ISSUES IN ENFORCING FOREIGN ARBITRAL AWARDS AND ROLE OF PUBLIC POLICY UNDER INDIAN ARBITRATION AND CONCILIATION ACT 1996

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SUPERVISOR CERTIFICATE

This is to certify that Ms. Priyanka Swargiary is pursuing Master of Laws (LL.M) from National Law University and Judicial Academy, Assam has completed her dissertation titled "ISSUES IN ENFORCING FOREIGN ARBITRAL AWARDS AND ROLE OF PUBLIC POLICY UNDER INDIAN ARBITRATION AND CONCILIATION ACT 1996" under my supervision. The research work is found to be original and suitable for submission.

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DECLARATION

I, PRIYANKA SWARGIARY, do hereby declare that the dissertation titled "ISSUES IN ENFORCING FOREIGN ARBITRAL AWARDS AND ROLE OF PUBLIC POLICY UNDER INDIAN ARBITRATION AND CONCILIATION ACT 1996" submitted by me for the award of the degree of MASTER OF LAWS of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

Dated 15-07-2021

Place: Guwahati, Assam

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PREFACE

In the wake of globalization International Commercial Arbitration has taken the front seat in alternative dispute resolution across borders. It has become an aid in maintaining business relations between private parties in separate nations. The reason is has achieved to do so is because of the efficiency, lesser time consumption and economical features.

The reason that I have chosen this issue is because of the dire necessity of making arbitration and enforcement of foreign awards uniformed and void of judicial intervention. The absence of pro-arbitration legislation in the country had India in the list of un-favourable place for international commercial arbitration in last several years. The reason for it was the discretion to the judges for the interpretation of the term 'public policy'. Such discretion resulted in the judges using different notions of the term which has caused a lot of confusion as well as criticism to the Indian judiciary.

India holds enormous potential in becoming an arbitration hub. It will be possible if relevant amendments and reforms are brought in the legal framework. A number of changes have been introduced in the arbitration regime towards the right direction.

This research work aims to study such modifications.

Table of Cases

Table of Statutes

1908-Civil Procedure Code

1937-Arbitration (Protocol & Enforcement) Act

1961-Foreign Awards (Recognition & Enforceability) Act

1963-Limitation Act

1973-Foreign Exchange Regulation Act

1996-Arbitration and Conciliation Act

1999-Foreign Exchange Management Act

2000-Information Technology Act

2015-Arbitration Amendment Act

International Instruments

1949 - Geneva Convention

1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)

1985 – UNCITRAL Model Law on International Commercial Arbitration

Table of Abbreviations

AIR	All India Reporter
BALCO	Bharat Aluminium Company Limited
CAMP	Centre for Advanced Mediation Practice
CORD	Centre for Online Resolution of Disputes
CPC	Code of Civil Procedure
Edn.	Edition
FERA	Foreign Exchange Regulation Act
FOSFA	The Federation of Oils, Seeds and Fats Associations
HCL	Hindustan Copper Limited
IBA	International Bar Association
ICA	Indian Council of Arbitration
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
IDRC	Indian Dispute Resolution Centre
LC	Law Commission
LCIA	London Court of International Arbitration
ILA	International Law Association
Ltd.	Limited
MNLU	Maharashtra National Law University
NAFED	National Agricultural Co-operative Marketing Federation of India
NRI	Non- Resident Indian
NYC	New York Convention
ODR	Online Dispute Resolution
ONGC	Oil & Natural Gas Corporation
SC	Supreme Court
SCC	Supreme Court Cases
Sec.	Section
SIAC	Singapore International Arbitration Centre
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
V.	Versus
VIAC	Vienna International Arbitration Centre
Vol.	volume

Contents

1. Introduction

Arbitration is widely regarded as one of the most effective methods for settling business disputes, particularly those involving multinational parties, throughout the world. The Arbitration and Conciliation Act of 1996 governs arbitration in India (hence referred to as "the Act"). Parties who are signatories to the New York Convention[1] are covered by Part II of the Act, which includes the provision which relates with foreign awards.

The New York was introduced in the year 1958. The main objective of this convention was to reduce the uncertainties in international trade arrangements arising out of differences in legal regimes. The agreement was signed by India, which integrated it into the Foreign Awards Recognition and Enforcement Act of 1961, which was later substituted by the Indian Arbitration and Conciliation Act of 1996. The Act consisted of provisions which deal with issues of domestic and international arbitration including acceptance and execution of foreign arbitral awards. This act's principal purpose is to establish regulations for domestic and international arbitration and conciliation.

Sec 44 of the Act describes an arbitral award as “an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October 1960”. To be regarded a foreign arbitral award under section 44, an arbitral award must be made in conformity with an agreement to which the New York Convention 1958 applies or in a country which the Central Government has notified in an Official Gazette under the said section. The parties must constitute a commercial relationship for the award to be recognized as a foreign award. In order to distinguish a foreign award from a domestic award is to see that the arbitration clause or the agreement is regulated by law other than Indian law and not merely dependant on the fact whether the award was made outside of Indian borders. In India, the procedure and conditions for an award to be recognized and executed in the same way as that of any award delivered in India in an arbitration suit. A competent Indian court will order that such an award be filed, and the award will be used to make a decision.

[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

The awards contemplated under Part II relate to international commercial arbitration (ICA). The term International Commercial Arbitration is mentioned in sec 2(1) (f) of the Act but the definition of 'commercial is not provided in the Act. The term 'commercial' as explained in UNCITRAL Model Law includes matters and relationships of commercial nature and also include, "Any trade transaction for the supply or exchange of goods and services, Distribution agreements; Commercial agencies; Factoring, leasing, licensing, consulting etc.; Construction and engineering works; Investment, financing, banking, insurance, exploitation agreement or concession; Joint ventures and other forms of industrial or business co-operation; Carriage of goods or passenger by air, sea, rail or road"

The UNCITRAL adopted the Model Law on International Commercial Arbitration in 1985. The national laws were deemed to be incompatible with international norms. The Model Law was created in order to provide consistency to the law of international commercial arbitration. Articles 34(2) (b) (ii) and 36(1) (b) (ii) of the Model Law incorporates an exception to this principle. According to Article 34(2) (b) (ii) "An arbitral award may be set aside by the court specified in Article 6 only if the court finds that the award is in conflict with the public policy of this State" The basis of this principle under Article 34(2) (b) (ii) is more difficult to assess and maintains a relatively weak position that can be readily contested in the courts. According to Article36(1) (b) (ii) "Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that the recognition or enforcement of the award should be contrary to the public policy of this State."

Additionally, in contrast to the exposition defined in NYC, the Model law illustrates public policy in a different means. Serious deviations from core conceptions of procedural justice are to be viewed as public policy. This is all that is said in the UNCITRAL secretariat's explanatory note about the phrase "public policy."

To guarantee the fair execution of the award and establish the reasons for the award is also specified Part II contains the necessary laws that regulates the execution of foreign arbitral orders. Sec 48 of the Act incorporates fundamental policy of Indian Law as a reason or ground to deny enforcement; "Enforcement of a foreign award may be refused at the request of the party against whom it is invoked only if the party furnishes proof to the court…" and Sec 48(2) (b) "the enforcement of the award would be contrary to the public policy of India."

Controversy had arisen around the principle of public policy as expounded by the jurists arising out of the act. In 1994 Supreme Court Judgement, the three judges bench in *Renusagar*[2] delivered the following statement "as far as enforcement of foreign awards was concerned the duty of the enforcement court did not extend to review on merits at all to the extent." In this example, the principle of public policy had been implied in a constrained manner.

The connotation of the term public policy in India is used interchangeably with 'policy of law'. In a larger sense, courts can interfere, allowing a party to appeal against arbitral judgment based on inconsistencies, if it believes that such judgement has inflicted or may inflict significant damage to the party. An object of the contract that obstructs justice, violates a statute, or is contrary to the morals will be considered to be violating India's "public policy" and thus void, and would be unenforceble.

There's no denying that the apex court of India judgement in *Renusagar* had been the beginning point in conversation where the subject of national court's intrusion on public policy is brought up. Nowhere in the Act has public policy been defined or even what may constitute public policy but in the case mentioned above, in a narrow way public policy is held to be

1. Fundamental Policy of Indian Law
2. Welfare of India and
3. Equity or Morality.

As previously mentioned, this judgement was premised on private international law and was consistent with global practise in the majority or established arbitral jurisdictions, such as the United States and France. This ruling reaffirmed the notion that national courts should only intervene with arbitral verdicts on public policy grounds in rare situations. In addition, the Supreme Court said unequivocally that the defence of public policy may not be utilised to assess the merits of an arbitral judgement.

In a wider sense 'Patent Illegality' has been added as the fourth ground of public policy in *SAW Pipes ltd*[3]. Sec 34(2)(b)(ii) states that when an arbitral judgment is in contradiction to India's public policy, the Court has the authority to overturn it i.e. set aside. The Indian Supreme Court ruled here that the term "public policy" needed to be given a broader perspective than in the Renusagar case since the term "public policy" indicated elements involving the benefit and interest of the public. The Supreme Court stated that ONGC was not needed to show its loss as

[2] 1994 SCC Supl. (1) 644

[3] Oil & Natural Gas Corporation Ltd vs Saw Pipes Ltd on 17 April, 2003

a matter of law, and so was to be compensated for damages. Consequently, the Supreme Court overturned the decision on the premise that the arbitral panel erred in concluding that ONGC needed to establish that it has suffered damages to be compensated for them. The Supreme Court believed that a decision which has been delivered by the tribunal that is inconsistent with the laws of the state does not have the capacity to be considered in the interest of the state because it would have a detrimental effect on the administration of justice. In addition to the three elements laid forth by the SC in the Renusagar case, patent illegality was added as another basis of defence for an award to be declared invalid on the grounds of public policy. It ruled that an award was patently illegal if it violated substantive law, the Indian Arbitration Act, and/or the contract conditions. In a nutshell, every legal mistake committed by the arbitrators was included in this category.

These rulings have caused a great deal of debate and worry both onshore and offshore, with legal practitioners throughout the world warning that if left unchecked, such decisions will severely damage India's international reputation. These rulings effectively returned India to the pre-1979 period in England, when English courts may evaluate the basis of an arbitrator's judgement using a case-stated approach, creating a significant obstacle to the execution and expansion of foreign arbitration. The Indian ministry immediately recognised these issues, realising that its conflict resolution mechanism needed to upgraded with the country's fast-growing economy. The Indian government recently decided to take a number of steps to bring about legal reforms in order to solve the difficulties that these policies have caused.[4]

Chapter I & II of Part II of the Act relate to judgements delivered under the New York Convention and the Geneva Convention sequentially. The Court have the discretion to refuse to implement an award if the plaintiff presents proof to the Court that the agreement was ineffective or that the party did not get appropriate notification of the arbitrator's appointment or he was himself failed to state his defense. The other provisions concerned the execution of foreign arbitral verdicts are identical to those dealing to the execution of domestic awards; there are no differences in terms of award enforcement.

A major goals of the Act was to limit the function of courts as arbiters. With regards to this aspect, the Act specifies three instances in which the judiciary can get involved in an arbitral procedure: appointing an arbitrator, determining whether an arbitrator's mandate is terminated

[4] Sameer Sattar, 'Enforcement of Arbitral Awards and Public Policy: Same Concept, Different Approach?'

due to his failure to discharge functions, and disapproving a judgment where it violates the Act's regulatory laws relating to enforcement. It is unable to rely on the provisions of a single states, and hence, it differs in every state. The NYC does not direct as to how the elucidation of the public policy must be done. The international jargon's pro-enforcement slant is a public policy in and of itself. Therefore, national courts are at liberty to construe public policy as they see fit, and it is clear that public policy has been construed narrowly in most established arbitral jurisdictions. In light of the latest case of *Vijay Karia*[5], the Supreme Court affirmed the pro-enforcement bias. The New York Convention is controlled by a pro-enforcement bias which has the provision to be able to extend to the national courts.

In 1824, the term 'unruly horse' was used to describe the principle that, once astrided, one will never know where it'll end up and that it's never debated about till all other options have failed. Bribes and corruption, for example, are controlled by fundamental principles of law and justice.

In 2002, the ILA "Committee on International Commercial Arbitration" held a public policy conference and published a public resolution stating that "public policy" relates to the state's international public policy and encompasses:

i. Fundamental principles of justice or morality that the State wishes to protect even when it is not directly involved;
ii. rules designed to serve the State's essential political, social, or economic interests, known as "lois de police" or "public policy rules"; and
iii. the State's responsibility to respect its obligations to other States or international organisations.

The public policy exception to a tribunal judgment's legality or execution is a legislative acknowledgement of a contradiction involving party autonomy and the state's simultaneous concerns in dispute resolution and justice. The interplay of public policy and arbitration attempts to achieve a balance between both factors. However, there may be inconsistency between jurisdictions on the domain of the public policy exception. The importance of public policy is almost widely accepted as a suitable instrument for an external interference on the freedom to contract in particular, instructing dispute resolution mechanisms; however, there may be inconsistency between jurisdictions on the ambit of the public policy exception.[6]

The Law Commission of India issued amendments suggested several amendments to the Act in its 246th report in order to make the Act efficient and streamlined with the international

[5] 2020 SCC Online SC 177

[6] Gracious Timothy, 'The Final Chapter to the Public Policy Saga: The Arbitration Amendment Act, 2015'
[2016] Int. A.L.R., 56

standards. The law commission criticised *ONGC. vs. Saw Pipes Ltd*. for "opening the floodgates" and condemned *Western Geco*[7] and *Associate Builders*[8] for bolstering the expansive reach of public policy.

The Arbitration and Conciliation (Amendment) Act, 2015 introduced provisions proposed by the 246th Report by the Law Commission of India. In its Report No.246, it has urged that the Act must be revised. The Report suggested that s.34 (2A) be added which will exclusively govern the domestic awards, which can be adjudged invalidated by the court if the court finds that the award is tainted by "…patent illegality apparent on the face of the award". The suggested proviso to the proposed s.34 (2A) emphasised that such "an award shall not be thrown aside solely on the premise of an erroneous interpretation of the law or by re-appreciating evidence" to create a balance and prevent undue interference.

Additionally, as the whole world and mostly every sector has been hit by Covid 19, this paper has made a study on how the Covid 19 has affected the procedures for arbitration in any way. Does the pandemic widen the scope for the interpretation of the term public policy or narrows it down? And how has the pandemic made a difference in the arbitrational rules and how have the authorities taken measures to keep up with the desperate times.

1.1. Statement of Problem: The issue that will be dealt with in this dissertation is related to the role of public policy in enforcing foreign arbitral awards in India. The subject matter is a vital part of the international commercial arbitration wherein disputes related to commercial transactions between two or more international entities are resolved. This process of international commercial arbitration is an alternative method of dispute resolution which is far more economical and less time consuming than litigation in national courts. In order to make the process of arbitration across national borders effective it is crucial that the awards which are decided in the settlement are enforced accordingly. The problem in the subject matter is whether the courts can examine the legality of the award and to what extent. A number of jurisdictions have adopted a restrictive and narrow interpretation of public policy for the term 'public policy', in India it has remained the best defence for the losing party since quite a long time in a number of cases. This paper will deal with the interpretation of public policy by the

[7] CIVIL APPEAL NO.3415 OF 2007

[8] CIVIL APPEAL NO. 10531 OF 2014 (ARISING OUT OF SLP (CIVIL) NO.14767 OF 2012)

courts in various cases and the impact of the interpretations. And has the pandemic made any difference in understanding of public policy or any of its elements.

1.2.Aim(s) : The aim of this dissertation is to analyse the growing importance of arbitration in international business transactions. This paper shall aim to study how increased judicial intervention in arbitration can reduce the efficiency of Indian Arbitration. In this paper, the author shall study the framework that governs arbitration and enforcement of foreign arbitral awards. The author shall also study the role of public policy in enforcing foreign awards. Another objective of this research is find out if the pandemic has made any impact on the interpretation of public policy.

1.3.Research Objectives:

i. To study the concept of arbitration in international commercial transactions.
ii. To analyse how the foreign arbitral awards are enforced in India.
iii. To understand what is public policy.
iv. To study the issues which arise while enforcing the foreign awards.
v. To study the legal provisions that govern the enforcement of such awards.
vi. The role of public policy under the Act for executing an award.
vii. To study the 2015 amendment and the changes brought by it.
viii. To find out how the pandemic has made an impact on the implementation of foreign arbitral award.

1.4.Scope and Limitation:

The study on this dissertation extends to the study of Indian arbitration system and its regulatory framework and how the grounds of public policy affects the efficiency of Indian arbitration. This paper shall put emphasis on the execution of foreign arbitral awards and the challenges that it faces. The concept of public policy is not defined concretely which gave the courts discretion to regard public policy in a wider sense or in narrower sense. While there have been many instances where the courts have construed the narrower sense of public policy, the international arbitral system have criticised the Indian judiciary while interpreting the wider sense. Resulting in increasing judicial intervention which defeated the purpose of the NYC and Model Law. This paper shall study how the interpretation of public policy in its wider sense

have affected the image of India Arbitration globally and its effectiveness in enforcing foreign arbitral law in India and has it been affected by the pandemic in any way.

Recent reforms in this regard shall also be studied. This study will be limited to

a. Understanding the history of application of the concept of public policy.
b. Understanding the consequences of adopting a narrow sense of the public policy and the wider sense of public policy.
c. Analysing the provisions and legal framework relating to enforcement of foreign arbitral awards in India.
d. Study the recent reforms in interpretation of public policy.

A major limitation of this research was the lack of access to materials in the wake of Covid 19 pandemic and paucity of time.

1.5.Literature Review:

i. "Role of Public Policy Under The Arbitration And Conciliation Act, 1996, For Setting Aside An Arbitral Award" by Priyadarshini, in this article the author has discussed about the several cases where public policy has arisen as an issue in enforcing arbitral awards and the role that it has played in arriving at a decision.

ii. Public Policy and International Commercial Arbitration by Mark A. Buchanan, this article defines the three levels of public policy: domestic, international and transnational. It also studies application of public policy to ICA.

iii. Indian Arbitration and "Public Policy" by Amelia C. Rendiero, analyses India's oft-criticized law surrounding public policy as applied to arbitral awards.

iv. The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India by P. Mahajan, discusses the doctrine of public policy in India and judicial interventionist culture in the matters of enforcement of foreign arbitral awards, this article delves into the public policy exemption, which if used irresponsibly, retards the successful completion of international arbitration. The paper further highlights the urgency to eliminate excessive court interventions in order that the objectives of arbitration as an effective mode of alternative dispute resolution stands achieved.

v. The Scope of Public Policy under the Arbitration and Conciliation Act, 1996 by O.P. Malhotra, in this paper the author examines the true meaning of the term "public policy" under the Arbitration and Conciliation Act, 1996, for the purpose of setting aside arbitral awards. The

author surveys contrasting judicial decisions and defends the much-maligned decision of the Supreme Court of India in ONGC v. Saw pipes.

vi. Emerging Trends in the Enforcement of Arbitration Awards by A.K. Ganguly, the author has made a study upon the how arbitral awards are enforced in India. It studies how the various international conventions is used as a foundation to formulate the Indian regulations and also the limits of judicial intervention with regard to public policy.

vii. Public Policy and Indian Arbitration: Can The Judiciary and the Legislation rein in the 'Unruly Horse'? By Jahnavi Sindhu, this paper traces the history of the contraction and expansion of the term public policy to demonstrate that the problem runs deeper than that of mere interpretation and is one of underlying attitudes in respect of arbitration as an alternative and thus highlights the uphill task left for the judiciary even after legislative intervention.

viii. Public Policy and Setting Aside Patently Illegal Arbitral Awards in India by Badrinath Srinivasan, here the author has made an attempt to study the meaning and scope of Patent Illegality as the fourth dimension of Public policy which widens its scope. This paper studies the various cases in which the Judiciary have interpreted the wider notion of public policy in enforcing of an arbitral award.

ix. International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions by Clearly Gottlieb. In this journal it has discussed the changes that have been brought in by the Covid 19 pandemic and how has it evolved in recent times to keep up with the drastic turns that have been caused by the restrictions due to the pandemic.

x. Global Impact of the Pandemic on Arbitration: Enforcement and Other Implications by Aram Aghababyan, the author in this article has made some notes on how the arbitration procedure and enforcement of awards have been globally hit by the pandemic

1.6.Research Question :

i. What is the meaning of "International" in "International Commercial Arbitration" and is does it have the same legal framework in international and domestic arena?

ii. What is the significance of "International Commercial Arbitration" today and how is the execution of a foreign arbitral award regulated?

iii. What is the role of public policy in enforcing foreign awards in India and how is it interpreted by the Indian Judiciary?

iv. What is Patent Illegality and why is the wider notion of public policy criticised?

v. How does it affect the efficiency of arbitration procedure in India and what steps have India taken to strengthen its implementation of foreign arbitral awards and minimizing court interference?

vi. How has Covid 19 made an impact on arbitral procedures and affected the execution of foreign arbitral awards. Does it mean that such changes may affect the interpretation of public policy in covid times?

