

THE ROLE OF PUBLIC POLICY IN INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

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ABSTRACT

Arbitration is a mechanism under Alternative Dispute Resolution in which the parties in an arbitration select a qualified expert known as an arbitrator who acts as a neutral party reach a binding decision that resolves the dispute. International Commercial Arbitration is a variant of arbitration in which at least one of the disputing parties is a resident or body corporate of a nation other than India. Arbitration with the government of a foreign country is also considered to be an ICA. Under Sections 34 and 48 of the Arbitration and Conciliation Act 1966, the violation of the public policy of India is a ground for setting aside of an arbitral award². The New York Convention and the Model Law have a similar approach of giving importance to public policy. The conflict of foreign arbitral award and public policy remains controversial. The definition of public policy of a nation is a dynamic concept. This article intends to analyse provides a proper understanding of ICA and public policy by exploring the comparative study of the conflict between Public Policy and ICA tracing its evolution. It also examines the case laws in India related to this topic.

Keywords: International Commercial Arbitration, Public Policy, Foreign Arbitral Award, Judicial Intervention in arbitration

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INTRODUCTION

Modern days, arbitration is an effective mechanism for resolution of disputes. Arbitration is a consensual 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. In selecting arbitration, the parties opt for a private dispute resolution procedure instead of going to court.³ Under the Section 2 (a) of the Arbitration and Conciliation Act 1996 defines arbitration. It is popular for its feature of confidentiality and is mostly preferred by companies. Arbitration may be domestic or international. Most of the international arbitrations are related to commercial disputes. International Commercial Arbitration resolves disputes between individuals, companies or governments and even cross-border disputes between nations.

ICA is indeed an expensive procedure; it requires time, effort. After the completion of the arbitration process, the arbitral award is adopted to resolve the conflict between the parties. The enforceability of a foreign award is in conflict with the public policy of the nation. The doctrine of public policy is a wide concept, and there is no universal definition for it. An arbitral award can be set aside if it violates the public policy of the nation or the domestic law. This provision often hinders the parties from enjoying the benefits offered by the arbitration mechanism. The doctrine of public policy is often used by courts to set aside arbitral awards and it is mainly due to the unclear understanding. This article deals with the evolution of public policy in India and ICA.

INTERNATIONAL COMMERCIAL ARBITRATION

According to Clause (f) of subsection (1) of section 2 of the Arbitration and Conciliation Act 1996, defines the term “international commercial arbitration as an arbitration relating to disputes arising out of legal relationships, whether commercial or non, considered as commercial under the law in India and where at least one of the parties is –

- i. An individual or a resident from a country other than India; or
- ii. A cooperate which is incorporated in any country other than India; or
- iii. A company or an association or a body of individuals whose central management and control is exercise outside India; or

³World Intellectual Property Organization, *What is Arbitration?* WIPO, <https://www.wipo.int/amc/en/arbitration/what-is-arb.html> last visited (Octo 17 2025).

iv. The Government of a foreign country.⁴

Companies from different countries generally prefer to arbitrate their disputes rather than adjudicate them in the courts of one side or another. The reason behind this is the international tribunal is much time efficient and confidential as compared to court proceedings⁵. Also, they could select expert arbitrators who are equipped with experience in dealing matters related to business etc.

International commercial arbitration is regulated by several international conventions and national laws, including the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.

Enforcement of Foreign Arbitral Award in India

An arbitral award made in the territory of a State other than the State where a recognition and enforcement of the award is sought is a foreign arbitral award. An arbitral award made in India under Part I of the Arbitration and Conciliation Act, 1996 is considered as a domestic award. Any arbitral award which is not domestic award is considered as a foreign award in India.⁶

The term “arbitral awards” includes not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.⁷ Public policy is one of the grounds for setting aside the arbitral award in India.

PUBLIC POLICY

The Black’s Law Dictionary defines the term public policy as “*a phrase of common use in estimating the validity of contracts. Its history is obscure; it is most likely that agreements which tended to restrain trade or to promote litigation were the first to elicit the principle that the court would look to the interest of the public in giving efficacy to contracts.*”⁸ Courts sometimes use the term to justify their decisions, as when declaring a contract void because it is the violation of public policy also termed policy of the law.⁹

⁴ A.K. BANSAL, LAW OF INTERNATIONAL COMMERCIAL ARBITRATION 14,15 (Universal Law Publishing Co. Pvt Ltd).

