Co. Ltd v. General Electric Co*[5].** the Apex Court said that in case of domestic awards the expression public policy has a wider meaning than foreign. In this case, the court said that the enforcement of a foreign award will not be accepted if the award in contravening with:

1. Fundamental Policy of Indian law
2. The Interest of India
3. Justice or morality, or
4. Patently illegal.

The Supreme Court gave a wider meaning to the term 'public policy' in the case of ***Phulchand Exports Limited v. O.O.O. Patriot*** [6] under Section 48 of the Act and laid down that the scope and purpose of the public policy is same under Section 34 and 48. Thus, in a case where the parties challenge the enforcement of the foreign award, Section 34 of the Indian Act can be interpreted in the decision of Phulchand which gave a wide interpretation to the expression public policy and it also re-open the entire matter. The decision given in Phulchand case was overruled by ***Shri Lal Mahal Ltd. v. Progetto Grano Spa***[7]. In this matter, an award passed under the rules of the Grain and Feed Trade Association, London and upheld by courts in the UK was sought to be enforced in India. Objection to the enforcement of the award was raised under Section 48 of the Act on the ground that the award was contrary to the terms of the contract and was patently illegal and in violation of 'public policy'. The doctrine of public policy differs in different countries, European countries are more restrictive in using the public policy shield in the face of unfavourable foreign awards. Latin American countries, on the other hand, seek to avoid enforcement in case of violation of national law.

4. Blacks law dictionary
5.Renusagar Power Co. Ltd vs General Electric Co, 1994 AIR 860
6. Phulchand Exports Limited v. O.O.O. Patriot, (2011) 10 SCC 300
7. Shri Lal Mahal Ltd. v. Progetto GranoSpa, Civil Appeal No. 5085 of 2013 arising from SLP(c) No. 13721 of 2012

However, the general trend emerging among most countries is a favourable turn towards enforcement respecting the principles of party autonomy and the laws of other countries unless it leads to a violation of morality or causes gross injustice, and violate the principles of justice and morality. But if we consider India, the recently in the above-mentioned case, Supreme court limited the meaning of public policy to fundamental policy of India, Interests of India, and Justice and Morality.

Chapter II: IN A GLOBALIZED WORLD IS THERE A NEED OF MORE ROBUST JURISPRUDENCE AROUND THE WORD "PUBLIC POLICY"?

The word "public policy" did not come to existence till the 18th century. It was in the case of ***Mitchel v. Reynolds***[8] , where the word public policy was employed in the court. In this case Lord Macclesfield made a contract that resulted in the restraint of trade throughout England. The doctrine of policy appeared there first. Later, it extended to other areas such as the rule against perpetuities, sales of offices, marriage contracts, and wagering[9].Globalization accelerates and expands the exchange of ideas and commodities over vast distances. The idea and concept of public policy has gone through a process of continuous change. The idea behind public policy of the 18th century and the idea behind public policy of the 21st century has witnessed major changes in aspect of public morality, interest, justice, process and of course the rules and regulations. The change is not just influenced by time but also by the law and status of a country. For example, the concept of public policy will differ between a developed and a developing country, the law applicable in that country. In a developing country like India, the implementation of public policy is difficult because India itself is going through a continuous process of change. The economy, the need of the people, the desires of people affect the definition of public policy because it is unstable in nature. Different countries have different standards of national public policy and these can result in quite different interpretations of the term.The process is significantly easily imposed and followed in developed countries because the concept is clearly laid down. Article 3 of the New York convention 1958, states that "Each

8. Mitchel v. Reynolds, (1711) 24 Eng. Rep. 347 (Q.B.)
9.Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685 (2015)

Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."[10] Here, the general principles clearly state the obligations to recognize the arbitral awards as binding and enforcing. The condition is clearly laid down in the convention. In India, the sole purpose of creation of a segregated body i.e., arbitration was so that there is no or minimum intervention of the courts. Public policy is flexible and open textured in nature. The intervention of courts makes it difficult for the arbitral tribunals to work accordingly. However, in practice, courts have varyingly used national, international and even transnational interpretations of the public policy exception.The public policy of one country will not be exactly same as that of another country. In addition, public policy is not necessarily static, and over time may continue to evolve. But there are some similar understandings and common principles that have, for the most part, prevented the public policy exception from creating a large loophole undermining Convention enforcement, and have encouraged courts not to refuse enforcement based on local, parochial standards. There are two main reasons why, for the most part, courts do not often refuse enforcement of a foreign arbitral award. First, domestic public policy has been traditionally. interpreted narrowly. Second, a number of countries have both a domestic public policy and an international public policy, and they have tended to apply their own states' international public policy with respect to foreign awards.