1.7.Research Methodology:

For the purpose of this dissertation, the researcher has used the legal doctrinal method. The data that has been collected for this study is based on secondary data such as published books, articles, journals and online websites & blogs. All the data that was collected was of qualitative nature.

The researcher has analysed the various case laws related with the subject along with the qualitative data gathered from the various sources.

The researcher has made an attempt to study the current scenario of the interpretation of public policy in enforcing foreign arbitral awards in India. The researcher has followed OSCOLA for citation and footnoting all through the paper.

1.8.Research Design :

The research pattern of this seminar paper includes the following structure:

a. Chapter 1 : Introduction
b. Chapter 2 : This chapter deals with understanding the legal framework of international commercial arbitration in India and its history. It also studies the procedure by which arbitration is conducted.
c. Chapter 3 : In this chapter it elaborates on what is an award and the issues in the implementation of foreign awards in India.
d. Chapter 4 : This chapter discusses the role of public policy and its interpretation in the Indian judiciary and the cases where the judiciary have interpreted the narrow and wider meanings of public policy.
e. Chapter 5 : In this chapter, the current position of interpretation of public policy have been discussed and the amendments brought in the Act in order to finalize the issue of public policy.

f. Chapter 6 : here, the author has researched about the effects of Covid 19 on international arbitration globally and in India and has it affected the interpretation of public policy while enforcing foreign arbitral awards/
g. Chapter 7 : This chapter consists of the conclusion and suggestion on what measures can be taken to make arbitration procedures effective during pandemic and post pandemic.

2. INTERNATIONAL COMMERCIAL ARBITRATION IN INDIA

Arbitration law is founded on the notion of diverting a contention from the traditional courts and facilitating power to the parties to replace it with a domestic tribunal comprised of arbitrators of their discretion. Russel has put it as, "arbitrator is neither more nor less than a private Judge of Private Court (called an arbitral tribunal) who gives a private judgement (called an award)."[9] Someone, to whom the parties submit disagreements or conflicts, and who adjudicates on their behalf is an 'arbitrator'. As a result, his responsibilities are quasi-judicial in character.

Any contention between parties relating to business transaction, such as "…shipping, sale, purchase, banking, insurance, building construction, engineering, technical assistance, scientific know-how, patents, trademarks, management consultancy, commercial agency, labour, and so on", arising between parties in India or a party in India and another in a foreign country, is subject to arbitration under Indian law.

2.1. History Of Arbitration In India

Arbitration can be traced back to the ancient Indian system of village panchayat.[10] During the 20th century, arbitration in India was regulated by Indian Arbitration Act of 1859, which had restrictive application and a second schedule of the CPC. Thereafter it was later repealed by by the Arbitration Act, 1940. Section 8 of that act gave the court the right to elect an arbitrator in response to an application made in that regard, and sec 20 gave the court broader authority to direct the filing of arbitration agreement and appointment of arbitrator. The act also allowed for the filing of the award in court, the making of the award a court rule, and the opportunity to have the award satisfied on specific reasons, as well as an appeal against the verdict on such a petition. The Arbitration Act, 1940 was repealed by sec 85 of the Arbitration and Conciliation act of 1996, repealed the earlier Act of 1940.

[9] Russel : On Arbitration, 20th Ed., p.140

[10] DR. N.V. Paranjape, *Law Relating to Arbitration and Conciliation in India,* (1st edn, 1999)

The Act of 1996 was enacted in response to the increasing complexities of modern business transaction as a result of economic globalization, which necessitated the establishment of efficient redressal mechanism for the prompt resolution of domestic and international commercial dispute in order to ensure steady flow of trade and commerce. The arbitration and Conciliation, Act 1996 was intended to comprehensively cover international commercial arbitrations and conciliations as also domestic arbitrations and conciliations. It envisages the making of an arbitral procedure which is fair, efficient and capable of meeting the needs of the globalised economy.

2.2. International Commercial Arbitration in India

Efforts were already being made by the United Nations to work out a comprehensive uniform Model Arbitration Law at the International level which could be adopted by the member countries with suitable modifications keeping in view their domestic needs and national laws. For this purpose, Model Law on International Commercial Arbitration was adopted in the United Nations Commission on International Trade Law (UNICTRAL) on 21st June, 1985. The General Assembly, in its resolution recommended that all states should adopt UNICITRAL Model Law on International Commercial Arbitration. India being a member country, has adopted the UNCITRAL Model Law by enacting the Arbitration and Conciliation Act, 1996 with a view to bringing about uniformity in arbitration procedures and meet the needs of International Commercial Arbitration in its commercial transaction with foreign countries.

There have been numerous incidents previously where the international parties have had to experience excessive judicial intervention resulting in delays in reaching a conclusive determination of their disputes in arbitration. Such arbitrations in the past were marred with the procedural and substantive lacuna present at every step on the way in the 1996 Act.[11] Due to such experiences of judicial intervention in the arbitration process in India, the arbitral regime of the country has been seen as an unfavourable destination to arbitrate. Therefore most of such international commercial arbitration disputes are centred outside India in order to avoid all the hurdles and barriers that the Act of 1996 presented. The international community is keeping a close watch on the development of arbitral regime in India due to the controversial

[11] Kamshad Mohsin, 'International Commercial Arbitration in India' [2020] Available at SSRN: https://ssrn.com/abstract=3552146 or http://dx.doi.org/10.2139/ssrn.3552146

decisions by the Indian judiciary in cases involving foreign party. The Indian Judiciary has been often criticised for its interference in the international arbitrations and extraterritorial application of domestic laws in foreign seated arbitrations.

With the increasing role of international trade and developing economy, the risk of commercial disputes have also grown substantially. Therefore, the importance of international dispute resolution mechanism including arbitration as a means of resolving trade disputes has assumed greater importance in recent decades. The recent trends in international commercial arbitration based on UNCITRAL Model Law clearly indicates that there has been greater emphasis on:

i. Independence of party and no involvement of Court in the arbitral proceedings;
ii. Institutional arbitration is preferred over ad hoc arbitration.
iii. Rather than going to court, use the arbitration process.

The adoption of a Model Law on international commercial arbitration is justified by the fact that, as Indian economy has become more liberalised and globalised in recent years, increasing numbers of non-resident Indians (NRIs) and institutions interested in foreign investment have set foot in the Indian market, necessitating a re-scripting of the Arbitration Act of 1940 to be upgraded with the changes in the domestic market.

2.3. Arbitration Proceedings

For any arbitration procedure to in be initiated the most important prerequisite is the arbitration agreement under sec7 of the Act. The arbitration agreement can be in the form of a clause or a separate agreement. It has to be written down and signed by both parties.

In *P.A.G Raju*[12], The Supreme Court concluded that an agreement to arbitrate is not required for arbitration since the court has the authority to refer the parties to arbitration if one party goes to court to refer their dispute to arbitration and the other party puts no objection. The parties' agreement is the most critical criterion. In *Bihar State Mineral Dev. Corpn*[13] the court held that the existence of present or future differences between the parties, the purpose to settle such differences, an agreement in writing which binds the parties to the decision of the tribunal, *consensus ad idem*, and clear consent to refer the disputes to arbitration are all necessary elements of an arbitration agreement. A notice from one party to the other is required under

[12] *AIR 2000 SC 1886*
[13] *AIR 2003 SC 3688*

s.21 of the Act. The goal of the notification provided under this clause is to help the parties arrive at an arrangement on the appointment of an arbitrator. The objective of this section is to ensure that the defendant is aware of the claims.

Under sec 10 of the Act, the parties have the freedom to choose u the number of arbitrators and the parties can negotiate on the method for the appointing of the arbitrators(s) under sec 11

The Act grants the parties the power to agree on the procedural norms that would govern the arbitral procedures under s.19. If the parties fail to do so, the panel is given broad discretionary powers to shape the arbitral procedures. Sec 20 states that the parties can determine the venue of arbitration, and if a consensus is not reached, the arbitral tribunal must determine the location in a judicial manner. The location of arbitration is important in arbitral proceedings since it defines the substantive law that will be followed. Parties are provided the power to agree on a language under s.22 which shall be adopted in the conduct of arbitral proceedings. The language will be used in the parties' written submissions, any hearings, the arbitral award, and any other communication from the tribunal. If the parties unable to reach at a consensus regarding the matter than tribunal shall make a choice.

After the parties or the arbitral tribunal has determined such provisions which shall determine how the procedure shall be conducted, sec 23 provides that the parties shall state claims and defense in front of the arbitral tribunal within a time frame approved by the parties or ascertained by the tribunal.

Hearings and written proceedings are governed by sec 24 of the act, which discusses how the arbitral proceedings should be handled. The arbitral hearings are discontinued either by the final award or by an order of the arbitral panel terminating the arbitral proceedings. The arbitral tribunal ends the arbitral proceedings in any of these cases where:

1. the plaintiff withdraws the complaint and the defendant does not object;
2. both parties agree to disconnect the arbitral proceedings; or
3. the arbitral proceedings have become infeasible or insignificant in light of the current facts of the matter.

Also, the arbitral tribunal authority is also dissolved when the arbitral procedure are concluded, and the arbitral tribunal becomes *functus officio*. The term “functus officio” means no longer holding office or having official authority once a decision is rendered. The word “functus officio” refers to someone who know longer holds office or has official authority once the decision is made.

21st century is witness to massive developments in globalization. It means that people are now closer than ever. Globalization has impacted the business industry in such a way that cross border transactions are easier than ever. It is important that we understand that an increase in International trade and transactions across borders means that it is accompanied by trans-national commercial disputes. Disputes of international nature need effective resolution methods in order to maintain trade relations among the states. Such effective resolution measures ensures expansion of the global trade and boost to the economy.

International Commercial Arbitration is an alternate means to resolve disputes which arise between parties to international commercial transactions. It has become a popular method of resolving disputes and has a number of advantages over a traditional reliance on the judiciary; since the parties to the dispute are able to confirm neutrality in process of arbitration, the arbitration process can settle the dispute under a lower expense than that of litigation and it ensures speedy conclusions in comparison with national judiciaries with court delays resulting in lengthier process.

2.4. Terminology

In order to understand the theoretical aspects of international arbitration the essential step to learn is the meaning of the term ‘international commercial arbitration’. The term ‘international’ directs at such method where the line between domestic/national arbitration and arbitration which go beyond such national and domestic boundaries is delineated. Such concept of International Arbitration can be referred to as ‘transnational’. Arbitration is administered by the laws of the jurisdiction where it is decided, according to present context. As a result, an arbitration which is decided within a State is considered a domestic arbitration. On the other hand, several governments differentiate between domestic and international arbitrations. One of the consequences could be that the kind of conflicts that can be taken to an international arbitration differ from those that can be presented to a domestic arbitration. Antitrust claims, in a number of territories can be filed in an international arbitration and cannot be raised in a domestic arbitration. Similarly, some States will only allow the State or State-owned entities to enter into genuine arbitration agreements if the arbitration will be held globally. Finally, several States have distinct rules governing domestic and international arbitrations, following the Model Law's lead. As a result, national law governs the distinction between domestic and

international arbitrations. There is no universally recognised difference, and there is no need for one because the New York Convention covers "foreign" awards.[14]

Any sort of transaction between traders in the regular in their business operations is referred to as a commercial contract. Apart of being governed by usual regulations it is also regulated by a particular code of commercial law. UNICITRAL Model Law defines which arbitrations will be constituted as international in article 1 but it does not define what construes as commercial but it is mentioned that the term 'commercial' "should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not." Commercial relationship, according to the Model Law, include business transaction for the provision of goods or services " distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licencing; investment; financing; banking; insurance; exploitation agreement or concession and joint venture and other transactions".[15]. The NYC purports that a distinction must be there in order to distinguish "commercial" from "non-commercial arbitration". This is expressed in the Article 1(3) which states that, "When signing, ratifying or acceding to the Convention…, any state may declare that it will apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration"[16] – NYC lays down that the word 'commercial' should be characterized in accordance with national legislations.

The term 'arbitration' is not defined in any national or international code as it is regarded to be unnecessary and difficult to formulate. It is understood that by keeping the term 'arbitration' outside the scope of any definition the borders will manage to adjust according to the ever changing perspectives over the course of time as to what the correct arbitration scope should be.

The Act, defines international commercial arbitration in sec 1(f) as "an arbitration relating to dispute arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India…" According to the Indian arbitration and conciliation act at least one of the parties to the dispute must be-

i. an person who is a national or a habitual resident of any nation other than India;
ii. a corporation which is established in any country other than India; or

[14] United Nations Conference On Trade and Development, *Dispute Settlement: International Commercial Arbitration* [2005] ch 5.1
[15] UNCITRAL *Model Law on International Commercial Arbitration*;
[16] Supra 1;

iii. an association or a group of individuals whose core management and control is

iv. regulated+74\ in any country other than India; or

v. the Government of a foreign country[17]

The requisites for any arbitration to be considered as an international commercial arbitration suggests that there must be the presence of a foreign element which distinguishes between international and domestic arbitration.

2.5. A favoured practice

The justice system endeavours to deliver a quick, cost effective & efficient litigation and the system of arbitration delivers the same. Arbitration process has existed since the dawn of civilization. It is a kind of mechanism that offers the parties to a dispute an alternative to settle their conflicts informally either through agreement or by intervention of a third party. Certain circumstances require parties in a conflict to settle their differences among themselves in a manner which is in mutual understanding resulting in a peaceful solution. Such settlement between the parties to the dispute facilitate intact future relationships and resolve the dispute smoothly. However, by and large the parties prefer the terms of the settlement in their own favour and unable to negotiate and reach to a mutually acceptable settlement. Thus the aid of a third party is sought. One way to solve a dispute by involving a third party is litigation, the other is to solve such dispute at private capacity. Among the various methods of solving a dispute via private mechanisms, arbitration is the most prominent one of them.

Arbitration process is consensual. It means that the process of arbitration shall be initiated with the consent of the parties. All the disputants must have consented to arbitrate the issue that has arisen between them. In the majority of cases, arbitration is merely semi-consensual. The majority of arbitration agreements are written as an arbitral clause in the main contract. This arbitral clause indicates that any dispute that arises in the future shall be settled with the arbitration mechanism. Arbitration isn't an element of the state court system and, as previously said, it is a informal procedure based on party agreement. Nonetheless, it serves the same purpose as litigation in the state court system. The decision of the arbitral panel is enforceable by the courts. As a result, the State has a stake in the conduct of arbitration in addition to its interest in resolving conflicts through other mechanism that are also alternate to litigation. As

[17] Arbitration & Conciliation Act 1996;

a result, several governments have imposed severe controls on arbitration in the past. The fact that arbitration legislation is contained in the Code of Civil Procedure in many nations demonstrates the strong relationship between arbitration and litigation. The current tendency is to provide the litigants and the arbitral tribunal complete discretion in the execution of the processes, with the exception of the duty of good faith set out in Article 18 of the Model Law. "The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case."[18]

The informal nature of arbitration has resulted in confidentiality between the parties in deciding the terms of negotiation for the settlement of the dispute. Confidentiality therefore has become some kind of an article of trust in the arbitration. It was agreed that no information concerning the arbitration, including its existence, would be disclosed by the parties, arbitrators, witnesses, specialists, or any other supporting officials.[19] The sole exception to this rule is if one of the parties need the court's assistance in connection with the arbitration or to annull or execute an arbitral judgement.

When parties agree to have their issues arbitrated, they relinquish their right to have them determined by a national court. Alternatively, they settle their matter privately, outside of the legal system. As a result, the arbitration agreement both relinquishes one essential right – the right to have the issue decided in court – and generates new ones. The rights it establishes are the rights to determine how the issue will be resolved. The agreement that the parties sign, will consist the rules that they opt for that will regulate the procedure, the arbitration venue, the language, and the legislation that will govern the arbitration.

Because most arbitration laws expressly provide that arbitral judgments are binding on the parties when they choose to resolve their matter through this mechanism, it results in a final and conclusive decision of the parties' resposibilities and duties. For example ICC Rule 28(6) provides, "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…" Article III of the NYC requires that all the current contracting states "to recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the awards is relied upon…"

Usually when the actions of the parties or any disagreement among them regarding any issue related to their commercial relationship arises, it results in a conflict of interests. The issues

[18] Supra 15

[19] Supra 14

relating with the business transaction needs to be attended solved by experts on the matter which the judges of the states or the lawyers are less likely to be. Arbitration allows parties to appoint experts with specialised knowledge to come to a decision or settlement on the dispute. The opportunity to appoint arbitrators with expertise is only available in jurisdictions that do not have restrictive arbitration policy that allows only lawyers to be appointed as arbitrators.

In such states, in relation with construction arbitration, it is up to the parties to choose an arbitrator having a technical expertise on the subject matter i.e., architect, engineers as well as lawyers. In trade related arbitration conducted by trade association, the arbitrators to be chosen by the arbitrator must have a minimum years of experience respective trade.

Another important factor for opting for international commercial arbitration is the option to decide seat of arbitration. There are concerns regarding court's independence when the state is party to the dispute. The presence of several factors which may influence the decision of the courts in such way makes the foreign party uncomfortable in litigating against it there. And while litigating in foreign courts, the parties have an additional burden of litigating with an unfamiliar procedure, with a foreign language and appointing lawyers who aren't familiar with their company along with the expense and inconvenience of staying in a foreign country.

Arbitration as a process reduces such inequalities which a party may face in the process of litigation because it gives them the option to select arbitration organisation/seat located in a third country. The convenience of executing an award, as opposed to enforcing a foreign court judgement, would be the last reason for international commercial arbitration's present popularity.

2.6. Role of the Courts

The execution of foreign arbitral decisions in India is built on the basic notion of minimum court interference to promote India's pro-arbitration and hence pro-foreign investment environment. To make this feasible, the extent of such defences accessible to the unsuccessful parties in the dispute must be limited by enacting the relevant rules and laws pertaining to the execution of international arbitral decisions.

The parties must submit a petition in order to begin a streamlined and one-stop mechanism for executing a foreign arbitral judgement in India. The defeated party can make any objection under the defences provided under the Arbitration and Conciliation Act 1996. The court will then decide whether the award is consistent with the Act's intent. After it is determined that the award complies with the Act, it is actionable in the same way that a court order is.

In *Vedanta*[20], Supreme Court evaluated the scheme contemplated under Chapter I Part II of the Act. The Supreme Court ruled that a foreign award does not constitute a "foreign decree" at any juncture during the procedure, and that awards are only enforced once the court determines that they are enforceable under Part II of Chapter I of the Act. A foreign award must pass secs 47 and 49 in order to be considered a "deemed decree." The requirements of Sec44A read with Sec 13 of the Civil Procedure regulate the execution of a foreign decree.

Due to the involvement of the Indian courts, the execution of foreign arbitral awards in India has been in controversy for a long time. Section 47 of the Act states that in any case where the award appears to be inconsistent to Indian public policy, the court has the authority to decline execution of the award. Although this clause limits the enforcement of awards, it does not explicitly define the word “public policy”. This has given the courts discretion to consider public policy the option of a wide scope of public policy. Wide spread discussion of the definition of the term “public policy” brings inconvenience and delays in deciding whether the awards are enforceable or not.

2.6.1. Enforcement under New York Convention

Foreign awards issued under the New York Convention are dealt with under Sections 44 to 52 of the Arbitration and Conciliation (Amendment) Act, 2015.

The New York Convention defines a "foreign award" as an arbitral award made on or after October 11, 1960, on differences between individuals arising out of legal ties, whether contractual or not, that are considered commercial under Indian law.

i. In accordance with a written agreement for arbitration that complies with the first schedule of the convention applies, and

ii. Once the Central Government is convinced that equivalent measures have been implemented, it may declare one or more of these regions to which the Convention applies by publishing a notification in the Official Gazette.

It is evident from the above requirements that there are two pre-conditions for foreign awards to be enforced under the NYC. They are:

i. The nation has signed NYC.

ii. The award shall be given in defendant’s territory that is has made reciprocating provisions and determined by the Union govt.

[20] CIVIL APPEAL NO. 3185 OF 2020 (Arising out of SLP (Civil) No.7172 of 2020)

Either of the parties who seek that the award should be executed in the country must present the court with (a) the initial award or a duly authenticated copy thereof; (b) the original arbitration agreement or a duly authorized copy thereof; and (c) any proof which establishes the fact that the award shall be constituted as a foreign award at the time of the request of execution, according to Section 47. The new Law stipulates that now the application/appeal must be filed with the High Court for the enforcement.