⁵ Katie Shonk, *International Arbitration: How it Works?* HARVARD LAW SCHOOL (July 24,2025), last visited (09 November 2025).

⁶ *Supra* note 3 at 43.

⁷ Article 1(2) of the New York Convention.

⁸ BRYAN. A. GARNER, BLACK’S LAW DICTIONARY, 1245, (7th Ed. 1999)

⁹ *Id.*

Public Policy has been defined by Winfield as “*a principle of judicial legislation or interpretation founded on the current needs of the community*”.¹⁰ Public policy connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what be injurious or harmful to the public good or the public interest has varied from time to time. Section 23 of the Indian Contract Act has used the terms “opposed to public policy” but Indian Contract Act does not define the expression “public policy” and there is lack of precise definition.

Public policy has been described as 'a principle of judicial legislation or interpretation founded on the current needs of the community' When courts perform this function undoubtedly, they legislate judicially. That is however, a kind of legislation implicitly delegated to them to further the object of the legislation and to promote the goals of society.¹¹

GLOBAL PERSPECTIVE ON PUBLIC POLICY

The doctrine of public policy is not same in all countries because it is based on various factors such as the nature of the government, interest of people and laws of the nation. This divergent view of the interpretation of public policy often creates chaos among countries. Especially when there is a conflict between domestic law and international law.

In 1853, the House of Lords stated the term public policy means "*that principle of law which holds that no subject can lawfully do that which tends to be injurious to the public, or against public good.*"¹² The courts in United Kingdom have been reluctant to precisely define public policy and laid down certain fundamental values:- “*Consideration of public policy can never be defined, but they should be approached with extreme caution. . It has to be shown that there is some element of illegality or that the enforcement of the award would be injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised.*”¹³

¹⁰ *Public Policy in English Common Law*, 42 HARV. L. REV. 76 (1928).

¹¹ O.P. MALHOTRA, *The Scope of Public Policy under the Arbitration and Conciliation Act, 1996*, 19 Nat'l L. Sch. India Rev. 2 (2007).

¹² *Egerton v. Brownlow* 4 HLC 1 (1853).

¹³ ANSHU SINGH RATHORE, *Public Policy Conundrum in the Enforcement of Arbitral Award* MANUPATRA, (Oct 7, 2022), last visited (Nov 10, 2025).

In France, Article 1514¹⁴ of the France Code of Civil Procedure, an arbitral award shall be recognized or enforced if the party relying on it can prove its existence and if such recognition or enforcement is not displaying the violation to international public policy. The scope of public policy was enumerated in the case of *European Gas Turbines SA v Westman International Ltd*¹⁵ where the Paris Court of Appeals held that enforcing an arbitral award related to an agreement based on bribery is contrary to public policy. While in Australia, the court has accepted the restrictive view of public policy that is prescribed in Section 8 (7) of the Arbitration Act, 1974¹⁶, and the interpretation of the public policy is limited to fraud, corruption, or violation of natural justice principles.¹⁷

PUBLIC POLICY IN INDIA

In India, the foreign award can be set aside on the ground that "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality". The Section 34 of Arbitration and Conciliation Act 1996 states that an arbitral award can be set aside if it is violating the public policy of India similarly the Section 48 specifies a foreign arbitral award can invoke if it violating the public policy of the nation.

By considering the international conventions and treaties, Article 3 of the New York Convention embodies the pro-enforcement policy of the convention, it states that "*Each Contracting State shall recognize arbitral awards as binding and enforce them per the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles...*" This provision makes unclear about the enforcement of the foreign award.

The Article 36¹⁸ of the UNCITRAL Model Law on International Commercial Arbitration in 1985 states an award can be refused if the subject matter is not capable of arbitration and its recognition would violate the public policy of the state. The Article 5 of the UNCITRAL and Section 5 of Arbitration and Conciliation Act 1996 provides limitations or minimalize the intervention of courts in arbitration proceedings.

¹⁴ Arbitration awards shall be recognised or enforced in France if their existence is established by the person relying on them and if such recognition or enforcement is not manifestly contrary to international public policy.

¹⁵ *European Gas Turbines SA v. Westman International Ltd*, Paris Cour d'appel (1re Ch.), 30 Sept. 1993.

¹⁶ International Arbitration Act 1974.