Chapter III: WHAT CAN WE LEARN FROM THE IDEA OF PUBLIC GOODS IN ECONOMICS VIS-À-VIS THE QUESTION OF PUBLIC POLICY IN ARBITRATION?

Public goods should have no rivals in consumption and should be accessible by all. The essentials of public goods are that it should be non- rivalry and non-excludable in nature. some common examples of public good can be Air, Water, Roads, etc. The non-rivalry and non-

10.Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

excludable nature of public goods leads to the over utilisation of it. These goods are not under the guardianship of anybody which also leads to over exploitation of it.Sometimes these goods are subjected to restrictions and are not available in their pure form. Air is one of the most common examples of public good. Air is often polluted which hampers the free usage of it. Factories often leads to emission of large amount of chemicals and carbon dioxide which is mixed with fresh air and is harmful for the nature as well as for living beings. This works as a blockage to the right of a person to use air which is a public good.

Another example of a public good can be a Metro. Metro is governing by the government and no private institute is involved in its operation. However, to use the metro one needs to pay a certain amount. This puts a restriction on some people who cannot afford the tickets to use the metro. The price of metro tickets was also increased recently. Also, when one person occupies a seat in a metro, it reduces the capacity of the metro. These questions the essentials of public policy (non- rivalry and non-excludable). Hence, metro can be said to be a semi public good. Not only metro, but any public transportation can be termed as semi-public good. The amount that a person has to pay makes it a semi public good.Thus, by these examples we can say that, if an arbitral award is given that is some sense deprives the use of public goods, to general public, a suit against that particular arbitral award, can be filed on grounds of public policy.

One aspect of public goods is also about the preference of that individual towards it, for example if there is a light house, it is preferred by sailors, but not by a farmer, thus it is very difficult for a country to access what are the goods that is needed by every person according to their preference, when a arbitral award is passed regarding public goods, a court has to look various factors for example how that particular arbitral award can effect environment, also would it hamper the trade of the country and also would the public policy be violated. A clear example of the above mentioned statement can be setting up of a car factory at a particular village, if there is a land dispute between two companies, and the arbitral tribunal passes an award in favour of one party, that it can set up its factory at that particular piece of land, here 3 factors are to be considered, positive factor, that particular factory would give new employment opportunities to the people, but also hampers their right access clean air, as that particular factory would release some amount of pollution, but if a foreign company invests, this would contribute in to the GDP

of the country, thus the relation of public goods in regards to public policy with in arbitration becomes very complex, and sometimes the intervention by courts is justified, but sometimes the intervention completely changes the results that was originally to be out at last of an arbitral proceeding. Hence the contrast between public goods and arbitration becomes relevant.

CONCLUSION

There is a need to narrow down the concept of public policy in law, the limits of the doctrine are needed to be created, so that courts cannot interpret it according to the situation, thus a proper definition of the term is needed to be created, and should be binding to all the countries, thus justifying the principle of minimal intervention by courts. There is a need to conceptualize the term in a concrete manner, but it is difficult as public policy varies around the world and is different for different individuals and till the time the term doesn't have concrete structure the intervention bt courts would not be minimal and hence it can be said that public policy would serve as a 53rd in the deck, yet it is a trump but can freeze any contracts, judgements and arbitral awards.[11] Considering the relation of public goods in regard to public policy in arbitral proceedings, it is still unclear, because there are various other factors that govern the same, and preferences of various individuals towards different public goods cannot be accessed thus making it difficult to maintain a balance between public goods and private goods.

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