Following the filing of a plea for execution of a foreign award, the defendant may file an objection to enforce under Section 48 of the Act. These reasons include the following:

a. the signatories to the agreement mentioned in section 44 were incapable under the law governing them, or the said agreement is invalid under the law to which the parties are subjected to, or, if there is no indication of this, under the law of the land where the award was rendered; or
b. The party did not receive intimation of the arbitrator's appointment or the arbitral proceedings, or could not represent his case; or
c. The award resolved an issue which did not fall within the scope of the arbitration agreement, or it incorporates rulings on issues not covered by the arbitration submission: The section of the award comprising the judgments on subjects submitted to arbitration may be execute if the rulings on topics submitted to arbitration can be differentiated from those not submitted.; or
d. The arbitral authority's structure or process did not conform to with the party's agreement, or, in the absence of such an agreement, with the laws of the country where the arbitration was held.
e. The award has not yet been rendered obligatory on the parties, nor has been set aside or stayed by a appropriate authority in the country where it was made, or under the laws of the country where it was made.
f. Under Indian law, the key issues of the matter is not amenable to arbitration arrangement;
g. Award's execution would be against India's public policy.

The Amendment Act has narrowed the definition of a breach of public policy in "international commercial arbitration" to awards that are: (i) tainted by deceit or corruption, (ii) in violation of Indian law's basic principle, or (iii) at odds with morality or justice.

If the appropriate authority receives an application for an setting aside or suspension of an award, then the court may decide to stay the execution of the award request the party who has challenged the award to provide sufficient security.

As soon as the foreign is deemed to be consistent with Indian laws and the Court believes that the award can be executed then the award shall be treated as decree by the Court.

2.6.2 Under Geneva Convention

The Arbitration and Conciliation (Amendment) Act, 2015 comprises sections 53-60 that deal with international awards made as per the Geneva Convention.

According to the Geneva Convention, a "foreign award" is an arbitral ruling rendered after July 28, 1924, on issues related to matters deemed commercial by Indian law-

a. Which follows an arbitration agreement where the Protocol of the Second Schedule is applicable;
b. Individuals bound by the rules of one of these Authority such as the Union Government after the satisfaction of the reciprocal provisions been made, may proclaim themselves as parties to the Convention in accordance with the third schedule by notification in the Official Gazette, and
c. An award shall be rendered as conclusive if it is awarded in those territories that the Union Government, after satisfaction of the reciprocal provisions been made, declares to be the areas where the convention is applicable by similar notification,
d. In any nation where the award was made, actions to challenge the award's legitimacy are pending.

Section 56 states for the execution of the awards, the desiring party shall present in the court (a) the initial award or a duly authenticated copy of the same; (b) evidence which exhibits that the award is conclusive; and (c) proof that demonstrates the award was decided in accordance with a valid application to arbitrate with regard to the applicable statute. According to the new Act, the sole option for enforcing a foreign award is to approach the High Court.

S.57 of the Act provides the requirements necessary for executing the foreign awards under the Geneva Convention. Following are some of the given requirements:

a. The award was made as a result of an arbitration filing that was legitimate under the applicable legislation.
b. Under Indian law, the award's subject matter might be settled by arbitration.
c. The arbitral panel which has been designated as per the agreement or established via mutual decision by the parties and in conformation of the law regulating the arbitration rules rendered the ruling;
d. The award will be considered final if the country where it is made, but it will not be recognised as so if it is challenged or appealed, or if it is proved that any processes to dispute the award's validity are pending;
e. Indian public policy is to be taken in consideration while enforcing the award.

The definition of a breach of public policy in international commercial arbitration with regards to awards has been restricted by the amendment act which are: (i) tainted by deceit or corruption, (ii) in violation of Indian law's basic principle, or (iii) at odds with morality or justice.

The stated clauses, however, indicates that even if the aforesaid conditions are satisfied, the Courts may deny the enforcement of the judgement they are convinced of the following-

a. In the nation where it was made, the award was revoked;
b. The defendant didn't get notified to be aware of the arbitration proceedings to allow him to state defence; or he wasn't properly represented because he was legally capable;
c. The award neither addresses the differences given within the parameters agreement, nor does it contain decisions on issues not covered by it: If the award does not address the given problems before the arbitral panel, the Court may postpone enforcement or allow with certain restrictions that the Court considers suitable.

Besides that, whereas if party against whom award is rendered exhibits that there is some other ground there under rules regulating the arbitration procedure that enables him to challenge the award's validity, the Court may, if it pleases, deny execution of the award or put a stay to its consideration, offering such party a suitable period to have the award revoked by the comity.

If the Court is convinced that the foreign award is actionable under this Chapter, s.58 requires the award to be treated as a decree of the Court.[21]

2.6.3. UNCITRAL Model law

The Model Law is built on three pillars: party autonomy, judicial minimization, and a fair and efficient arbitral system. The Model Law was approved by a number of countries to show their commitment to promoting trade and business by resolving disputes quickly. India also believed that by adopting the Model Law, it would become a more appealing location for Alternative Dispute Resolution Mechanisms and improve the flow of investment into the country. As a result, the 1996 Act was passed in part by adopting the Model Law. The Model Law's

[21] India: Enforcement of Foreign Awards in India
https://www.mondaq.com/advicecentre/content/3100/Enforcement-of-Foreign-Awards-in-India
accessed 14-07-2021

cornerstones of party autonomy, judicial simplicity, and fair and expeditious arbitral processes were not changed.

The same terms are used in Section 18 of the 1996 Act as they are in Article 18 of the Model Law. This indicates the Model Law's resemblance to the 1996 Act. When it comes to minimum judicial intervention, Indian law is clearer than Model Law when it comes to the former "Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except when so provided in this Part."[22]

The Model Law stipulates that the court will not interfere unless it is specifically requested.

One of the main goals of the Model Law in adopting this provision was to avoid the arbitral procedure from being slowed and frustrated by resort to the courts. The adoption of restricted grounds for challenging arbitral judgments in the seat of arbitration based on the grounds of the New York Convention was one of the main ways in which the Model Law addressed frequent court involvement. The decision to accept the New York Convention's grounds was made for two policy reasons.

Model Law gives limited ground for challenging an arbitral award. This is due to the theory that an award once passed is final and binding on all the parties

[22] Arbitration and Conciliation Act, 1996 sec 5.

3. Challenges In Enforcing Foreign Arbitral Award

Arbitration has become one of the most prominent forms of alternative conflict settlement. It downplays the importance of courts in the administration and distribution of justice.

Although arbitration awards are often damages awards against a party, tribunals in many jurisdictions have a variety of remedies that can be included in the award. These may include the following:

a. Payment of a any amount also known as conventional damages
b. a "declaration" can be issued for any matter to be decided during the proceedings
c. in given areas, the power of the court shall be rendered to the panel such as:

i. commanding a party to do or abstain from doing something ("injunctive relief")
ii. specific performance of the award may be commanded
iii. ractification, setting aside or cancellation of a deed or other document may be commanded.

d. In certain nations, the tribunal's powers may be restricted to assessing whether a party is entitled to damages unless the parties have explicitly granted the arbitrators the ability to do so. It may lack the legal ability to grant injunctive relief, make a declaration, or correct a contract, as such functions are left to the courts' exclusive jurisdiction.[23]

Arbitration procedures, by their very nature, are not appealable in the traditional sense. In most nations, however, the court retains the role of a supervisor, with the power to deny execution of awards in severe circumstances, such as deceit or major legal irregularities on the part of the tribunal. Set aside procedures apply only to domestic arbitral awards.

There is a small but important body of case law in American arbitration law that deals with the courts' ability to interfere where an arbitrator's judgement is fundamentally inconsistent with the relevant legal principles or the contract. Recent Supreme Court rulings, however, have created doubt with regards to certain aspect of these particular case laws

Regrettably, there is minimal consensus among the many American decisions and available literature on the existence as well as the condition of application of such a distinct concept. It does not appear that it has been employed in any documented judicial ruling. However, to the extent that it exists, the principle would constitute a significant departure from the usual rule that awards are not open to judicial review.

When UN General Assembly enacted the UNCITRAL Model Law and recommended the members nations to adopt suitable law founded on the model statute, the Apex Court proposed

[23] Arbitration, https://en.wikipedia.org/wiki/Arbitration accessed 14-07-2021

simplification of the law of arbitration, freeing it from the constraints of technical interpretation norms.[24]

The Arbitration (Protocol and Convention) Act of 1937 and the Foreign Awards (Recognition and Enforcement Act) of 1961 regulated the enforcement of foreign awards in India. Except for section 3 (in both acts), these two legislation did not deal with international arbitration per se, rather it set out the requirements for "enforcement of foreign award" in the nation. Both the statutes have provisions where either of the parties to the dispute have filed for any legal proceeding anywhere in India, and any party to the same dispute may apply for putting a stay on the proceedings before the competent court prior to filing a written statement or appearance or any other step in the proceedings. For granting a stay to the proceeding the court will have to be convinced that the said award is null and void, cannot be operated or incapable of execution.[25] Though a fine work of legislation, the Arbitration Act of 1940 was inefficient in its actual functioning and execution by the parties involved which include the arbitrators, the attorneys and the judiciary.

Unlike trade-related legislation, UNCITRAL did not consider or recommend the drafting of any international substantive arbitration law. The UNCITRAL Model Law on International Commercial Arbitration, which was enacted in 1985, proposed that the law of arbitral processes and international commercial arbitration practises should be standardised. Following the proposal of the United Nations General Assembly, virtually all member nations began to explore the possibility of adopting legislative measures along the lines recommended by the UN.

A given award can be denied execution by a court on specific circumstances outlined in S.34. Only if the parties requesting relief provide proof of the presence of the reasons listed in subsection 34(2)(a) does the court have the authority to set aside an award. The grounds are:

(1) a party's incapacity;

(2) a party's arbitration agreement is invalid;

(3) adequate notice of the arbitrator's appointment and the proceedings of arbitration was not provided to the applicant or they were unable to submit their arguments.

(4)the arbitral awrd resolving the issue does not follow the conditions of arbitration filing.

[24] A.K. Ganguly, 'Emerging Trend In The Enforcement of Arbitration Awards' Journal of the Indian Law Institute, Vol 50, No 1, [Jan-Mar 2008], pp. 55-66

[25] ibid

(5) The tribunal's composition or the proceedings of arbitration are not in conformation with the agreement.

Two justifications are listed in clause 34(2)(b), although they are left to the court's discretion. The reasons are that (1) The major contention of the dispute is ineligible for arbitration i.e., the conflicts are not arbitrable; and (2) the decision is not in agreement with Indian public policy. Such issues are present in both domestic and international arbitral awards.

In our country, enforcing a foreign judgement is a two-step process that begins with the filing of an execution petition, after which the national court determines whether the foreign award complied with the Indian Arbitration Act's criteria. An award shall be deemed to be a court order when it is assured to be enforceable. A party enforcing a foreign award has no right to contest it; instead, it simply has the right to prevent its execution. The grounds for denying enforcement and setting aside an award are essentially identical following the 2015 legislative change to the India Arbitration Act, which has been established in the Apex Court judgement of *HRD Corporation v. GAIL(India) Ltd., 2018 (12) SCC 471*.[26]

3.1. What is an Award?

The Act defines award in Part II sec 44 as "an arbitral award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India, made on or after the 11th day of October, 1960…" The section goes on to say that the previously stated provisions should be in compliance with a written arbitration agreement as to which the Convention applies, as listed in the First Schedule, and in one of the jurisdictions that the Union Government has mentioned to be the territories in the Official Notification after becoming convinced that reciprocal provisions have been made by them.

The award has to be written and assented by each tribunal member, or by a majority of them accompanied by explanation of the missing signatures. The Act stipulates that the award provide the justifications for its conclusion except where the parties have decided differently. The date and location of the arbitration should be included, as well as a signed copy of the award for each party should be provided. The rights arising from the arbitral award might take

[26] Alipak Banerjee & Payel Chaterjee, 'Enforcement of Foreign Awards in India: Overview and Recent Developments' [2019] IGE 59

different forms, and they may need to be implemented in those nations where such arbitral award was made.

In a third nation, such a right can be upheld when in such country, an arbitral award is implemented through. The level at which an arbitration judgment becomes binding on all parties is determined by Section 46 of the Act. Any enforceable foreign award will be regarded as obligatory upon on parties amongst whom it was rendered for all purposes, and perhaps utilised by any of them as a rebuttal, lay off, or other role in any legal action in the country, as specified in the provision. As a result, an Award can be recognised without being imposed, but it must be acknowledged if it is imposed.

S.47 provides that, any person who wants to enforce an award in India is bound to present the "original award or a copy thereof (duly authenticated), the original arbitration agreement or a certified copy thereof, and any other evidence necessary to establish that the award is a foreign award before the court."

Furthermore, the application must be submitted to the court wherein the award's point of contention is located, according to s.47 of the Act. Anything, including evidence as defined by Section 47 or any other remedy which may surface throughout the arbitration process, can be the subject matter of an award. If an international judgement offers certain additional reliefs connected to either party's intellectual property in a jurisdiction where either party has any actionable assets or claims, the international arbitral award may need to be executed in that third country. It is stated that a judgement debtor's entitlement to relief given by a foreign arbitral award may not be used in a third nation except when foreign award has been implemented in that particular country. When a foreign award is executed in a given nation, it becomes a court's decree, and the rights provided by the decree is made enforceable.[27]

3.2. How are Arbitral Awards Regulated?

The Arbitration (Protocol and Convention) Act 1937, the Indian Arbitration Act 1940, and the Foreign Awards (Recognition and Enforcement) Act 1961 were the primary legislation governing arbitration in India until 1996.

[27] Karan Gandhi, 'India: Foreign Arbitral Award - Territorial Jurisdiction' [2013] https://www.mondaq.com/india/arbitration-dispute-resolution/247170/foreign-arbitral-award--territorial-jurisdiction accessed 14-07-2021

The 1940 Act, is inspired by English Arbitration Act of 1934, was the basic legislation regulating arbitration in the country. 1937 and 1961 Acts were enacted with the intent of enforcing international arbitral decisions. Further the 1961 Act enforced the New York Convention of 1958.

The parliament passed the Arbitration and Conciliation Act of 1996 to update the 1940 Act. The Act is a detailed law built after the UNCITRAL Model Law on International Commercial Arbitration. Prior to this Act all the previous acts were repealed (the 1937 Act, the 1961 Act and the 1940 Act). The main goal was the promotion of arbitration arbitration as a cost-efficeint kand speedy method of resolving disputes of commercial nature.

The 1940 Act only applied to domestic arbitration, and though it was seen to be a fine work of legislation when it came to its real operation and execution by all parties involved - parties, arbitrators, attorneys, and judges - it proved to be ineffectual and obsolete.

In two ways, the current Act is unusual. First, unlike the UNCITRAL Model Law, which was applicable solely to commercial arbitration of international nature, it covers both international and domestic arbitrations. Second, in terms of reducing judicial interference, it goes beyond the UNCITRAL Model Law.

Besides passing an order granting a party permission for enforcement of the award, the arbitral tribunal has no ability to implement its decision. If the party against whom the decision is given does not willingly comply, the party on whose favour the award was given will pursue enforcement in any nation wherever the assets of the losing party is situated. From country to country, responsible authority in charge of this varies. Judicial or governmental offices are the primary enforcement agencies. Most nations issue an enforcement order granting a court jurisdiction to implement a foreign judgment, but the court to which this authority is delegated is unclear. For example, in France and Belgium, the capable court who has the authority to enforce a foreign award is the same one which has authority over enforcing national awards.

S.47 of the India act, which provides for the execution of foreign awards, defines the word “court” as “having jurisdiction over the award's subject matter”. This clearly refers to a court in the territory where the asset is situated or the party against whom execution is sought after is located. The enforcement application is filed at the court where the respondent's bank account is located when the award is monetary in nature. The award under section 47 has a different issue than the award under section 2(e) of Part I of the Act. The actions described in Section 47 must be followed for acknowledgement and execution of the award.

Among the significant advantages of ICA is its capacity to be enforced across borders. In other words, an award made in one nation may be easily transferred and enforced in another one.

The NYC, which now includes 145 member governments following Fiji's admission to the convention, is the primary source of this ease of enforcement. NYC recognises any international arbitral decisions that fulfil some fundamental minimal requirements (such as being in writing and following public policy principles). The legality of the agreement to arbitrate, acknowledgement of their jurisdictional clout, and presumed enforcement of arbitration law are all covered by this Convention. It also highlights the significance of maintaining the ethics of the national legislative framework by permitting the courts of a requesting state to refuse to enforce an award based on the defence of "inarbitrability" and a public policy exemption. The content of these reasons will be determined by the applicable national legislation.

However, it has been observed that this form of alternative conflict resolution's enforcement mechanism is hampered by something called "judicial intervention." This is a term that appears frequently in arbitration texts. However, the term "intervention" is not relevant because arbitration is a procedure founded on the conscious decisions of the parties and recognised by law to be an alternate option to litigation. As a result, the function of the courts should be confined to assisting the arbitral tribunal in achieving the arbitral tribunal's goal.

Even though it is acknowledged that the reasons for setting aside an award under the relevant regulations “lex loci arbitri” should be as restricted as feasible, progress is possible only if these grounds were defined in line with UNCITRAL Model Law, which is based on Article V of the NYC.

The Model law's most fundamental concept is that the parties have the liberty to decide the "rules of the game." This recognition of the parties' independence derives from policy considerations based on international experience, as well as the reality that arbitration is based on the consent of the parties. Despite the fact that, as asserted in the recent case of Saw Pipes (P) Ltd., possess the authority to overturn arbitral awards if they violate any legislative framework, are patently illegal, or violate India's public policy, we believe that the idea of autonomy of parties should take precedence.

The character of the arbitral procedure may be considerably influenced by national legislation governing arbitration. At the enforcement stage, these criteria would necessitate some sort of judicial assessment of the arbitral judgements' merits.

Part I of the Act, 1996, which covers arbitration taking place in India and the awards issued thereunder, and Part II, which covers the enforcebility of foreign judgements and is divided into two parts, allow such judicial intervention in India. The Awards as governed by the NYC, as specified by s.44 of the Act, are the subject of Chapter One. The Geneva Convention

regulates awards in Chapter 2, which is covered by s.53 of the Act. Part I of the Act, 1996 governs arbitration in India and the enforcement of those awards (domestic or international), whereas Part II of the Act of 1996 deals with the enforceability of international awards in India, based on the New York Convention or the Geneva Convention principles.

Furthermore, as will be seen in the next sections of this paper, challenges based on the award in question being contrary to "public policy" are increasingly becoming a means of court intervention in arbitral procedures.

After a throughout review of the Apex Court's decision in *Badat Co., Bombay*[28], the court found: (i) that the plaintiff's cause of action on the original side of the Bombay High Court, based on the judgement of the New York Supreme Court, is beyond the purview of Bombay High Court's jurisdiction; (ii) that the arbitral awards lack the conclusiveness as pegged by the Supreme Court; and (iii) that the arbitral awards, which lack the finality required by New York law until they result in a judgement, is not capable of providing a legitimate cause of action for the litigation in the Bombay High Court..[29]

The first basis is in direct opposition to the "doctrine of obligation." Despite the ruling in the judgement that the initial cause of action must not be amalgamated, the issue of the Bombay High Court's lack of jurisdiction to hear the case will not take place if the aforementioned doctrine, which is codified in section 13 of the Indian CPC as *res judicata*, is followed. In spite the fact that the Apex Court in the country overlooked the procedural rule linked to the court's jurisdictional competence in the global sector, the said court also failed to recognise that the rules of procedure relating to the relationship of jurisdiction and cause of action does not have any relevance to actions brought for the enforcement of foreign judgments. The court's ruling was based on the second reason, which placed foreign awards in a lower position than foreign judgements. In truth, foreign arbitral award and a foreign judgement has not much in common in terms of finality or conclusiveness. The court determined that there is a viable cause of action for the execution of the foreign award. With this, the Supreme Court established the first case where a foreign award was recognized in an Indian court. The judgement itself presents a number of issues in relation to foreign judgments and awards. Sec 47 elucidates that foreign arbitral awards must be enforced by the Supreme Court or the High Court.

[28] Badat And Co vs East India Trading Co 1964 AIR 538, 1964 SCR (4) 19

[29] Alipak Banerjee & Payel Chaterjee, 'Enforcement of Foreign Awards in India: Overview and Recent Developments' [2019] IGE 59

For the years 1996 to 2003, statistical data based on enforcement of arbitral awards in the High Court and Supreme Court show that 29.41 % of challenges were based on "jurisdiction," 17.64% on "public policy," and 17.64% on "technical grounds" (to be filed under Section 48, not Section 34). As a result, the current state of international arbitral award enforcement may be fairly ascribed to excessive judicial interference.[30]

Notwithsatnding the fact that section 35 deems an arbitral award to be "final and binding" on the parties, it is "subject to" the other provisions of part I. In other words, if a party to an award files a motion to set aside the award under section 34 of the Act, the arbitral award cannot be considered "final and binding" on the parties until the motion to set aside the award is denied. Section 36 of the Code of Civil Procedure, which deals with the enforcement of arbitral awards, also states that the processes to set aside an arbitral award must be completed before the award can be executed under the CPC as if it were a decree of the court.