¹⁷ *Traxys Europes SA vs Balaji Coke Industry Pvt Ltd* [2012] FCA 276.

¹⁸ Grounds for refusing recognition or enforcement.

The doctrine of public policy in arbitration was evolved in India through various judgments which shaped the present meaning of public policy.

JUDICIAL APPROACH IN INDIA

The arbitral award is a binding document but it can be set aside due to various reasons such as incapacity of arbitrator or party, invalid agreement and most importantly if the arbitral award is against public policy of India. This invokes the validity of the arbitral award and cause difficulties to the parties. In the case of International Commercial Arbitration, it is very common for the courts in India to check whether it is violating or not. The notion behind this provision is to protect the public good and public interest.

The case of *Renusagar Power Electric Company Vs. General Electric Company*¹⁹ serves as the landmark case of the enforceability of foreign award in India and the ICA. The facts of case the Indian Company Renusagar Power Co. Ltd was engaged in electric power production entered into a contract with General Electric Company, a New York-based entity. It was for the supply and erection of a thermal power plant. The main issue regarding this case was the enforceability of arbitral awards under the Foreign Awards Act, 1961 followed by the tax exemption, payment of interest. The Apex Court upheld the enforceability of the arbitral award made by the International Chamber of Commerce (ICC) against Renusagar Power Co. Ltd. The award comprised various components including regular interest, delinquent interest for delayed payments, compensatory damages, and costs. Renusagar case contested the enforcement of this award on grounds including violations of the Foreign Exchange Regulation Act (FERA), public policy considerations, and issues related to the calculation of interest. It questioned the validity of Section 7(1)b(ii)²⁰ of the Foreign Awards (Recognition and Enforcement) Act, 1961. The Supreme Court three-member bench comprising Agrawal S.C J. Venkatachalliah M.N CJ, Anand, A.S J, “*The enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.*”²¹ This case provided a narrow interpretation with respect to the private international law.

In the second landmark case of *ONGC vs SAW Pipes Ltd*²², The Oil and Natural Gas Commission (ONGC) ordered to Saw Pipes for the supply of equipment for offshore

¹⁹Renusagar Power Electric Company Vs. General Electric Company, 1994 Supp (1) SCC 644.

²⁰ The enforcement of the award will be contrary to public policy.

²¹ *Id.* at 18.

²² ONGC vs SAW Pipes Ltd, 2003 (5) SCC 705.

exploration, specifying procurement from approved European manufacturers. Due to a general strike by steel mill workers in Europe, the delivery was delayed. The timely delivery was a crucial aspect of the contract. Despite ONGC granting an extension of time, it exercised the right to recover Liquidated Damages by withholding the amount from the payment to Saw Pipe. The dispute was taken to arbitration and the award was favourable to the respondent. The petitioner took the case to the Bombay High Court and the court upheld the award. While issue came before the Supreme Court the Bench comprising of M.B Shan J and Arun Kumar J held the doctrine of public policy in the context of Section 34, giving a wider meaning than in the previous case of *Renusagar* and observed the public policy connotes some matter which concerns the public goods and public interest. 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. An award which, prima facie breaches statutory provisions cannot be considered as the public interest, because it is likely to negatively affect the administration of justice. Accordingly, in addition to the three heads set forth in *Renusagar*, an award can as well be annulled, being in conflict with public policy of India, if it is patently illegal.²³ The Court held that an arbitral award could also be set aside if it were so unfair and unreasonable that it shocked the conscience of the court. Such an award must be adjudged void and opposed to the public policy of India.

The facts of the case of *Shri Lal Mahal Ltd. Vs. Progetto Grano Spa*²⁴ concerned the dispute between an Indian supplier and an Italian buyer in a contract for the supply of wheat. The seller relied on a quality certificate issued by a certifying agency at the Indian port of loading to claim that the wheat met the required standards. The buyer questioned the reliability of the quality certificate at the port of loading and on the basis of various reports that argued about the quality of wheat was below that which was contractually agreed. The dispute was taken to Grain and Feed Trade Association (GAFTA) which was seated in London. The arbitral tribunal was in favour of the buyer and awarded damages against the seller. An application by the seller before the High Court of Justice in London to set aside the award under section 68 of the English Arbitration Act 1996 was also rejected. The three bench comprising of Kurian Joseph J., Madan B. Lokur J., R.M. Lodhat J., the Supreme Court overruled the judgment of *Phulchand Exports Ltd vs Ooo Patriot*²⁵ case which the test laid down in *ONGC Saw pipes* should be succeeded in case of foreign awards, thereby permitting Indian courts to deny the enforcement of the

²³ *Id.* at 17.