3.3.Difference in Domestic and Foreign Awards

Foreign awards and foreign judgements based on foreign awards were enforceable in British India prior to 1937 on the same grounds and under the same circumstances as they were in England under common law, namely, justice, equity, and good conscience. The Arbitration (Protocol and Convention) Act 1937 was passed in 1937 to make the Geneva Protocol on Arbitration Clauses 1923 and the New York Convention on the Execution of Foreign Arbitral Awards 1958 operational in India.

However, there were little differences between the 1937 Act and the 1996 Act in terms of how international arbitral awards were classified. Both highlight the business aspect of the issue, and Section 4(2) of the Act states “Any foreign award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceeding in [India], and any references in this Act to enforcing a foreign award shall be construed as including references to relying on an award.”

[30] Divya Suwasini & Shreya Bose, ‘Arbitration in India Not for the Faint-Hearted: Enforcing Foreign Arbitral Awards’ NSLR

Furthermore, if the Court is satisfied that the award is enforceable, the Court will order the award to be filed and will continue to render judgement based on the award. There were also local Arbitration Laws in force throughout the 1937s, which the parties may select from. However, once the 1937 Act was enacted, the question of whether a case was regulated by the local Arbitration Act or the Arbitration (Protocol and Convention) Act 1937 became a question of law that could not be decided by the parties' actions. The 1937 Act's provisions have since been abolished by the Arbitration and Conciliation Act 1996, save that they continue to apply to arbitral procedures that began before the 1996 Act took effect, unless the parties agree differently.

Part II of the current Act deals with the execution of international arbitral awards. The distinction between Part II and Part I has become muddled as a result of a recent Supreme Court ruling. Part II provides effect to the New York and Geneva conventions (albeit the Geneva Agreements' provisions are now practically obsolete). India is not a party to the ICSID[31] treaty or any other conventions dealing with the implementation of international arbitral decisions.

A foreign award is enforceable in India, subject to legislative limits, as if it were made on a case brought to arbitration in India. Any foreign award that would be enforceable under the Foreign Awards (Recognition and Enforcement) Act 1961 is to be treated as binding for all purposes on the persons between whom it is made, and may accordingly be relied on by any of those persons as a defence, set-off, or otherwise in any legal proceedings in India, and any references in the 1961 Act to enforcing a foreign award are to be construed as referring to enforcing a foreign award. A foreign award must be recognised if it is enforced. It is possible for a party to seek just for acknowledgment to protect itself against re-agitation of problems covered by the award.

The distinction between a Foreign Award and a Domestic Award is twofold. To begin with, in terms of the award's implementation method. There is no necessity for separate award execution in the event of a domestic award. When an award is made and objections are dismissed, the award is immediately implemented, and no application for enforcement of an award is required. The enforcement of a foreign award is necessary. When a court determines that a foreign award is enforceable, it becomes a court decree that may be enforced. Another major distinction between a domestic and a foreign award is that international honours, unlike domestic awards, cannot be set aside. A party wishing to enforce a foreign award must file an application with the court, which can accept or reject the request, but cannot set aside the award.

[31] International Centre for Settlement of Investment Dispute

However, upon closer inspection, we discover an obvious flaw in this system, since the parties would be left with no viable appeal in situations where the foreign judgement was issued based on an invalid arbitration agreement or where adequate notice was not properly served on the parties, etc.

However, in the instance of *Venture Global*[32], the court concluded that Indian courts might set aside foreign arbitral decisions utilising the mechanism provided out in section 34 of the Arbitration and Conciliation Act 1996.[33]

3.4. Enforcements in India

The Act was enacted in the hopes of minimising court interference in the arbitral procedure, in keeping with the UNCITRAL Model Law's spirit. Despite this, Indian courts have demonstrated a strong willingness to interfere with foreign arbitration. The most contentious aspect of this is court involvement at the award enforcement stage on the basis of public policy. In international arbitration, the national court plays an important role and is recognised in many nations. This is because arbitration is governed by national laws and administered by national courts. This is especially true at the enforcement stage, when the award must withstand a number of statutory requirements in order to be effectively enforced. National courts may decline to enforce an arbitral award after it has been issued, citing Article V of NYC. By signing the NYC and embracing the UNCITRAL model legislation, most countries have integrated these criteria into their national laws. The purpose of exceeding power is to safeguard the basic state of justice and equality in arbitration because it is a private proceeding. The supervisory powers of the court are necessary to construct an arbitral procedure with checks and balances to ensure a just and unbiased hearing.

Certain foreign awards are enforced under Part II of the Act. Section 44, which deals with "foreign award as an arbitral award on differences between persons arising out of legal relationships that are considered commercial under Indian law (a) in pursuance of a written agreement for arbitration to which the New York Convention applies; (b) any of the reciprocal

[32] Venture Global Engineering vs Satyam Computer Services Ltd. & ... on 10 January, 2008
[33] All Answers ltd, 'Comparison of Foreign and Domestic Enforcement Regime' (Lawteacher.net, July 2021) https://www.lawteacher.net/free-law-essays/commercial-law/comparison-of-foreign-and-domestic-enforcement-regime-commercial-law-essay.php?vref=1 accessed 14 July 2021

territories that the Central Government may designate." Section 46 specifies when foreign awards are legally enforceable. It states that any enforceable foreign award will be considered as obligatory on the parties for all reasons. S.48 of the Act establishes the criteria regarding enforcing of foreign awards, stating that execution of foreign awards could be rejected at the request of a party against whom the award has been revoked, but only if that party can provide the court proof "—a)the party was in some incapacity; b) the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was unable to present his case; c) an award deals with difference not contemplated by or falling within the terms of the submission; d) the composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, or with the law of the country where the arbitration took place; or e) An award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which or under the law of which, that award was made."

The court may also deny for the implementation of the arbitral award when it believes that a) the matter cannot be resolved via arbitration under Indian legislations, or b) the aexecution of the award would be detrimental to India's public policy.

When the court is convinced that the verdict which was delivered in the foreign arbitration is eligible to be enforced, the award is constituted as a judgement of the court, according to s.49. In *Fuerst Day Lawson*, the Supreme Court decided that a party that has a foreign award in their favour can file for the execution, but that the court must follow sections 47 to 49 of the Act before taking further effective actions for the award's execution. It is a single process with several steps. The court must first determine the enforceability of the award afterwards, it must then take further measures to have it carried out. The court dismissed the argument that an award should be enforced first in an independent process, and that if a decree is obtained in that procedure, a second proceeding for its execution should be launched next. As previously stated, section 49 states that the award shall only be declared a "decree" of the court "if the court is satisfied that the foreign award is enforceable" in line with the Act. Despite the fact that, in contrast to the Geneva Convention, the New York Convention put no restriction to its application for arbitral awards contrived in one of the parties' territories and between individuals who are subject to one of the contractual parties' jurisdiction, the distinction between common law and civil law in certain situations was evident during the drafting of the convention.. Article I is a good illustration of this kind of impact. It is divided into two separate sections. The agreement will be applicable to international arbitral awards rendered in the jurisdiction of the state apart from the nation seeking recognition and execution of such awards,

according to the first provision, which represents the essence of common law. According to the second section of the article, which illustrates the effect of civil law, the convention will govern the arbitral awards that are not deemed domestic awards in the state where there is a desire for enforceability. National courts have upheld the convention's rules differently due to a conflict between two sets of legal concepts. The simple text of the convention's article I implies that the two phrases within are unrelated. The first sentence is fairly broad, recognising any award established on the country other than the states where such awards are sought to be recognised and enforced as a "foreign award". The expression 'shall also apply to' in the second sentence plainly implies that the criteria set out therein are independent of the first. The second line, on the other hand, demonstrates that arbitral awards must not be "regarded as domestic awards" in the territory where execution and implementation are pursued. The question is whether, notwithstanding the unambiguous wording used in the two sentences in Article I of the convention, the second statement implies that the first sentence is limited in its function. If it does, the next question is whether an arbitral ruling must meet both of the requirements in order to be enforced in a state's territory. As seen by various judicial decisions, the questions do not have simple answers.

The problem is further complicated by the convention's article V (l) (e) provisions. It indispensably call for the party that wants acknowledgment and execution of an award, as well as the party seeking to prevent imposition of the award, to show that "the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of a country in which or under the law of which the award was made." This provision undoubtedly acknowledges that the court in the territory in which the award has been rendered, or the legislation as per which the award is constituted, has the authority to set aside or suspend the award, and that this country is distinct from the state where the award is filed to be recognised and enforced. Evidently, the courts of the nation only have authority to set aside domestic awards made in conformity with the country's legislation, not “foreign awards” defined in article I of the convention. If such is the true legal position, the requirements of article V (l) (e) will surely cause problems and violate the scope of the convention's article 1. As a result, several courts have sought to reconcile these clauses through judicial interpretation, which has inevitably resulted in a inconsistency in the execution of the convention.

3.4.1. Procedure for Enforcement of Foreign Arbitral Awards

Foreign arbitral awards need knowledge of the norms of procedure for enforcing them. To be successful, the winning side must adhere to procedural norms.

CPC defines "foreign judgement" in sec 2(6) as "the judgement of a foreign Court," by court it means a court that is located beyond the borders of the counntry that was not formed or perpetuated by the Central Government's authority. Foreign judgement enforcement in India is contingent on reciprocating and non-reciprocating nations. A wants to enforce a court's decree in a reciprocating nation must file execution procedures in India, but a party seeking enforcement of a decree from a non-reciprocating country must file a new suit in India. In the case of *Union of India v. Hardy Exploration and Production (India) Inc*[34], the court held that in cases where the arbitration agreement specifies the "venue" for holding the arbitrators' sittings but not the "seat," the question arises as to "on what basis and by which principle" the "seat" should be determined, because the "seat" "has a material bearing for determining the outcome of the arbitration." Given the Supreme Court's contradictory rulings and law put down "in numerous decisions by the Benches of varying strength," the Court believes the case should be referred to a bigger bench. The Supreme Court recently reversed a previous ruling in *BGS SGS SOMA JV v. NHPC Ltd*[35], holding that the venue of the arbitration is assumed to be the seat of the arbitration unless otherwise stated in the arbitration agreement.

The agreements address this problem by stating that the actual enforcement mechanism of foreign arbitral decisions in India is controlled by the *lex fori*. The NYC expressly states that the regulations governing the procedure for acknowledgment and imposition are regulated by the national legislation of the jurisdiction in question. "Each contracting state should accept arbitral awards as binding and enforce them in accordance with the rules of procedure of the area where the award is relied upon," according to Article III of the Convention. Furthermore, Van Den Berg claims that the procedural law of the *lex fori* can be applied to issues of enforcement not covered by the NYC, such as attachment, discovery of evidence, set-off, the effect of bankruptcy, time restrictions for demanding enforcement, and concerns of estoppel. The idea of attribution of rules relating to *lex fori* has been adapted from a number of Indian conventions. An award made in conformity with the Washington Convention does have force of res judicata in all member States, as though it were a final decision of the state court. The Convention, on the other hand, allocates procedural norms to the national law of the country where an award is executed, stating that "the execution of an award should be controlled by

[34] (2018) 7 SCC 374

[35] (2019) SCC Online SC 1585)

the legislation regulating the execution of judgments in effect in the state whose territory such execution is sought."

National rules of procedure for imposition of the international arbitral awards often fall into one of three categories: (1) Rules of procedure are governed by particular laws; (2) one rule of procedure is applied to all foreign awards; (3) the same rules of procedure are used to the enforcement of foreign awards; and (4) the same rules of procedure are applied to the enforcement of domestic awards. This section looks at the specific rules of process that must be followed. The main objective of parties participating in ICA is for the winning party to move quickly to enforce the award if the losing party does not. The losing party may file an appeal in order to have the award reversed or changed in any way that benefits it. A challenge is a constructive challenge to an international prize's legitimacy. However, it is appropriate to begin by examining the issue of foreign arbitral award performance from a broader perspective, in order to set the difficulty in its correct context. Although the majority of awards are given freely, it is occasionally essential to determine how an award can be legally enforced. A state has the authority to repudiate to recognise awards made by a foreign arbitral tribunal or awards based on a foreign judicial procedure. Performance through court processes is the ultimate consequence for non-performance of an award, which varies by country in terms of foreign arbitral award enforcement. A foreign award could be enforced under a multilateral convention, such as the Geneva Convention and the New York Convention, which were made possible by the enactment of the "Arbitration (Protocol & Enforcement) Act, 1937" and the "Foreign Awards (Recognition & Enforceability) Act, 1961". Awards under both the convention were implemented in india along the same basis and under the same criteria as they were under common law, namely, justice, equity, and conscience;

1. A final judgment may not be executed in India if the party against whom the other party is seeking to enforce it can establish that the award was issued in contravention of Indian legislations like under s.48(1)—

i. In the absence of any reference of such regulation in the nation in which the award was issued, i.e. the location of arbitration, parties to an agreement had some incapacity to execute under any laws to which they were exposed.;

ii. The agreement was void because of the law to which the parties had submitted it and the lack of any reference to that legislation or the law of the nation where the award was rendered.

iii. The tribunal that made the decision did not conduct a fair trial.

2. The award rendered would either be partially or entirely outside the purview of an agreement subjecting an arbitration; and anywhere any portion of the award that was beyond the sphere of arbitration could well be split from the entirety of the award.
3. The arbitral award's composition, authority, or method for appointing it were not in line with the concept of arbitration agreement, or it was not included in the agreement, or the legislation of the arbitration venue was not complied with.
4. Even if the parties have not been made obligated by the award or it has been set aside or withdrawn by the authorities concerned in the place where the arbitration court is located, the party making the application under section 48(1) may be supported by evidence to confirm the existence of some or all of the premises to deny enforcement of the award.
5. According to section 48(2) of the Act, a foreign award may not be executed in India when a court in India determines that the award

a. Settlement of the award in consonance with Indian legislation.
b. The award is stated to be against the public policy of India. This defence should be construed in the most restrictive sense imaginable. If an award is contaminated by deception or corruption, or if it was issued in breach of the Act or a fundamental principle of Indian law, it is said to be against India's public policy.

Sec 48 merely lays forth the reasons for deny execution a foreign award, as expressed above, but it does not provide for an assessment of the mistake through the appeal process. When a petition is filed for the stay or suspending an award with a competent authority, it may adjourn the ruling for the execution of the award if considered necessary, and on the request of the party seeking implementation, the court may further require the other party to provide sufficient security.

3.5. Limitation Period

Part II of the Act governs the enforcement of New York Convention decisions in India. Sections 47 through 49 of the Act are important: Section 48 re-enacts Article V of the New York Convention and lays out the limited reasons for rejecting enforcement of a foreign award; and Section 49 says that a foreign award enforceable under Section 48 is regarded to be a decree of that court for the exclusive purpose of enforcement. In India, the Limitation Act of 1963 controls the time limit for taking legal action.

There is no time limit in the Limitation Act or Part II of the Arbitration Act for filing an application for execution of a foreign judgement. The Schedule to Limitation Act's Articles 136 and 137 are applicable in this case. This is in contrast to the legal position in China and Hong Kong, where domestic legislation explicitly allows for a two-year and six-year limitation period for execution of a foreign award in Mainland China and Hong Kong, respectively.

In this case, sections 47-49 of the Act, which are part of the chapter on New York awards, are applicable. Section 47 mandates that the party seeking enforcement present proof before the court. Sec 48 sets the groundwork for the award debtor's refusal to be enforced. Sec 49 applies when a judge determines that a foreign award is enforceable under this framework. After citing *Thyssen Stahlunion GMBH v Steel Authority of India*[36] and *Fuerst Day Lawson v Jindal Exports*[37], the Bombay High Court in *Imax Corporation v E-City Entertainment*[38] concluded that Article 136 (12 years) applicable to an enforcement petition. The Apex Court in *Thyssen* contrasted the terms of the abolished Foreign Awards Act, 1961 with those of its successor, noting that, under the Foreign Awards Act, a decree follows the award. The question in *Fuerst* was whether two distinct petitions for enforcement and execution were necessary, and the Supreme Court decided that awards are already branded as decrees and can be enforced and executed in one procedure. As a result, the Bombay High Court in *Imax* came to the conclusion that the phrase "stamped" should be interpreted as "considered," and a foreign award should be treated as a decree, in order to further the Act's goal.

Though the Supreme Court has not addressed the matter directly, it recently decided in *Bank of Baroda v Kotak Mahindra Bank*[39] that the limitation term for the execution of a foreign decision under Section 44A of the CPC 1908 is controlled by the reciprocating country's limitation legislation. Article 136 of the Limitation Act, which is limited to Indian court decisions, was found to be inapplicable. For three reasons, this decision does not apply to international arbitral awards. For starters, the CPC is aware of the many legal sectors in which arbitration is used and clarifies that an arbitration decision is not included in a foreign decree, even if it is enforceable as a decree. Second, the Supreme Court used the countries' reciprocity principle, which is not applicable in the context of arbitral verdicts. Finally, a foreign award is considered a decree that has already been stamped, but not a ‘foreign' decree.

[36] (2002) IIAD Delhi 149

[37] Fuerst Day Lawson v Jindal Exports EA Nos. 790-91 & 789 of 2012

[38] Imax Corporation v E-City Entertainment Civil Appeal No.3885 OF 2017

[39] 2020 267 SC

The issue of establishing the limitation period applicable to applications for execution of foreign awards continues to be a source of consternation for Indian courts. The statute establishes explicit time limits for such petitions; nevertheless, the length of time depends on whether or not a foreign arbitral judgement may be regarded a decree. The issue of contention is section 49 of the Act, which states that state awards can only become decrees if the court is convinced that they are enforceable. It is widely acknowledged that enforcement is divided into two stages: (1) determining the enforceability of a foreign award; and (2) executing the award if it is enforceable. After clearing the first step, the satisfaction under section 49 may be obtained, and a 12-year limitation may be applied. However, given Article III of the New York Convention's pro-enforcement policy and the Act's goal of speedy resolution of disputes, reduced supervisory jurisdiction of the court, and prompt enforcement of awards, including foreign awards, smooth enforcement should be made possible by using a purposeful approach. The objective of interpreting sections 47-49 of the Act is to apply Art. 136 of the Limitation Act to enforcement actions. The interpretation of the Act should not exclude parties from engaging in substantive and completed arbitral procedures. [40]

Because of many inconsistent and radically opposed judgements given by different High Courts in India, the subject of the statute of limitations applicable to the execution of a foreign award in India has been a difficult issue for the longest of times. The matter was finally settled recently by the Supreme Court of India in the case of *Government of India v. Vedanta Ltd. ('Vedanta Judgment')* on Sept. 16, 2020. In the Vedanta Judgment, the Supreme Court took an entirely different approach, and the Court's ruling on this matter is summarised as follows:

i. Article 137 of the Limitation Act governs the execution of foreign awards and it sets a duration of three-year commencing when the right to apply incurs.

ii. Article 136 of the Limitation Act shall not apply to the implementation of a foreign judgement under Part II of the Act beacause it is not a judgement of an Indian civil court.

iii. The Limitation Act's Section 5 permits the court to forgive a delay if it determines that the failure to file the petition within the appropriate limitation period was due to a justifiable reason. If necessary, the holder of a foreign award may submit an application for condonation of delaying as per Section 5 of the Limitation Act.

iv. The holder of a foreign award shall submit a comprehensive appeal pursuant Part II of the Arbitration Act in order for it to be recognised and enforced. If the enforcing court determines

[40] Talat Chaudhary, 'Enforcement of Foreign Arbitral Awards in India' [2021] IJLMH Vol. 4 Iss. 2, p. 1477

that the foreign award is actionable, it will be proclaimed a verdict of that court as per Section 49 of the Act, and the award will be executed in according with the Indian law.

The Vedanta Judgment gives long-overdue clarity on the subject by addressing the uncertainty caused by conflicting rulings by several High Courts. The Vedanta decision must be seen in the light of Indian courts' pro-enforcement position on the implementation of international awards in India.

3.6. Challenges

The losing party has three alternatives for avoiding the award once it has been passed.

The losing side has the option of appealing the decision (only when it is permitted by the applicable law or the arbitration regulations). The party that has lost gets the right to challenge the award in the court of the jurisdiction in which it was made. The losing party has the right to object to enforcement procedures as they are taking place.

The award can be contested to the national court at the arbitration's seat or venue. According to NYC and Model Law, a competent court may decline to recognise and enforce an award that has been set aside by a court in the seat of arbitration.

It's award may be contested in a nation other than the arbitration's seat if the law under which an award was issued differs from the law of the arbitral seat. A challenge may come from a legal mistake, irregularities in the conduct of the procedures or an award, or the arbitral tribunal's lack of jurisdiction. A challenge might be made against the entire reward or only a portion of it. The goal of a challenge is to either alter or nullify the award in the jurisdiction where it was issued.

There are several limitations on the implementation of foreign arbitral rulings, particularly in India. Court participation has been shown to impede the implementation procedure in this technique of alternative conflict settlement. Arbitration is a procedure which is entirely functioning on the basis of party sovereignty and it is a successful alternate to make settlements, thus the term "intervention" does not seem accurate. As a result, the function of the court should be confined to assisting the arbitral award in achieving the arbitral goal. While there are certain reasons for the award to be set aside, they should be interpreted in accordance with the law applicable under Article V of NYC and UNCITRAL model law. Recognizing and enforcing foreign arbitral decisions is based on mutual agreement, but it is also the consequence of policy

that has been translated into international practise. The only time a court will intervene with the execution of a foreign award is if it violates any legislative requirement, is plainly unlawful, or violates Indian public policy.

The court said in *Saw Pipes* that "in our judgement, the concept of party autonomy should receive priority attention by the supreme court, since excessive court interference in the form of judicial review has slowed the settlement of disputes." The character of the arbitral procedure may be considerably influenced by national legislation governing arbitration. At the enforcement stage, these criteria would necessitate some sort of judicial assessment of the arbitral awards' merits.

The issue of being in contravention with public policy is one of the problems that Indian courts can rule on.[41]

The expanding extent of the court's ability to assess awards is the primary source of all enforcement delays. Excessive judicial involvement, which results in the admission of a significant amount of disputes that should never have been heard in the first instance, is another problem that obstructs the resolution of business conflicts, therefore slowing economic growth and progress. In order to fit their own circumstances, Indian courts have misunderstood the Act on several occasions, making it difficult to accomplish the desired objective.

[41] Talat Chaudhary, 'Enforcement of Foreign Arbitral Awards in India' [2021] IJLMH Vol. 4 Iss. 2, p. 1477

4. Role of Public Policy

The Act was enacted in the hopes of minimising court interference in the arbitration procedure, in keeping with the UNCITRAL Model Law's spirit. Despite this, Indian courts have demonstrated a strong willingness to interfere with foreign arbitration. The most contentious aspect of this is court involvement at the implementation stage of award on the basis of public policy. Despite allegations that it is a weapon of involvement of the court in the proceedings, the idea of "public policy" has become a significant foundation for appealing arbitral judgments in recent years. This is owing to India's ambiguous and too expansive interpretation of the term. The term, while intuitive and common, is immensely vital and subjective in its use; it is determined by the sector of legislation where it is meant to be employed, such as administrative law, commercial law, and so on, as well as the domain in which it is utilised: civil or criminal. However, it was understood that its use in arbitration did not imply a reconsideration of the substance of the judgement; an arbitrator or arbitral panel was meant to have the concluding voice on facts and legislation. As a result, a section 34 application to set aside an award is viewed as a challenge rather than an appeal. India's delegate was among a tiny number of persons who complained that the word was overly wide during the formulation of the UNCITRAL Model Law, which acts as a standard guide for national arbitration rules. [42]
Although, the international community, in its wisdom, decided to keep the word because of its flexibility, allowing each national jurisdiction to interpret it according to their own legal system. Indeed, in India, the party against whom the award has been rendered who regret and are ready to violate their initial agreement to forego a merits appeal have persuaded the court that overlooking arbitral tribunals' erroneous application of the rules to the factual data or misinterpretation of factual information would equate to acceptance, which must be deemed contradictory to any legal system's fundamentals. In India, precedent has formed in precisely this way, giving only credibility to the forecasts made by Indian delegates during the UNCITRAL Model Law's formulation. India's capacity to function as a venue for international commercial arbitration has been hampered by the court's judgments, mandating a readjustment by both the court and the parliament. The Arbitration and Conciliation Amendment Act, 2015

[42] Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the Judiciary and the Legislature Rein in the ''Unruly Horse''?' Journal of the Indian Law Institute
October - December 2016, Vol. 58, No. 4 (October - December 2016), pp. 421-446

is the most recent example of this course correction. The Act has been amended to provide precise prescriptions for what the court can and cannot consider when faced with a challenge to an award, but it is up to the court to explicate these guidelines. The issue has never been one of explication, but rather of the judiciary's stance toward arbitration and judicial interpretation determining the fate of legislation. Apart from interpreting these modifications, it is also important to comprehend how the problem was addressed, evolved, and maintained through time in the first place.

Although the Model Law and the NYC recognise and enforce foreign arbitral awards as an principal part of the arbitration process, this acknowledgement and execution is not unrestricted. The national enforcement court oversees the enforcement and recognition of these awards, and can overturn them for a variety of reasons, one of which being a disagreement between the award and the enforcing state's public policy. Following the Model Law, the 1996 Act accepts the basis of "awards incompatible with India's public policy" for setting aside foreign arbitral awards. However, because of the varied and sometimes criticised approach used by Indian national courts in defining and interpreting the extent and inclusions of the public policy exemption, its applicability remains a hotly disputed, contentious, and complicated topic. Furthermore, disproportionate and draconian court rulings and judicial involvement in the execution of foreign arbitral judgements under the pretence of public policy exemption have engendered worldwide criticism and contempt for the Indian arbitration process in recent years.[43]

Of fact, the phrase "public policy" is a hazy one that defies clear definition. “A concept of judicial legislation or interpretation based on the current requirements of the society,” according to one definition of public policy. When courts fulfil this duty, they definitely legislate via the courts. That is, however, a kind of law implicitly entrusted to them in order to achieve the legislative purpose and society's goals. It is changeable in nature a priori[44]. However, the idea of the public policy theory remains the same: while it is generally beneficial for parties to have autonomy in contracting, a court will refuse to perform the agreement if

[43] Pallavi Mahjan, ‘The unruly horse of public policy exemption in the enforcement of foreign awards in India’ [2015] Mahajan, Pallavi, The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India (September 7, 2015). Available at SSRN: https://ssrn.com/abstract=3449565 or http://dx.doi.org/10.2139/ssrn.3449565

[44] O.P. Malhotra, ‘The Scope of Public Policy under the Arbitration and Conciliation Act, 1996’; Student Bar Review

, 2007, Vol. 19, No. 2, Special Issue on Alternative Dispute Resolution in Association with the Singhania Chair on ADR Laws, NLSIU, Bangalore (2007), pp. 23-29

such autonomy is surpassed by interest of the public. Using public policy as a basis for overturning an arbitral decision follows the same reasoning.

The phrase "public policy" has long been viewed as "vague," "elusive," "ambiguous," and "impossible to define precisely." Many types of language indeterminacy are included in the idea of public policy as applied in many domains of law, including ambiguity, vagueness, and contestability. It is a frequent argument that public policy's intrinsic ambiguity permits courts to utilise it as a catch-all provision, invalidating otherwise lawful and legitimate activities, and that public policy's open texture is a source of tremendous dispute.[45] The English House of Lords delineated public policy as "that principle of law which holds that no subject can lawfully do that which has a tendency to be injurious to the public, or against public good."[46] It is a "moral, social or economic principle so sacrosanct… as to require its maintenance at all costs and without exception."[47]

In this case, a difference must be made between indeterminacy of the idea and indeterminacy of its application. Every word concept is ambiguous in and of itself because a word concept has no concrete meaning in and of itself; rather, it is given meaning by the context in which it is used. "[f]or a substantial class of cases—though not all—in which we utilise the word "meaning," it can be defined thus: the meaning of a word is its usage in the language," wrote Ludwig Wittgenstein. A concept, according to Wittgenstein, has no meaning in and of itself, but it is employed as a name to indicate a variety of objects. He said that the items listed had no objects in common and coined the term "games" to describe them. He said that, despite our original assumption that all games must have something in common, we have discovered that none of them do. What we see here is a "complex network of overlapping and crisscrossing similarities: sometimes overall similarities, sometimes detail similarities." He coined the term "family resemblances" to describe this occurrence. This explanation is true for any idea, including public policy. Taken independently, an investigation into the meaning of the term "public policy" will yield an infinite number of "things," none of which will have a common thread. As a result, asking ontological questions is pointless. This idea that ideas had no inherent essence or basic notion was ground-breaking since it had been assumed for almost two millennia that concepts had a core meaning from which usage was decided.

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[45] Badrinath Srinivasan, 'Public Policy and Setting Aside Patently Illegal Arbitral Awards in India' (March 27, 2008). Available at SSRN: https://ssrn.com/abstract=1958201 or http://dx.doi.org/10.2139/ssrn.1958201

[46] Egerton v Brownlow (1853) 4 HCL 1

[47] Cheshire and North, Private International Law, 13th edn, Butterworths, 1999, at p 123.

The term "public policy" has been used in a variety of contexts. Public policy has been described as "purposeful decisions made by authoritative actors in a political system who have the formal obligation of making binding choices among society goals" in political science literature. As a result, any governmental decision aimed at a specific goal would fall under this description of public policy. The term "public policy" can also refer to something that is in the public interest or serves the public welfare. Elsewhere, public policy has been characterised as a state's or legal system's most essential ideas. Public policy has also been used to refer to rules that safeguard a state's political, social, and economic organisation, such as embargoes, foreign exchange control regulations, police regulations, tax laws, and so on, and these laws are mandatory to apply regardless of the relevant legislation. An idea of public policy like this is known as *lois de police*.[48]

These diverse interpretations of the term "public policy" lead us to believe that it has been employed differently in distinct situations. Applying a single notion to all instances when public policy is mentioned would undoubtedly lead us wrong. The dispute over the degree to which the government can intervene in “private” acts is at the heart of the private law debate. The extent to which government involvement is desirable has influenced the scope of public policy. As a result, discussions concerning the extent of public policy in private law are basically ideological debates over how much state interference should be allowed.

4.1.Judicial Intervention

Almost every country, some more than others, recognises the significant position of national courts in international arbitration. That's because arbitrations are governed by national laws and share an immediate link with national courts as a result. Whilst national courts are involved in the arbitration process at various stages, their presence is probably particularly apparent once the arbitral judgement is proffered. This is certainly relevant at the implementing stage, when the arbitral judgement must pass a variety of statutory tests in order to be carried out successfully. One reason mentioned that is mentioned in Article V of the York Convention, national courts may invalidate an arbitral judgement after it has been made. These requirements have been subsumed into national laws by most countries that signed the New York Convention and accepted the UNCITRAL Model Law. Because arbitration is an informal proceeding, these

[48] RUBINO- SAMMARTANO, id., at 505. 40

monitoring powers are intended to conserve the essential principles of fairness and impartiality, which have been characterised as: “bulwark against corruption”, “arbitrariness”, “bias”, “improper conduct” and— where necessary—“sheer incompetence”[49]

Delocalized arbitration supporters argue that this review procedure acts as a second stage of scrutiny and goes against the litigants' purpose while they signed the arbitration agreement. However, the court's regulatory duties in this regard are certainly significant since they offer a system of "checks and balances" for the arbitral procedure, ensuring a fair and unbiased outcome. Article V of the NYC secures the parties' fundamental rights in international arbitration. It allows the parties to contest the execution of arbitral decisions on a broad basis.

Public policy is one of the criteria listed in the NYC for challenging the execution of a foreign arbitral judgement. The well-known personality of public policy is not a recent invention. Parties are cautioned against using public policy as a ground since the beginning of the twenty-first century:

“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.”[50]

Public policy is a most potent instruments in the national court's armoury, allowing it to rebuff an enforcement an otherwise valid arbitral judgement. It is particularly well-known since this defence cannot be precisely defined and is entirely reliant on the rules of each state. Consequently, it varies greatly in different countries. To make matters worse, the New York Convention gives national courts little guidance on how to apply the public policy defence. As a result, national courts have complete freedom in interpreting public policy, and much will depend on the national court's attitude and the specific judge at the moment. Due to a lack of unanimity on what must international public policy be composed of, the International Law Association (ILA) sought but failed to develop a broadly recognised idea of international public policy.

Apart from the lingering questions surrounding this issue, there is an observation that national courts in most established arbitral jurisdictions have construed public policy in a restrictive manner. This is due to the fact that courts in industrialised nations are typically pro-enforcement of arbitral judgments, which they see as a separate aspect of public policy. The

[49] M. Kerr, note 4 above, at 15

[50] Richardson v Mellish (1824) 2 Bingham 229 at 252

following is how it was explained:[51] "Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is termed in international arbitration parlance as the pro enforcement bias. *Pro-enforcement is itself a public policy*."[52]

The NYC provides little guidance to national the courts on how to construe the public policy defence. The "pro-enforcement" tilt of global jargon is a form of public policy in and of itself. The national courts are at a liberty to read public policy as they understood, and most established arbitral jurisdictions have clearly defined public policy narrowly. In the recent case of *Vijay Karia*, the Supreme Court affirmed the pro-enforcement bias, holding that the NYC is controlled by a pro-enforcement bias that can be applicable to national courts. Indian courts have a history of meddling with international arbitration proceedings. The most contentious is judicial involvement during the implementation of award on the public policy defense. If one analyses the subject of Indian judicial involvement on premise of public policy, *Renusagar* was the starting point. This judgement was made on the basis of private international law and followed international practise in most established arbitral jurisdictions, such as France and the United States. It is established that national courts should only intervene with arbitral decisions delivered, on the premise of public policy in rare situations.

In Saw Pipes, the Indian Supreme Court chose a different approach. A personal disagreement over the payment of liquidated damages under a supply contract led to the case of saw pipes. The case was brought to arbitration, and the tribunal issued an award holding that "ONGC was not entitled to liquidated damages since it failed to prove any loss as a result of the saw pipe's late delivery". On the public policy premise, ONGC asked Indian courts to throw aside arbitral decisions. Many eminent writers have criticised the case of Saw Pipes for its broad explication of the public policy defence. It has been chastised for its broad interpretation. The Indian Arbitration Act makes no provision for reversing arbitral judgments due to a legal error, and it is commonly believed in our country that an arbitrator's ruling is out of the scope of being overturned on same grounds. The case went beyond Indian tribunal action by alluding that public policy reasons include arbitral panel mistake of regulations. Errors of regulation are

[51] Sameer Sattar, 'Enforcement of arbitral awards public policy: Same Concept, Different Approach?'

[52] O Ozumba, note 12 above, at 9.

regarded within the scope of public policy, and a procedure to examine arbitrators' decisions that are in violation of arbitration legislation has been established.

The Indian government issued a consultation document in 2010 proposing alteration to the Act to address the matters generated by excessive court participation. The document plainly recognises that Indian courts have misconstrued the Indian Arbitration Act's provisions in such a way that it has defeated the Act's goal and purpose. The consultation document offers to address the issues raised by Saw Pipes, Bhatia[53], and Satyam judgments. The modification brought about by this article narrows the domain of public policy as a premise for rescinding the award. In established arbitral jurisdictions, the proposal represents a shared view of public policy. According to the consultation document, an award is against public policy only if it contradicts India's basic policy, national interests, or justice and morality. In the future, Indian courts would not be able to establish a breach of public policy based on the Saw Pipes basis of 'patent illegality'.

In *NAFED v. Alimenta*[54], the Supreme Court reversing a public policy trend. The court declined to execute a foreign arbitral judgement, claiming that violating Indian and export limitations is a breach of Indian public policy. When dealing with international awards, the court takes a pro-enforcement position. The Renusagar judgement has put an end to the dispute about how public policy should be interpreted. This established the groundwork for the pro-enforcement stance that was reaffirmed in the recent judgement in Nafed's case. However, the aspect of discretion has been neglected, and the NYC has failed to encourage prompt enforcement.[55]

4.2. Conundrum of Public Policy Doctrine

The phrase "public policy" now encompasses a broad variety of concerns and functions in the current period of globalisation, liberalisation, and rising international commerce. The primary function of public policy is to mitigate the effects of foreign legislation or judicial decisions, while secondary functions include preventing injustice in extreme circumstances and empowering the court to apply its own law when there is a strong link between the forum and

[53] Appeal (civil) 6527 of 2001

[54] National Agricultural Co-operative Marketing Federation of India (NAFED) v. Alimenta S.A. CIVIL APPEAL NO.667 OF 2012

[55] Talat Chaudhary, 'Enforcement of Foreign Arbitral Awards in India' [2021] IJLMH Vol. 4 Iss. 2, p. 1477

the transactions. The NYC and the Model Law are the sources of public policy in the 1996 Act. However, neither the NYC nor the Model Law succinctly define the term "public policy," but its meaning is understood to be – tapered than the general understanding of public policy, being limited to the enforcing State's public policy and limited to the time when enforcement was sought.

Given the uncertainty and vagueness, Indian legal academics have made several attempts to establish a clear explanation of the phrase "public policy." All of these definitions, however, were insufficient because, while they linked to fundamental societal norms, they lacked identification with the relative character of location and time. Due to the aforementioned anomaly, the jurisprudence surrounding public policy interpretation swung between an expansive view for domestic awards and a narrow view for foreign and international awards, with the expansive view allowing judicial law making to create new heads of public policy, whereas the narrow view did not.

Despite the above-mentioned law, the Indian arbitration regime has gone into wide interpretations of public policy, especially in situations involving foreign arbitrations, eliciting international criticism and suspicion. Although arbitration rules and practise have made an attempt to match the notion of public policy with international best practises throughout time, the disparity in attitudes across national courts, particularly in recent years, has made this job nearly difficult.

The extent of the public policy exception is not stated in the NYC or the Model Law, therefore it can be interpreted as one chooses. According to some legal academics, the New York Convention's public policy exception for setting aside foreign arbitral decisions refers to the imposing state's explication of "international public policy," a concept more limited than domestic public policy. To put it another way, not every norm that governs a country's internal policy also governs its international policy. The international component of public policy has been preserved in the Indian arbitration process. Furthermore, while the Model Law fails to expressly distinguish between foreign and domestic public policy, the debates at UNCITRAL previous to the Model Law's adoption show that such a difference was made.

As a result, even though there is no codified "international public policy" in India, the Model Law and the New York Convention are used to construe the public policy exemption for foreign arbitral awards and domestic awards. In this connection, Section 48(2) (b) of the NYC Awards and Section Section 57(1) (e) for Geneva Convention Awards, in Part II of the 1996 Act mentions the public policy exception for foreign arbitral decisions;

"Enforcement of an arbitral award may be set aside if the Court finds that the enforcement of the award would be contrary to the public policy of India.

Explanation - Without prejudice to the generality it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

The terms "set aside" in Sections 48(2) (b) and 57(1) (e) should not be construed to indicate that in order for the foreign award to be imposed in the country, it can also be contested in Indian courts on its merits. As a result, Indian courts do not have jurisdiction to revoke an award issued outside the nation or to hear an appeal to a foreign award on its merits under Sections 48(2) (b) and 57(1) (e).

Due to the courts' discretion in defining the inclusions, exclusions, and limitations of the public policy exemption, the scope of the public policy exemption is open-ended, impossible to straightjacket, and dependent on socio-cultural notions prevailing in the society. This broad reach has given courts more authority to interfere in the execution of foreign arbitral awards.[56] India's unbridled expansion of the scope for courts to interfere and examine a judgement makes it undesirable as an arbitral venue, and it also breaches India's international responsibilities guided by the New York Convention, which it ratified on June 10, 1958. The New York Convention's foremost aim was to disseminate a pro-enforcement bias in international arbitral verdicts across nations, which it did in a number of ways. To begin with, the need for removal of double exequatur means that the award need not to be declared an order of the court or recognised in the country where it was granted before it may be implemented in another. Second, enforcement objections were to be thorough but limited in extent. Specifically, the phrase "public policy" was to be taken in its simplest meaning, more akin to the French concept of "ordre public," which refers exclusively to basic moral and legal principles. The phrase "public policy" was selected over "ordre public" since the latter was thought to be unfamiliar to most jurisdictions. A study of the clause in *pari mataria* in the Geneva Convention, which allows refusal of the awards if they are "contrary to the public policy or the principles of the law of the nation," shows that public policy was supposed to be applied in restrictive manner.

[56] Pallavi Mahjan, 'The unruly horse of public policy exemption in the enforcement of foreign awards in India' [2015] Mahajan, Pallavi, The Unruly Horse of Public Policy Exemption in the Enforcement of Foreign Arbitral Awards in India (September 7, 2015). Available at SSRN: https://ssrn.com/abstract=3449565 or http://dx.doi.org/10.2139/ssrn.3449565

The reference to the country's legal principles was purposefully omitted, indicating that a merits review was not permitted. Furthermore, it was stated that what would be examined was whether the award's enforcement, rather than the award itself, would result in a breach of the enforcing country's national policy.