²⁴ *Shri Lal Mahal Ltd. Vs. Progetto Grano Spa*, (2013) 3 SCC 437.

²⁵ *Phulchand Exports Ltd vs OOO Patriot* (2011) 10 SCC 300.

foreign arbitral award on the ground of "patent illegality".²⁶ The Renusagar case was reinstated concerning the enforcement of the foreign arbitral award and confirmed that the test held in the Renusagar case will be applied henceforth for the refusal of the arbitral award on the ground of public policy. The decision limited the inference of 'public policy' in the impugned section remove patent illegality of the award.

The *ONGC Ltd. Vs. Western GECO International Ltd*²⁷, the ONGC contracted with the Western GECO for procuring U.S. origin Hydrophones Due to the post 9/11 regulatory measures in the U.S. GECO suggested ONGC that it would impossible to provide for the desired U.S. Hydrophones. The dispute arose between the parties regarding the interpretation of the contract and the amount payable by the ONGC to GECO. The parties moved for arbitration in accordance of International Chamber of Commerce (ICC). The award was favourable to GECO and the ONGC was liable to pay the amount. The ONGC moved to the Bombay High Court but it favoured the decision of ICC. The three-bench of the Supreme Court upheld the award, concluding that ONGC failed to exhibit any clear violation of public policy of India. The Court carefully scrutinised whether the award violated the public policy of India. They accepted on the ratio given in the Case of Saw pipes and further elaborated on the meaning of '*fundamental policy of Indian law*'. The court determined that '*three distinct and fundamental juristic principles*' form a part and parcel of the fundamental policy of Indian law - first, the adjudicating authority must adopt a 'judicial approach' when determining the rights of a citizen.²⁸

The Arbitration & Conciliation (Amendment) Act, 2015 made major changes to Section 34 of the Act, the changes had been suggested by the 246th law commission report. These changes were focused on restricting courts from interfering with the arbitral awards on the ground of "*public policy*". *The amendment added, explanation 2 to Section 34(2) as well as Section 2A. Explanation 2 of Section 24(2) states "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."* This made to ensure that there is no misreading of the ONGC judgment. Since the 2015 Amendment, there is no more stress towards the courts to give a wider meaning of public policy.

²⁶ *Id.* at 10.

²⁷ *ONGC Ltd. Vs. Western GECO International Ltd*, (2014) 9 SCC 263

²⁸ *Id.* at 10.

CHALLENGES

The emergence of Alternative Dispute Resolution is a relief to both citizens and the courts, as it offers dual advantages. Arbitration stands as an efficient mechanism for dispute resolution, preserving time and effort and resulting in a binding arbitral award, especially in business disputes, international trade disputes, and other similar cases. But if the procedure is expensive, and it is not enforceable in the country, then all the effort done by the parties will be meaningless.

The lack of clarity of the doctrine of public policy may be misused as a loophole, and the uncontrolled judicial intervention when it is not necessary also creates difficulties and discourages parties from resolution of disputes through arbitration. The judiciary has to intervene in the matter when it is a concern to the public good or public interest because it is needed for safeguarding of the interests of the citizens.

CONCLUSION

The concept of public policy in ICA in India has significantly, evolved reflecting the balance between judicial supervision and respect for arbitral autonomy. When public policy serves as a shield against an arbitral award contrary to the fundamental laws and interests of the country is not uniformly defined across numerous jurisdictions. This will narrow the scope by Courts to align with international arbitration standards.

The Arbitration and Conciliation Act, 1996 and other landmark judicial interpretation has expanded India toward arbitration. Recently the Indian courts restrict the application of public policy to the fundamental policy of Indian law, principles of natural justice, and basic notions of morality and justice, thereby ensuring regulated interference in foreign arbitral awards.

For the enhancement of the clarity and effectiveness of public policy grounds, the collective involvement of lawmakers, judges, and lawyers is required. It also includes the establishment of specialised tribunals and ensuring consistent application. The adoption of these strategies in India can strengthen the arbitration system in India and enhance its standard for international arbitration.