The Model Law was developed in 1985 by the UNCITRAL to provide a uniform framework for nations to follow. When drafting article 34, i.e., an application for setting aside an award, when the addition of new grounds other than those included in the "New York Convention" outrightly rejected by the committee, and the definition of public policy was supposed to be the same as it was under the NYC. The United Kingdom's representative, on the other hand, emphasised that the word ordre public was larger scope than "public policy" because the former encompassed procedural inequities as well. As a result, the committee stressed in its final report that the phrase "public policy," meant fundamental principles of law and justice in New York Convention and several other instruments in both substantive and procedural matters. Thus, significant cases of corruption, bribery, or fraud, as well as comparable egregious situations, would be grounds for setting aside. The phrase "public policy" was only used in a broader meaning in this sense of include procedural inequities. In reality, it was also acknowledged that public policy did not refer to a state's political position or foreign policies in the conventional sense as it did in common law nations, but rather to the fundamental concepts and principles of justice. The panel unanimously agreed that the ground was not meant to allow a reconsideration of the award's merits. This has mostly been preserved. The phrases and notions that draw the public policy charge are basically the same in most nations. The following are the phrases "unconscionable or reprehensible," in violation of "essential morality" and "the most basic and explicit principles of justice and fairness," and "clearly injurious to the public good or wholly offensive to the ordinary reasonable and fully informed member of the public, or where it has been violated." Even in India, the phrase "public policy" was meant to include the country's core policies, interests, morals, and justice, and it did until a more comprehensive approach was adopted. The case *of Renusagar* starts the tale for India.[57]

In Renusagar, a three-judge bench clarified that the interpretation of section 7 (1) (b) (ii)[58] on the scope of an award delivered in New York under the ICC rules in the context of a disagreement between an Indian and an American company. With the passage of the Act 1996,

[57] Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the Judiciary and the Legislature Rein in the ''Unruly Horse''?' Journal of the Indian Law Institute
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[58] Foreign Awards (Recognition and Enforcement) Act, 1961

this Act of 1961 was abolished, but the decision's significance has persisted. The appellant objected to the award, claiming that it violated the Foreign Exchange Regulation Act by enabling overdue interest to be paid, damages on damages to be paid, and compoundable interest on interest to be paid, as well as that it would result in the respondent's unfair benefit. Recognizing the 'narrow' and 'broad' scope of “public policy”, the Supreme Court evidently clarified that the context and purpose of the provision dictated which criterion to use, "While implementing the abovementioned norm of public policy, a distinction is established between an issue regulated by domestic law and a matter involving conflict of laws," the court ruled. When there is a 'foreign element,' courts are known to be hesitant to depend on the larger meaning of public policy. The court was careful and aware of the pro-enforcement bias as well as the need give disputes conclusion in attempt to settle them quickly, both of which were driving forces behind the NYC and the Foreign Award Act, to declare that a assessment of the award's grounds for imposing could not be included in the ground of public policy in this situation, such that the step for challenging, acts as an act of appeal. The Supreme Court ruled that neither the Foreign Awards Act nor the NYC imply that the word "public policy" encompasses a simple breach of Indian laws or contract conditions. Instead, it said that the award would only be rejected enforcement if it was in violation of (i) Indian law's fundamental policy, (ii) India's interests, or (iii) justice or morality. These words were not defined by the court. The court made it very apparent that the award's merits could not be reviewed on this definition of public policy or what constitutes it. When the appellant contended that the award violated the Foreign Exchange Regulation Act's(FERA) requirements, the court provided a lucid account that the legislation was designed to protect financial interests of the country, and transgressing these rules would be a breach of public policy. Nonetheless, the court was cautious to distinguish between the appellant's position and the court's own. The court determined that it could not investigate the arbitral tribunal's award of overdue interest for breaches of FERA because doing so would amount to an unjustified assessment of the judgment's merits. The court did, however, examine the appellant's argument that the payment under the judgement would be a breach of sections 9 and 47 of FERA since it could not have been done without the “Reserve Bank of India” and the “Central Bank of India's” prior consent. In light of its previous decisions, the court ruled defendants are not allowed to utilise them to get around the law and avoid paying legal fees, determining that no law had been broken or the country's economic interests jeopardised. The Supreme Court's decision in Renusagar has been widely.

In reality, the case is considered as a seminal example of a court's refusal to assess an award on its merits. Moreover, the court's reasoning is sophisticated, and it acknowledges the glaring discrepancy during the New York Convention's formulation, namely, whether the award's execution would violate India's national policy, rather than the award itself. The point addressed in this case by the court was whether or not payment under the judgement would be in breach of FERA requirements, rather than whether decisions on the merits, such as interest payment, would be in violation of FERA. This, in the author's perspective, is the highest creative abstraction of the test that can be defined, i.e., one must examine the impact of the enforcement rather than distinct features of the award to compare them to the award's standard. Indeed, this does not necessarily imply that the merits are shielded from such an investigation, as they were in this instance when the court was able to draw a clear line. As an example, a contract for solicitation or the payment of a bribe. The execution of an award which imposes such an agreement would suggest that India considers prostitution and palm grazing to be lawful and acceptable. As a result, the award's public policy implications are intimately tied to, and will continue over to, the award's enforcement. This difference, however, would not be there all of the time. In most cases, when the award's execution would not violate public policy but an element of the merits judgement could, the latter would have to be ignored. Of course, in general means, this test is vulnerable to extrapolation. It may always be argued that enforcing an award based on faulty reasoning and findings on merits would turn India into a legal regime that allows for the improper application of law and is incompatible with India's core ideas of justice. As a result, the judges had to be cautious and adhere to the Renusagar ratio. With the passing of the Act, the “Foreign Awards Act” was scrapped. Part I of the Act was supposed to be an omnibus law dealing with the administration of arbitrations and awards in the country issued therein, while part II was governs the enforcement of foreign awards and other relevant problems. Furthermore, the move was largely inspired by the UNCITRAL Model Law and was intended to align India's arbitration process with it. Part I's sections 34 and 36 contains provisions regarding enforcement and its refusal of domestic award, on the other hand part II's section 48 dealt with enforcing a foreign award. In both sections 34 and 48, public policy was preserved as a ground. Renusagar's ongoing application, on the other hand, remained uncertain until it gained court approval in respect of awards made under the new Act. In Saw Pipes, the Supreme Court first faced this opportunity in the context of a suit to set aside a domestic award as per section 34 of the Act.

"Would the court have jurisdiction under section 34 of the Act to set aside an award passed by the arbitral tribunal that is patently illegal or in contravention of the provisions of the Act or

any other substantive law governing the parties or is against the terms of the contract," the court asked in Saw Pipes. In other words, might the court review the award on appeal and re-examine its merits? The court responded in the affirmative, a decision reached by painstaking, if faulty, reasoning. The court initially observed that, because the Act established an arbitral tribunal, it would exercise its powers outside of its authority if it issued an award that did not comply with the Act's requirements, and hence courts would be justified in interfering. To hold differently would render the Act's provisions null and void, since there would be no means to assure their implementation. The court's conclusion that every right requires a remedy overlooks the commonly accepted notion that parties might agree to waive an appeal-like remedy against arbitral judgments through negotiation. Furthermore, there is a stated justification under the Act for putting aside an award if it is outside of its authority. Jurisdiction over that issue, on the other hand, refers to jurisdiction in its broadest meaning, including jurisdiction over the character of the reference area, the legitimacy of the arbitration agreement, arbitrability, and so on. The court in Saw Pipes combines jurisdiction with procedural infractions by stating that every infringement of the Act is a jurisdictional violation by the arbitral panel. Furthermore, the court cleverly applies section 28 of the Act, which states that "it is the duty of the tribunal to decide the dispute in accordance with the parties' terms of contract, substantive provisions of law chosen by the parties (Indian law if it is a non-international commercial arbitration) to hold that if the arbitral tribunal's award violates provisions of the contract or sues the parties to hold that" if the arbitral panel's award transgress clauses in the agreement or sue, to be sure, the court appears to be aware of the potential consequences of classifying these infractions as jurisdictional breaches, and so classifies them as clearly illegal.

There are two issues that need to be addressed. To begin with, the court's reasoning was premised on the reality that a tribunal given authority by the Act could not act outside of that jurisdiction, and therefore the court had to put aside jurisdictional breaches rather than patent illegalities. Second, simply because an award is clearly unlawful is not enough to set it aside as per s.34. The court overcomes the second hurdle by agreeing with the claimant that "patent illegality" should be deemed an auxiliary public policy base under section 34 beyond what was stated in Renusagar, stating that section 34's reach is distinct from that of section 48. According to the appellant, the award has not reached conclusion and so might be subject to an expansive assessment at this level of section 34. The award would be subject to a two-step exequatur in a section 48 application, with the award first being subjected to disregarding procedures in the country where it was granted, and then being declared final once these procedures were finished.

This logic is faulty to the point of absurdity. With the implementation of the NYC, the need for “double exequatur” was eliminated, as The award didn't need to be proclaimed binding in the place of origin, and it could be implemented right away in the place where the properties were situated. This was reaffirmed in the UNCITRAL Model Law's preparatory work, which concluded that the award becomes final the day it is made, not until it passes the section 34 test. As per the legislative history of the Act, there is no reason to construe section 35 in any other way. As a result, the claim that the award would not have been final at the time of the restraining order was incorrect. The lawsuit was criticised for being a retrogression in India's arbitration history. The interpretation given to Saw Pipes would determine whether Renusagar's logical approach would be completely annihilated.

The most troubling interpretation claimed that the Saw Pipes judgement resulted in a broadening of the definition of "public policy" to include section 48. It has also been claimed that the judgement does not contradict Renusagar because Renusagar simply advised that a simple breach of Indian laws would not be detrimental to public policy. In Saw Pipes, the court described patent illegality as "illegality or contraventions that go to the heart of the matter and are not trivial in nature," essentially restating Renusagar's negative statement in positive language. But a thorough read of Renusagar reveals that no merits review is permitted unless it is done in the case of analysing the effects of the award's enforcement.

A more convincing view acknowledges that the Supreme Court explicitly indicated that the context of public policy interpretation was critical. In the instance of Saw Pipes, the background was the revocation of a domestic award. As a result, rather than an unqualified acceptance of a broader interpretation, it is fair to believe that the appellant's counsel attempted to differentiate Renusagar based on its own context. Renusagar claims that perhaps the jury chose a restricted view of public policy not just due to the procedure was in the enforcement stage, but also due to the fact there was a foreign component to the case, if read carefully. "The applicability of the theory of public policy in the sphere of conflict of laws is more limited than in domestic law, and judges are slower to invoke public policy in a case having a foreign element than in a case involving a solely local legal problem," the court stated. 45 As a result, it may be argued that the Saw Pipes judgement is only applicable to the setting aside of awards issued in exclusively domestic disputes.

Interpretation of section 48 in any way that conflicts with India's cross-border principles under the NYC and the international accord represented in the UNCITRAL Model Law is against the law. On these grounds, in Saw Pipes made no attempt were made by the court to tell the difference from Renusagar. Given the peculiar structure of the Act, this difference should have

been noted in the case itself, as section 34 can also have an influence on India's international responsibilities. Part I is applicable if the place where arbitration is held is India. Many think that the site of arbitration, or the territoriality principle, is the basis of difference in the Act as a result of this. Although the territoriality concept is acknowledged to provide certainty, the UNCITRAL Model Law uses nationality of parties as the foundation of differentiation, focusing on "international" and "non-international" awards rather than the conventional distinction from foreign to domestic awards. As a result, the model law's goal was to establish a consistent approach addressing international arbitral decisions, regardless of the "place of arbitration". Aside from New York Convention being limited to foreign awards, the UNCITRAL rules are designed to complement rather than conflict with the NYC's system. Part I international commercial arbitrations should follow the Renusagar norm of public policy, according to this rationale. As a result, separating Saw Pipes solely on the basis of the award's stage, rather than the substance of the award, puts India's international responsibilities in jeopardy.

Provisions which govern foreign awards are contained in Part II of the Act may have escaped the depravity of Saw Pipes as s.34 does not typically govern the overseas awards. In India, an Indian party can only object to a request for the award to be carried out, not to a request to have the judgement overturned. Regrettably, a slew of Supreme Court rulings have created this level of trust a pipe dream. Judgement in the notorious *Bhatia International* broadly expanded the applicability of part I of the Act to arbitrations held outside of India, except when the parties had specifically or implicitly excluded part I by their accord. The judgment's ramifications may have been kept limited to the context in which the court's decision was required, namely, interim measures given in s.9, where it was held by the court that by departing from the model law and un-applicability of s.9 to foreign arbitrations, the law makers had effectively kept parties with no recourse in the cases where a foreign arbitration was involved. Although, in Venture Global Engineering, the Apex Court expanded the applicability of the Bhatia International ratio to an action for setting aside a foreign arbitral decision under section 34 of the Acknowledgements Act in 2008.

To aggravate the situation, the case proceeded to embrace the Saw Pipes public policy notion. It's worth remembering that the applicable law in a foreign arbitration will nearly always be legislation from a foreign country. In that circumstance, Indian courts shall have to assess if the award was in accordance with international law. Penn Racquets eloquently articulated this issue, but Saw Pipes and Satyam brazenly ignored it. Supporters of this decision would argue that the Supreme Court in Saw Pipes differentiated among the realm of jurisdiction at the phase

of setting aside and enforcing judgments and not in the substance of the awards themselves. In Satyam, however, the court found no contradiction between sections 48 and 34, instead seeming to explain the ruling on the premise that a judgement debtor with holdings in India is allowed to challenge the judgement on the grounds public policy of India. As a result, the court appears to have been misled by a protectionist mindset.

Indeed, protectionist logic might easily be used to enforcement proceedings brought against an Indian party by a foreign judgement creditor, requires the judgement creditor to overcome a larger sense of Indian public policy. The High Court reached different judgments on the issue. Regrettably, in Phulchand in 2011, the Supreme Court succumbed to this protectionist attitude. The respondent objected to proceedings brought under s.48 in connection with a foreign award with public policy defence. The appellants' arguments based on Renusagar were rejected by sole judge and the division bench of the High Court of Bombay. The Supreme Court, unconvinced, agreed with the respondents' submission and gave no reasons for embracing the broader extent of public policy as propounded in Saw Pipes and for overlooking the primary goal of section 48. The Supreme Court's judgment was condemned, and as a result, it must be rectified. A decision like Phulchand would not have occurred on its own, but rather as a result of the trajectory of Indian arbitration, which began with the cases of Saw Pipes and Bhatia International, which served as the first big "crack in the dam", and finally ruptured with Satyam and Phulchand. This trend indicates that the issue is not one of differing interpretations and schemes of the Act, but rather one of the judiciary's and other stakeholders' attitudes toward arbitration and their unwillingness to give arbitrators' findings and conclusions finality. A succession of rulings headed in that direction would best convey that the judiciary is prepared to reflect on and reassess this approach.[59]

4.3. Public Policy in Domestic and foreign awards.

A confusion about what public policy entails has always there. Because of the ambiguity of the phrase "public policy," it can be difficult to determine what falls under its purview and what does not. Be it domestic or foreign, public policy can be either, although the extent of it varies.

[59] Jahnavi Sindhu, 'Public Policy and Indian Arbitration: Can the Judiciary and the Legislature Rein in the ''Unruly Horse''?' Journal of the Indian Law Institute
October - December 2016, Vol. 58, No. 4 (October - December 2016), pp. 421-446

It is also known as an amorphous exception. The rowdy horse is another metaphor for the public policy exception. Domestic and international aspects of public policy are included. On the one hand, household relationships are governed by public policy in their entirety. When it comes to international arbitration, however, it acts as a barrier to foreign law's access to domestic law. We must consider the transnational nature of public policy because it affects the acceptance and execution of foreign arbitral decisions. A state's domestic public policy is the collection of rules that it determines to follow in its internal affairs. It is affected by the legal system in place in that particular state. A state's domestic public policies are complemented by a set of foreign public policies. Because a state's foreign public policy is construed relatively limited in manner than its national policy, a foreign arbitral award is less likely to be refused recognition and enforcement than a domestic one. Scholars argue that a state's foreign public policy is neither really multinational nor a set of transnational public policies. It must be recognised that the State has created a set of standards for the adoption and enforcement of foreign arbitral rulings in international public policies. This set of criteria is therefore developed by the State and defined at the level of the State. The requirements are never identical to those of other countries. In the international norms of public policy, a state always contradicts the standards set by other states. The international public policy norms of States are their national public policies that may differ from their international public policies. These worldwide criteria will differ from country to country, as previously indicated. In order to ensure uniformity of interpretation, a set of international regulations must be adopted by states in the context of the acceptance and execution of foreign arbitral decisions. The Committee on International Commercial Arbitration of the International Law Association sets forth international public policy in its final report. It defines international public policy as follows: "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 the award would entail their violation on account either of the procedure pursuant to which it was rendered or of its contents".[60]

It is reasonable that the legislators, judges and academics have tried to make the norm global by citing an international standard of public policy, in view of the lack of coherence and risks in connection with national standards. A number of notions are explored under this

[60] Recommendation 1(c), Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, 253

umbrellla term, among others an international standard derived from national sources; a national standard in conformity with international sources; or simply a national standard that is more liberal for international honours than national awards. The first and second approaches can successfully replace an international or transnational norm with an autonomous national public policy standard. The text and intent of Article V(1) (b)cannot be reconciled with this substitution. The only compatible method is the third. The third way is to regard International Public Policy a national standard for recognising and enforcing of international arbitral outcomes rather than a national standard for the enforcement of domestic rulings. Even though the difference among both domestic and foreign policy is often stated, it is not required under Article V(2)(b). Because as Convention gives Contracting States with the flexibility of establishing their own norms of public policy, nations may create specific domestic and foreign award criteria, as well as uniform standards. The best practise standard, however, includes a lenient handling of international arbitral decisions for grounds of comity.[61]

The notion of international public policy that applies to international public policy as a matter of fact is more limited in extent than domestic public policy, as is commonly agreed amongst the international jurists. In other words, public policy in the US is different from public policy in other nations. "International public policy is increasingly alluded to in legislation and court judgements in the context of enforcing arbitral awards." On the other hand, a national court must decide what defines international public policy. While international or transnational public policy is often not the same as domestic public policy, the goal of separating the two is to restrictthe extent of public policy that must be evaluated in determining whether or not the execution of a foreign award is consistent. Even while it is acknowledged that Article V(2)(b) of the NYC pertains with international instead of domestic public policy, decisions of the appropriate High Court demonstrate that in the context of international awards, a restricted reading of the term is often not applied. Courts have articulated the concepts underlying the breach of public policy erratically after establishing if they are in civil law or common law nations. In the first case, public policy definitions usually allude to the fundamental ideas or ideals that underpin society's basis, without defining them specifically. In common law regimes, however, the concept frequently relates to more clearly defined, although extremely broad, principles like justice, fairness, or morality.' In nations such as the United Kingdom, for

[61] Shubhi Pandey, 'Public Policy as an Exception to Compliance with International Obligations: Lessons from and for India' (Master's Thesis of Law, Graduate School of Law Seoul National University 2020)

example, judges are known to be hesitant to define public policy exactly and have instead alluded to some essential ideals, stating that:

"Public policy considerations can never be fully defined, but they should be handled with utmost caution... It must be demonstrated that the award is unconstitutional, or that enforcement would be plainly detrimental to the public welfare, or that enforcement would be totally objectionable to the ordinary reasonable and fully informed member of the public on whose behalf the state's powers are exercised." In India, however, public policy has been given a considerably broader meaning, and an Indian court may refuse to implement a foreign arbitral judgement on the grounds of public policy if doing so would be inconsistent to "fundamental policy of Indian law, the interests of India, justice, or morality."

Domestic public policy is made up of moral and legal concepts enshrined in a country's constitution or other legal documents. International public policy, on the contrary, is a reflection of a society's desire for justice, as well as a collection of a country's principles, whose violation cannot be allowed by the society, even in international affairs. In terms of enforcement casts, only a few nations have openly accepted the idea of international public policy. The fundamental or basic ideas that make up public policy are usually those that already exist in the territory in which the execution is desired. This is mentioned clearly in Article V(2)(b) of the NYC, which mentions a scenario in which the award's acceptance or execution would be detrimental to "that country's" national policy. International and domestic public policy are distinguished in countries like France and Switzerland, and international arbitral awards are considered part of international public policy."

In Renusagar Power, the Apex Court expressed that a difference must be made between an issue regulated by domestic law and matter that involve conflict of laws while considering the specified norm of public policy. In the sphere of conflict of laws, the applicability of this concept is restrictive, and courts are slower to engage public policy where foreign element is involved than in situations involving solely municipal legal issues.

The Supreme Court reinforced the distinction between the scope of domestic and foreign arbitrations for the reasons of public policy in Saw Pipes. While following Renusagar's distinction, the Court added made another addition to the grounds on which enforcement might be denied, patent illegality, much to the international community's chagrin. Following this judgement, courts might assess the merits of the pending case and deny the enforcement an award if it was in direct violation of India's basic laws. However, this expansion only extended to domestic arbitrations.

The Bhatia "The Court ruled that the Part I remedies must also be open to international parties.”

In the case of Venture Global, the award was issued in London, and the legislation which governed the trade accord was Michigan law. The Court granted an application for international commercial arbitration under the broad Section 34, following the Saw Pipes case. The Court did so by setting aside a foreign verdict based on patent illegality, which was unusual even for domestic arbitrations. The court's decision in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*[62] received much criticism and it was overturned. Following that, in the Amendment Act s.34 was changed to make foreign commercial arbitrations expressly inapplicable. In addition, it has been emphasised that a judge cannot go into the merits of a Section 48 application. barring the use of the basis of patent infringement. In the case of Associate Builders, the following facts were presented:: The Supreme Court narrowed the scope of public policy for domestic arbitrations as well, holding that arbitral judgments may only be overturned in extremely restricted circumstances if the domestic ruling in question was either unreasonable or arbitrary unreasonable or outraged the court's conscience

As a result, the scope of public policy for both domestic and international arbitrations has been significantly limited and made in consistent with globally accepted norms, as the legislation currently stands.[63]

4.4.Impact on Arbitral awards.

The Saw Pipes judgment has been criticised in domestic and international arbitration circles for allowing courts to examine an arbitral judgment on its merits. The Supreme Court effectively insulated at least the international awards from such assessment at the implementation level in Lal Mahal by overturning Phulchand and declaring that the Saw Pipes' "patent illegality" criterion was inapplicable. As a result, the storm that developed around the idea of public policy, which was largely founded on the concept of patent illegality, was confined to domestic arbitrations. By widening the concept of "fundamental policy of India," Western Geco and Associate Builders have given noisy plaintiffs a new basis to postpone the

[62] Civil Appeal No. 7019 of 2005

[63] Vyapak Desai, Moazzam Khan and Payel Chatterjee, 'Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India' available at https://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/Public_Policy_and_Arbitrability_Challenges_to_the_Enforcement_of_Foreign_Awards_in_India.pdf

execution of international awards. Western Geco has given greater options for parties to fight implementation of a judgement under the ambit of public policy by incorporating judicial considerations appropriate in the realm of public law into the idea of "fundamental policy of Indian law." This is compounded by the Supreme Court's judgement in Associate Builders, which not only confirmed such a broad elucidation of the phrases "fundamental policy of India," but also expanded and broadened the notions of "justice," "interest of India," and "morality.""".

Even though "Western Geco" as well as "Associate Builders" are pronouncements that were delivered in S.34 of the Act, they seem to be equally applied to cases under s.48, which are now administered by the Renusagar test, that includes, among other things, "fundamental policy of India." The Model Law's Section 34 was adopted into the 1996 Act without any modifications by Parliament. Unlike other legislation from a variety of jurisdictions that scrutinizes domestic awards on another level of than international awards, the 1996 Act does not do so. Domestic awards, however, have come to be subject to considerably more scrutiny than was likely intended by the law, thanks to judicial rulings, particularly the Saw Pipes "patent illegality" standard.

The situation has been exacerbated by Western Geco's expansion of the test of India's "public policy." Western Geco is a far more dangerous example since the court overturned the award based on its own reading of the cirmcumstances. Despite the fact that study into the facts is prohibited in a challenge procedure, the Court preserved the decision in Associate Builders because it made a de novo finding that the decision was entirely contingent on its own evaluation of the facts and arguments.

By integrating possibly the best legal notions with a lengthy series of precedents in common law into the concept of "fundamental policy of Indian law," Western Geco has started the ball rolling for future assessment of domestic arbitral decisions on merits.[64]

4.4.1. Patent Illegality

The judiciary has sought to provide a framework for comprehending the idea of public policy and determining what actually falls under its jurisdiction. The Renusagar and Saw Pipes cases

[64] Analysis of Public Policy with respect to Arbitration and Conciliation Act, 1996 https://legaldesire.com/analysis-of-public-policy-with-respect-to-arbitration-and-conciliation-act-1996/ accessed on 14-07-2021

are two major decisions that shed a great deal of light on the subject. Both of these decisions called into question two key features of arbitration law: limited court involvement and the award's finality.

When it came to the fourth basis of 'patently illegal,' the Court in Saw Pipes made it clear that it solely applied to domestic awards. In BALCO, the Supreme Court's Constitutional Bench held that the decision delivered in “Bhatia International” and “Venture Global Engineering” and its application to international arbitrations could not be supported. The Delhi High Court, has though, in its decision *Ogilvy & Mather Pvt Ltd. v. Union of India*[65], reaffirmed the dicta stated and construed by “Bhatia Foreign” and “Venture Global Engineering” that it will also be applicable to international arbitrations.

The basic premise of SAW Pipes is that an award that is clearly unlawful is against public policy and, as a result, is likely to be overturned. But what exactly is patent infringement? In contrast to the phrase "latent," "patent" refers to anything that is highly clear and does not require additional explanation or is not subject to debate. A mistake that is open to view, readily observable, or comprehensible is referred to as patent illegality, patent error, or an obvoius mistake. In a remark on Indian Arbitration, the term "patent infringement" was defined as. “The expressions ‘patent illegality’, ‘blatant illegality’, and ‘error of law apparent on the face of the record’ have synonymously been used to denote the illegalty or error of law which goes to the root of the matter, or is violative of constitutional or statutory provisions or is inconsistent with the law established by judicial decisions.”[66]

The first counter-argument is that establishing a new patent illegality criterion to demonstrate an infringement of public policy was unnecessary. Since indicated in the previous sections, in the case of Saw Pipes, Apex Court established a new foundation for patent illegality, and the logic in the judgement was utilised in numerous subsequent instances. The new cause of patent infringement permits further court intervention, culminating in the non-enforcement of international arbitral decisions. The inclusion of a patent infringement argument broadens the meaning of public policy. As a result, India has violated the New York Convention's obligations. Article III of the New York Convention essentially calls for the signatories to enforce arbitral judgments, as outlined in Chapter 2. The most important lesson from that report

[65] O.M.P. 651 OF 2007

[66] , O.P. MALHOTRA & INDU MALHOTRA, THE LAW AND PRACTICE OF ARBITRATION AND CONCILIATION 42 (2006)

is that the New York Convention's signatories are required to execute arbitral decisions in line with the territory's regulations.

The "UNCITRAL Model Law" and the "New York Convention" make no mention of expanding the scope of public policy. Although these international instruments provide states the freedom to establish their national laws, without contradicting international legal instruments that a state has chosen to incorporate into its national legislative system. The objective of national law is to fill up the gaps left by international treaties. When it comes to the state's government, it is accountable for ensuring that its mechanism is consistent with and do not conflict with its international obligations.

The Act has been invoked in numerous cases to prohibit arbitral rulings from being implemented even before it was updated to incorporate the ground of patent illegality. The decision in Saw Pipes was sustained in the case of Phulchand. In actuality, these incidents were viewed as having sparked widespread criticism of the Indian arbitration system. In the case of *Shri Lal Mahal Ltd*, the judgement in *Phulchand Ltd.*, was eventually overturned when establishing the arbitral judgement is in breach of public policy, patent illegality is no longer used[67]. What is troubling, however, is that in one of the Supreme Court of India's most recent rulings, the patent illegality basis was once again invoked, resulting in the arbitral award's non-enforcement. Apart from making the arbitral procedure more technical, the issue of patent illegality might be said to be leading in more arbitral decisions not being enforced. Which resulted in the New York Convention's responsibility to execute arbitral decisions not being met.

Another cause for India's breach of the New York Convention commitment is the expansive viewpoint of the public policy exemption. The Indian courts appears to have deviated from the notion of "pro-enforcement bias" set forth in the NYC. The above-mentioned string of judicial rulings demonstrates this.

In many bigger nations globally, the idea of public policy has been limited or restricted. Most countries throughout the globe have strictly obeyed the New York Convention's "pro-enforcement" stance. The exemption for public purposes has been limited in the United States of America. In international commercial arbitrations, the American judiciary bears a pro-

[67] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433. 422 Cruz City 1 Mauritius Holdings v. Unitech Limited, EX. P. 132/2014 & EA(OS) Nos. 316/2015, 1058/2015 & 151/2016 & 670/2016, Judgment delivered on April 11, 2017; See also Vijay Karia & Ors v. Prysmian Cavi E Sistemi SRL& Ors, Civil Appeal No. 1544 of 2020, arising out of SLP (Civil) No. 8304 of 2019.

enforcement stance, resulting in “minimal intervention”. The court in *Scherk v. Alberto-Culver Co.*[68], a landmark decision, reaffirmed the significance of the concept of pro enforcement and narrowed the scope of the public policy exemption. There are additional instances in which the United States has narrow interpretation of public policy.

In these cases, the courts have concluded that if an arbitral award disagrees with the state's notions of justice and morality, it may be refused for implementation on public policy grounds. French foreign policy is governed by a set of principles. Whenever the instance of executing an international arbitral verdict, French courts seek to determine if they meet specific requirements. As evidenced by court judgments, the French courts follow the limited or restrictive interpretation of the public policy exemption.

Spite of the fact that there have been other alleged anomalies, the fact that French courts are investigating the “pro-enforcement bias” shows their desire to honour their international commitments.

Similarly, English courts have interpreted the public policy exemption narrowly, noting the pro-enforcement slant of the Convention. The few early English court rulings bear witness to this. According to a recent English court decision, the national good in the finality of arbitration verdicts triumphed over an argument that the transaction was stained by deception as a basis for execution.

The norm of public policy varying in different areas is inescapable and establishing uniformity in this regard is almost impossible. The International Bar Association's “Report on the New York Convention's Public Policy Exception” backs this up. The analysis unambiguously shows that the extent of judicial review of arbitral rulings by domestic courts of signatories is inconsistent. Uniformity in state practise in terms of how the judiciary works would be difficult, if not impossible, to accomplish. States can at the very best embrace global standards in the context of executing an awards considered as foreign. The Judicial system must strive to match its position on the public policy exemption's understanding with those of other nations. This will aid India's arbitration structure in establishing itself as a reputable location for the execution of arbitral rulings. Expanded perception allows for a broader scope of public policy and more judicial action, all of which leads to courts weighing in on the merits of the arbitral judgement, undermining the arbitral aim.

In *Saw Pipes*, the basis of "patent illegality" was added, allowing for further court involvement. By reviewing the merits of arbitral decisions, Indian courts have taken on the authority to

[68] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

change them. The New York Convention and the UNCITRAL Model Law make no indication of arbitral rulings being contested on their merits. According to Article III of the New York Convention, contracting nations must recognise and enforce arbitral rulings as binding. The Model Law is supported by three main elements. Party autonomy, minimal court involvement, and a fair and effective arbitration system are the three pillars. Evaluating the principles of an arbitral award or the arbitrator's arguments promotes judicial involvement, but a study of Supreme Court of India verdicts shows that the bulk of merits-based judgments are not implemented out.[69]

[69] Shubhi Pandey, 'Public Policy as an Exception to Compliance with International Obligations: Lessons from and for India' (Master's Thesis of Law, Graduate School of Law Seoul National University 2020)

5. Legal Position in India

The 1996 Act was passed with the goal of increasing “autonomy, efficiency, and effectiveness” while limiting the scope of court involvement. Article 19(1) of the 'Model Law states, "Subject to the requirements of this Law, the parties are free to agree on the method to be followed by the arbitral tribunal in conducting the proceedings." Additionaly, Article 18 of the Model Law demonstrates the law's allegiance to limiting judicial intervention and creating a high level of autonomy.

This legislation discharges a variety of functions. To begin, it tries to reconcile the diverse arbitral regulations of various countries with Indian arbitration law. Second, to establish a fair and non-discriminatory arbitration procedure in the nation. Third, it consolidates all prior acts relating to arbitration, and last, but most crucially, it provides for the execution of decisions by court decrees.

Opponents, on the other hand, claim that, despite Parliament's efforts, the Act has had little influence on the system and leaves international and local disputes exceedingly difficult to resolve through arbitration. In response of the foregoing, parties have begun to seek conflict resolution outside of the country. The court's attitude toward arbitration has not changed, despite the fact that the Act has altered.

These improvements, if approved by Parliament, may make the process more efficient and dependable. The depth and scope of judicial participation will diminish if Parliament increases its authority and assigned some responsibilities to an arbitral tribunal. Allowing parties to file claims and disputes directly with the arbitral tribunal rather than going to court and seeking interim relief might be one of the powers granted. The arbitral panel would then be able to assess whether judicial interpretation is required.

As previously indicated, the term "public policy" was interpreted in Saw Pipes in line with the fundamental principles presented in the 1996 Act. Public policy, according to the court, is concerned with problems of public benefit and public interest. As a result, as determined in the Renusagar case, The Supreme Court inserted Patent Illegality as a fourth ground to its list of Public Policy grounds. This meant that if a decision was made in contravention of the law, this reason may be used to reverse the decision.

Despite all of the objections levelled at the Saw Pipes ruling, Justice Sinha upheld it in the *McDermott International case*[70]. The premise of "patently illegal" under public policy, elseways, is thought to go against the spirit and essential foundation of the Act. If Parliament had opted to keep Section 30 of the 1940 Act, it is said to be the same. Furthermore, during the production of this decision, the issue of power separation was overlooked and ignored. The 1996 Act was adopted by Parliament in line with the Model Law with the intention of limiting the courts' supervisory jurisdiction, but this clearly unlawful premise expands the court's breadth and purview in terms of judicial intervention.[71]

5.1. 246th Report

The Law Commission of India's 246th report, titled "Amendments to the Arbitration and Conciliation Act 1996" (the "LC Report"), suggested numerous substantial altercations to the Act on August 5, 2014. The main goal was to improve the effectiveness of the Arbitration Act and bring it in line with worldwide norms. One of the key goals of the LC Report was to increase foreign investor trust by ensuring that arbitration issues are handled quickly; one of their main worries was the excessive delay in resolving disputes in Indian courts and arbitration tribunals.

To reduce judicial intervention, the LC brought forward that the notion of "public policy" be narrowed and brought in line following the Supreme Court's judgement in Renusagar. Following the LC Report, the Supreme Court (three-judge bench) in ONGC v. Western Geco ("Western Geco"), on September 14, 2014, reviewed the subject of "[w]hat then would constitute the 'Fundamental policy of Indian Law' under Section 34 of the Arbitration Act," and ruled that

(i) judicial approach
(ii) principles of natural justice and
(iii) rationality of reasonableness (Wednesbury principles)

[70] Mcdermott International Inc vs Burn Standard Co. Ltd
[71] Ajay, Patent Illegality As A Ground For Setting Aside An Arbitral Award[2016] https://blog.ipleaders.in/patent-illegality-ground-setting-aside-arbitral-award/ accessed on 14-07-2021

" …must necessarily be understood as a part and parcel of the Fundamental Policy of Indian law ".

The LC published another Report spplement to the LC Report in February 2015 in response to Western Geco's judgment, noting the judgment's "detrimental effect." The Law Commission noted that the Supreme Court's judgement in Western Geco violates the recommendations of the LC Report, and that further changes to S.48 of the Arbitration Act are required to ensure that the basis of "fundamental principle of Indian law" is carefully applied. [72]

5.2. Arbitration and Conciliation (Amendment Act) 2015

The 2015 amendment makes a number of significant improvements to strengthen international arbitration in the state. One amongst such supports the development of standard specifications in accordance with the Act by arbitral institutions to guarantee that arbitration is performed quickly and efficiently. This is complemented by the stated inclusion of "communication through electronic means" for drafting the arbitration agreement and a model price schedule to prevent tribunals and arbitrators from charging unreasonable fees ("however for international commercial arbitration and institutional arbitration, the fee limit is not applicable"). Fixing a one-year time limit for settling arbitral issues is one of the most contentious changes. With the parties' permission, this timetable can be extended for another six months. Surprisingly, the speedy decision is rewarded by the increase in the compensation of the arbitration panel during six months, but up to 5 percent each month is charged by a delay. The amendment also contains a mechanism for "fast track proceedings," in which parties might agree to resolve a dispute in six months using just written filings and no oral or technical hearings. Furthermore, an arbitrator must be appointed and an appeal against the award must be lodged in six months. The costs of the proceedings will be determined depending on the parties' behaviour and other considerations. This would be a big help in dissuading people from using dilatory methods. The tribunal is now able to impose a greater rate of post-award interest and, to the extent practicable, convene day-to-day hearings. If a side requests excessive adjournments, the arbitrator has the authority to impose hefty fees. In terms of court participation, the amendment stipulates that an arbitration tribunal can be established within 90 days after the court's interim protection and limits the court's authority once the tribunal has been established.

[72] Notes on dispute resolution Practice, Lockdown Edition

In providing temporary protection, the tribunal is provided with powers equivalent to that of the court's. In terms of governing the arbitrator, the changes have put in provisions to guarantee that the arbitrator has enough time to complete the arbitrations that they accept. The inclusion of neutrality in promotional proceedings is another major change. As a schedule to the Act, the IBA guidelines on conflict of interest (under the fifth and seventh schedules) were prescribed. This regulation prohibits the appointment of arbitrators who are employees of a party to the dispute.

5.3. Position of Public Policy

In Section 48(2)(b) of the Act, public policy was further constrained by the idea of the "public policy of India," which was amended in response to the suggestions.[73]. Furthermore, the "interest of India" was deleted as one of the grounds under public policy since it was too ambiguous and prone to misinterpretation, especially when it came to challenges to the execution of a foreign award. The change also added an explanation that emphasised that the criteria for whether there is a violation of Indian law's basic policy does not include a consideration of the dispute's merits. As a result, the revisions granted formal recognition to the judgement of Supreme Court in Shri Lal Mahal. Following the modification, several courts have limited intervention in the execution of foreign awards, while upholding the legislative objective of the Arbitration Act and subsequent amendments. In *Cruz City 1 Mauritius Holdings vs. Unitech Limited*[74] ("Cruz City"), the Delhi High Court elucidated that the "fundamental policy of Indian law" to mean the "basic and substratal rational values and application of allegedly disparate standards in determining breach etc.," and further held that the phrase "was otherwise unable to present his case" found in Section 48(1) (b), which reflects a natural-justice principle.

In keeping with the pro-enforcement stance, the Supreme Court (three-judge bench) in Prysmian reiterated the restricted extent of interference and under Section 48 on February 13, 2020. In Prysmian, the Supreme Court concurred with Cruz City's argument that a foreign award might be implemented even if it is in conflict with an Indian legislation.[75]

[73] The ordinance (dated 23 October 2015) was promulgated into the Amendment Act which received the President's assent on 31 December 2015 and is dated 1 January 2016
[74] Cruz City 1 Mauritius Holdings vs. Unitech Limited, 2017 SCC Online Del 7810.
[75] (i.e. the Foreign Exchange Management Act, 1999)

The concluding paragraph of the Supreme Court's decision in Prysmian is also significant. It sends a strong statement and encapsulates India's stance to the implementation of foreign judgments. The petitioner in Prysmian was fined INR 50 lakhs by the Supreme Court for "engaging in speculative litigation in the ardent hope that by flinging dirt on a foreign arbitral decision, some of the mud so hurled might cling." "[w]e have no doubt whatsoever that all of the Appellants' pleas are, in reality, pleas to the unfairness of the award's conclusions, which is plainly a foray into the merits of the matter, and which is plainly proscribed by Section 48 of the Arbitration Act read with the New York Convention," the Court added. As a result, there have been cases13 (both before and after the Amendment Act) when foreign awards have been rejected enforcement. Understandably, there aren't many of these situations. For example, in *Campos Brothers*[76], the Delhi High Court declined to implement a foreign judgement on the grounds that it was detrimental to India's national policy and violated the principles of natural justice, as mentioned in sub-Section 2(b) read with s.48(1)(iii) of the Arbitration Act. In this instance, the tribunal neglected to examine one of the parties' submissions, and the foreign award had wrongly noted that no submission/filing had been made (which the respondent, in this case, rebutted with proof of receipt by the tribunal). The execution of a foreign award was denied in another instance of *Agritrade International*[77] (which is a pre-amendment ruling) on two reasons – (i) in s.48(2) (a) of the Arbitration Act, since the dispute could not be arbitrated where no agreement to arbitrate was signed; and (ii) in S.48(2) (b) of the Arbitration Act (as modified), because the foreign award was not founded on any evidence.

In the case of *M/S. Centrotrade Minerals And Metals Inc.*.[78], the Supreme Court of India, a bench of Justice R.F. Nariman, Justice S. Ravindra Bhat, and Justice V. Ramasubramanian held that the foreign arbitral award can be enforced in the case of a two-tier arbitration agreement. In this case, clause 14 of the agreement included a two-tier arbitration system, with the first tier being resolved by arbitration in India. A second arbitration can be requested even when one

[76] Campos Brothers Farms vs. Matru Bhumi Supply Chain Pvt. Ltd, (2019) SCC Online Del 8350 ("Campos Brothers"); National Agricultural Co-operative Marketing Federation of India Ltd vs. Cinergy Corporation Pte Ltd, OMP 243 of 2008, Delhi High Court; Agritrade International Pte Ltd vs. National Agricultural Co-operative Marketing Federation of India Ltd, 2012 (128) DRJ 371 ("Agritrade International")

[77] Agritrade International Pte. V. NAFED

[78] M/S. Centrotrade Minerals And Metals Inc. V. Hindustan Copper Ltd Civil Appeal No.2562 OF 2006

party is dissatisfied with the outcome, which will be heard by the ICC in London. Two additional rulings were made in the case after this one.

The ruling in *Centrotrade,* was split between Justice S.B. Sinha and Justice Tarun Chatterjee on whether a multi-tier arbitration procedure may be used in the first round. After outlining the circumstances of the case, Justice S.B. Sinha, concluded that a two-tier provision like the one found in clause 14 of this agreement is non est in the eyes of the law and considered to be unenforceable as per s.23 of the Indian Contract Act. In these conditions, the foreign award are not capable to be implemented in the country, and Centrotrade's appeal was dismissed. Justice Chatterjee, on the other hand, determined that the two-tier arbitration process was acceptable and lawful under Indian legal framwork; that the ICC arbitrator was hearing an appeal against the Indian arbitrator's award; that the ICC award was a foreign award; and that Centrotrade's appeal would have to be dismissed because The ICC arbitrator did not provide HCL with a suitable chance to state the case.

The Court decided whether or not, as provided for in clause 14 of the contract between the parties, it is authorised in Indian law to resolve issues or disagreements through the two-tier arbitration system and has delivered the same positive response. The bench, on the other hand, remained silent on the second issue, "Assuming a two-tier arbitration system is used".

Is it lawful under Indian law for the award made in the appellate arbitration, which is a "foreign ward," to be implemented at Centrotrade's request as per the terms of Section 48 Act? If that's the case, what kind of remedy does Centrotrade have? The appeal was listed again for consideration of the second question.

As understood by the facts of the case the panel concluded that the respondent did not engage in the arbitral proceedings, despite being asked to do so. On 11.08.2001, the learned arbitrator received a fax from counsel for HCL asking a one-month extension to file their defence. This was only after the learned arbitrator told the parties that he was continuing with the award on 09.08.2001. It was also noted that the respondent attempted to halt the arbitral proceedings by petitioning the Rajasthan courts, and having partially succeeded, at least until February 2001, the respondent's behaviour leaves much to be desired. Despite being repeatedly told to appear before the Tribunal and file their answer and supporting evidence, it was only after the arbitrator announced that he was about to deliver an award that the respondent's attorneys awoke and began requesting time to present their case. The arbitrator cannot be blamed on this basis since, according to the sources cited above, the arbitrator is in charge of the arbitral

procedures, and procedural instructions setting time limitations must be scrupulously followed. Furthermore, HCL opted not to appear before the arbitrator, instead submitting paperwork and legal filings outside of the arbitrator's timeframes. Finally, it was decided that remanding the matter to the ICC arbitration for a new award is clearly outside the power of an enforcing court under Section 48 of the 1996 Act.[79]

[79] Notes on Dispute Resolution, Lockdown Edition

6. Impact of Covid 19

In Halsbury's Laws of England, 3rd Edn., Vol. 8, the doctrine is stated, "Any agreement which tends to be injurious to the public or against the public good is void as being contrary to public policy…. It seems, however, that this branch of the law will not be extended. The determination of what is contrary to the so-called policy of the law necessarily varies from time to time. Many transactions are upheld now which in a former generation would have been avoided as contrary to the supposed policy of the law. The rule remains, but its application varies with the principles which for the time being guide public opinion."

6.1. Global Impact

We've all been coping with a global epidemic for over a year. Is the worldwide catastrophe going to call into doubt established international arbitration norms, including the recognition and execution of foreign arbitral awards as directed in the New York Convention?

The text of the New York Convention does not define the phrase "public policy" it leaves the discretion on the national courts enforcing international awards to do so. In a broad sense, all legal systems across the globe recognise public policy in private international law. Its primary responsibility is to refuse foreign laws that are incompatible with the State's core legal principles. Public policy is primarily used in international commercial arbitration in practise. In international contracts, it's also often utilised in arbitration clauses. It's difficult to explain public policy exactly in commercial arbitration since there are so many roles to play. Public policy has an impact on both the structure of arbitration and the content of the decision.

In the lack of an explicit restriction or definition, courts might read the global health concern into Article V(2) depending on the facts and circumstances (b).

The exemption given in Article V(2)(b) of the NYC covers violations of procedural and substantive public policy standards. As a result of the present global health crisis, charges involving both of these areas of government activity may arise.

Procedural public policy problems in the context of Article V(2)(b) of the NYC might include errors in the competent arbitral tribunal's adjudication of the dispute at issue. Infringements of due process, for example, are issues of procedural public policy.

As a result of local lockdowns and a series of international flight and travel bans, arbitral tribunals have been forced to conform to a new paradigm of distant, e-operation. Virtual proceedings have become the new standard, and arbitral tribunals are striving to ensure that processes can continue uninterrupted in the interests of justice. Despite its laudable objectives, however, the instant digitalization of arbitration may generate major due process concerns. This is especially true if either of the litigants rejects a virtual hearing and instead opts for postponement of the proceedings in order to meet in person. Arbitral institutions reacted immediately, issuing a series of additional observations and recommendations outlining the several alternatives open to arbitrators pursuing a reasonable balance between procedural effectiveness and due process. Despite the introduction of these soft law techniques, fundamental questions such as whether virtual hearings and other technological aspects of administering arbitral proceedings adequately satisfy the parties' right have a fair hearing in a meaningful manner along with being in consistence with Article V(2)(b) requirements remain unanswered. It entails the ability to present evidence, remark on the evidence of the opposing party, and cross-examine witnesses digitally.

Furthermore, the technology utilised to conduct virtual hearings could raise concerns about the proceedings' confidentiality as well as the parties' general privacy and data protection. In the context of this, it will not be surprising if, following electronic hearings and citing a public policy exception pursuant to Article V(2)(b), parties that are currently compelled to take part in virtual arbitral proceedings use the complexities identified above to challenge the recognition and enforcement of arbitral awards issued. Of course, the viability of such statements is highly dependent on the facts underlying the assertions. The more severe the situation, the better the chances of succeeding. The safeguarding of the following essential pillars is required by substantive public policy, according to the applicable case law: (a) fundamental principles of justice or morality; (b) regulations that serve the state's primary political, social, or economic objectives “lois de police”; (c) the state's duty to respect international law obligations; (d) the forum state's national interests; and (e) the forum state's national interests. In this scenario, parties attempting to impede the recognition and implementation of arbitral rulings in the pandemic would very likely invoke the forum state's national interests as well as the forum state's constitutional standards as well as national interest.

Parties trying to prevent recognition and implementation of arbitral judgments as a result of Covid-19-related occurrences might utilise these non-health-related lines of reasoning in at

least two ways through analogy. First, the opposing party may claim that if the foreign arbitral judgement in issue were to be accepted and implemented, the economic repercussions of the lockdown, or other restrictive measures, would be magnified to the detriment of the economy.

This is especially true where proof exists that the opposing party will go bankrupt as a consequence of the execution operation in issue, or that the enforcement procedures would have incidental but significant economic repercussions for other players in the market connected to the opposing party. Second, based on the situation at the moment, the opposing party may claim that enforceability of a foreign arbitral award would violate any appropriate restrictive measures at the time, such as special measures suspending certain judicial, commercial, or banking activities, and thus be in the violation of the law.

Reading the world health catastrophe into Article V(2)(b) might be permissible, given that the content of the public policy exception is not intended to stay static but to change over time. The requirement to represent variations in modern socioeconomic situations necessitates the non-static character of the public policy exception. This evolutionary explanation assumes, the word "public policy" should include the most recent societal developments, such as the present global health crisis. This outcome, however, does not remove the need to apply a strict interpretation of the public policy exemption or to go against the city's core pro-enforcement attitude. Rather, it illustrates that public policy is a fluid notion that can adjust to changing circumstances, like as the Covid-19 epidemic. However, in light of the provision's unusual character and the NYC's overall aims, courts must apply Article V(2)(b) in cases arising from the present pandemic.

According to international jurisprudence on the execution and acceptance of arbitral decisions, the public policy exception has only been sustained by courts in a few cases. As a result, just because the global health crisis may result in more claims under Article V(2)(b) does not mean the NYC's pro-enforcement balance will shift. Historically, the provision has been strictly implemented, and it has only been upheld in the face of extraordinary procedural errors or extremely desperate financial situations. Overall, given the current unique circumstances, the exception is more likely to be employed, but it is not likely to become the rule. On this front, the odds should not be reversed.[80]

[80]Zena Prodromou, 'The Public Policy Exception under Article V(2)(b) of the New York Convention in the Time of Covid-19'
http://arbitrationblog.kluwerarbitration.com/2021/02/17/the-public-policy-exception-

6.2. Covid 19 and Arbitration in India

Before the pandemic, online proceedings of arbitral processes was open to arbitrations situated in India, but they were not widely used. In significant number of arbitrations involving high stakes and complicated legal problems, the majority of parties and arbitrators preferred to perform proceedings "in person." Various independent organisations were increasingly offering online hearing services and advocating their use for low-complexity arbitration, although the movement was still in its early stages. Due to the extreme restrictions imposed during the pandemic, several arbitrators have been obliged to perform their arbitrations via online resources.

The Act sets no restrictions for the manner or platforms through which arbitral proceedings are to be held. Arbitral tribunals have broad authority to conduct arbitral procedures on any forum with the parties' consent. The Arbitration Act, when combined with the Information Technology Act of 2000, allows the whole arbitration process, including the award, to be conducted virtually.

The Supreme Court, however, has halted the limitation term for all arbitration cases from March 15, 2020, until further order, as arbitrators and parties' alike struggle to adapt to the changed practise.

The Centre for Online Resolution of Disputes (CORD), Centre for Advanced Mediation Practice (CAMP), Indian Dispute Resolution Centre (IDRC), Sama, Presolv, and ADResNow are all standalone ODR providers that provide and encourage online mediation. Due to the evident difficulties of holding actual hearings during the pandemic, more people are opting for online dispute resolution. Parties are also beginning to consider mediation and bargaining as a result of a growing number of laws mandating pre-litigation mediation and the impending passage of mediation-specific legislation. A growing number of ODR providers are beginning to meet this demand.

The arbitrator, arbitral institution, and parties to an arbitration agreement are all required by Section 42A of the Arbitration Act to keep the arbitral proceeding secret. Different platforms have different means for assuring this on the internet. To safeguard secrecy, some organisations implement rigorous access controls and permissions. In addition, most platforms do not allow parties to record proceedings on the site. Broader restrictions on recording and taping, on the other hand, are normally left to the arbitral tribunal to establish.

The arbitrator or tribunal may email its orders to the parties in the exercise of their discretion under the Arbitration Act. An arbitral award must be written and signed by the members of the arbitral tribunal, according to Section 31(1) of the Arbitration Act. In an online arbitration, however, the Information Technology Act's processes must be followed as well. As a result, members of the arbitral tribunal may place their digital signature on an award served on the parties online in order to authenticate it in the same way that a paper signature would.

Section 24 of the Arbitration Act empowers the arbitral tribunal to decide whether to have oral hearings for the presentation of evidence or arguments or to conduct the proceedings solely on the basis of documents, subject to the parties' agreement. Notably, under section 29B of the Arbitration Act, document-only arbitration is the default for 'Fast-Track Arbitration.'

A physical or "in-person" hearing is not required by the Arbitration Act. Arbitrators, on the other hand, are more likely to conduct arbitral hearings in person as a matter of practise. During the pandemic, there was no Covid-19 legislation or other legislative changes in India that affected the arbitration regime. However, as an ad hoc arrangement, most arbitral procedures have switched to a virtual platform.

With effect from 8 June 2020, the Delhi International Arbitration Centre has published a 'Guidance Note for Conducting Arbitration Proceedings by Video Conference,' and the Maharashtra National Law University (MNLU) Mumbai's Centre for Arbitration and Research has published 'Virtual Arbitrations in India: A Practical Guide,' both with effect from 8 June 2020.

Due to the obstacles posed by the pandemic, no changes to the Arbitration Act have been made in India. A variety of initiatives are now being considered, and the central government's policy arm has issued press releases. This type of legislation is expected to be passed in the coming months.[81]

There has been no explicit government or court-appointed body developed or appointed to evaluate the impact of the epidemic on arbitration. However, the government's policy arm, Niti Aayog, is considering these concerns as part of its bigger mandate.

6.3. Effect of pandemic on enforcement of a foreign arbitral award

[81] International Bar association, 'The Global Impact of the Covid-19 Pandemic on Commercial Dispute Resolution in the First Seven Months' https://www.ibanet.org/article/BD404CE3-3886-48A8-98F6-38EAACCD5F53 accessed on 20-07-2021

All the award creditor needs to prove for due process reasons is that the award debtor was heard at a significant time and in a significant manner, according to courts in enforcing jurisdictions. Assuming the tribunal takes care to ensuring that all parties get a significant chance to present their case during a remote hearing, the likelihood of a court in a New York Convention jurisdiction refusing enforcement is minimal.

The arbitral seat serves as the arbitration's legal basis. The parties put their arbitral proceedings inside the framework of that state's national laws by choosing a specific state as the legal place of the arbitration. The chosen seat may have major implications, including the right to contest an award and whether the New York Convention's standards for enforcement are fulfilled. While the chosen seat is frequently the same as the location where in-person arbitration proceedings are held, the two places are not required to be the same.

Arbitral institutions frequently perform extra crucial procedural duties, such as scrutinising and notifying arbitral awards. In light of the epidemic, some institutions have addressed the treatment of arbitral awards. For example, DIS (as well as the ICC) stipulates that awards will only be communicated electronically if both parties agree. DIS will provide notification of an arbitral award in its original hardcopy form unless otherwise agreed (but without the customary signature from the Case Management Team)

Similarly, the LCIA and SIAC will, in theory, offer electronic notification of awards to parties and send paper copies only after their respective offices have reopened. While the regular time period for submitting a draught judgement from an arbitral panel to the ICC Court remains in effect, the ICC has stated that it will be attentive to delays “truly attributable” to the pandemic. Other arbitral institutions (including VIAC) continue to rely on hard-copy notice of awards as the usual rule, unless it is impossible or impracticable to do so within a reasonable time frame.[82]

6.3.1. Justice Delayed is Justice Denied

[82] International Arbitration in the Time of COVID-19: Navigating the Evolving Procedural Features and Practices of Leading Arbitral Institutions

A party's ultimate goal in arbitration is to have a successful arbitral ruling enforced quickly. Failure to enforce an award in a timely manner will almost certainly raise the parties' costs, which is contradictory to arbitration.

The pandemic's expected delays will have a severe influence on enforcement proceedings. Arbitration proceedings that were close to being concluded, for example, could be kept open indefinitely if requirements such as demanding an original copy of the final decision could not be completed, or if the parties could not agree to an electronic award.

With flights cancelled and mail communication disrupted or delayed, enforcement becomes a major challenge. It is not always possible to file enforcement petitions online, and postal service disruptions may cause parties to have difficulty or, at the very least, face delays in filing the enforcement application with the court in question.

Additional challenges may occur if some courts demand a tangible copy of the award and supporting documents. They may demand that the parties submit a duly authenticated hardcopy of the award or evidence that the award has become binding on the parties.

The award's enforcement is not impeded by any provision of the New York Convention unless a member state determines that enforcing the award is contrary to its public policy (Article V(2)b), which is worth considering given COVID-19's negative consequences on many industrialised countries.

According to international jurisprudence on the enforcement and acceptance of arbitral verdicts, the public policy exception has only been upheld by courts in a few cases. As a result, just because the global health crisis may result in more claims under Article V(2)(b) does not mean the NYC's pro-enforcement balance will shift.

6.4. 2021 Amendment of Arbitration and Conciliation Act

The Arbitration & Conciliation (Amendment) Act 2021 is a relatively new addition to the pro-arbitration landscape. The Act of 1996 has been revised three times in the previous six years, indicating the legislative goal of amending the Act of 1996 and making India a more arbitration-friendly country.

As a result of the modification, the Act contains two main amendments. The first is to allow awards to be automatically delayed in specific situations if the court discovers prima facie evidence of "fraud" and "corruption" in the contract on which the award is based.

The most notable change in the Amendment Act of 2021 is a revision to Section 34, which governs the automatic stay of awards issued under the Principal Act. Under the existing system, a party can file a petition to the Court against the arbitral judgement under Section 34 of the 1996 Act. Following a 2015 reform to the Act, however, an automatic stay on the award's execution would not be granted merely by submitting an application.

The 2021 Amendment made a significant change by introducing a clause to section 36(3) that ensures that the award will be upheld if the courts are prima facie satisfied by the case based on either (i) the arbitration contract that is the foundation of the award; or (ii) the award was elicited or influenced by improper conduct. It will keep the award and the result of the appeal, unresolved indefinitely. It has a backwards effect, and believed to be in force as of October 23, 2015.

During the Bill's presentation in the Lok Sabha, many Legislators questioned the automatic stay. Critics also warned that a blanket stay is the same as an unconditional stay, putting India's efforts to establish a pro-arbitration policy at risk. This is owing to the simplicity with which the losing party can claim corruption and get an automatic stay on the implementation of the arbitral judgement.

By drawing parties to courts and increasing the possibility of litigation, this may work against the aim of an alternate conflict resolution system. Another fundamental flaw with this amendment is that it fails to define either fraud or corruption, leaving defendants vulnerable to legal action even if they are correct. The legislation's retroactive effect might result in a flood of lawsuits, overburdening the courts.

Applicants will be required to submit new applications based on the additional reasons if an application under Section 36(2) of the Act is currently being adjudicated by a court. This is likely to result in delays and increased costs unless the courts can discover this new development on their own and resolve it with the filing of new submissions.

As a result of this change, award enforcement would be affected, and India may slip farther behind in the ease of doing business rankings. This shift is backwards and undermines India's objective of building a pro-arbitration environment.

In response to criticism of the change, the Law Minister argued that Section 34 was necessary since it did not provide for an "automatic stay" of the award, despite the use of the phrases

"fraud" and "corruption." He said, "The government wishes to avoid collusive attempts by parties to profit from a tainted award as quickly as possible".

Because he does not explain why he believes what he believes, his arguments are unpersuasive. Furthermore, pro-amendment experts say that approving this change will help individuals who have been affected by the arbitration award's erroneous components.

The award had to be reviewed and appropriately set aside because the deceit was discovered three years after it was imposed. However, when the challenge is made merely to postpone the execution of awards, it's unclear how extending the Act's reach will protect numerous innocent people.

7. Conclusion and Suggestions

A really well way of settling business disputes in international commerce is “international commercial arbitration”. Despite the fact, it is a voluntary procedure needing both parties' permission, once an agreement is made, neither party may unilaterally withdraw from it. Arbitration achieves the same goal as state court proceedings in that it culminates in a conclusive and binding judgement in the guise of an award. Such a judgement is often simpler to execute in a foreign nation than a state court judgement. With a few exceptions, the 135 signatories to the New York Convention have agreed to enforce international arbitral decisions. There is no comparable international convention that obligates governments to respect the rulings of foreign state courts.

Despite the fact that arbitration serves a comparable purpose to litigation in state courts, the parties get the freedom to pick the norms of arbitration under existing arbitration rules, subject to the particular rule set out in Article 18 of the Model Law.

Amongst the most important factors in the successful conclusion of international commercial arbitration is the simplicity with which international arbitration rulings may be enforced. The effectiveness of International Commercial Arbitration is considerably decreased if an award lacks an efficient execution mechanism. The whole arbitration system will collapse if an award cannot be enforced, and arbitration awards will become nothing more than words on paper.

Indian arbitration law has long been criticised for its aggressive attitude. In truth, the attempt to change the law began within the first five years of its adoption in 1996, and much has been tried and tested since then. The requirement was undeniably strong. In its 176th “Report on the Arbitration and Conciliation (Amendment) Bill, 2001”, the Law Commission of India proposed numerous modifications to the Act. After reviewing the 176th Report's recommendations, the government chose to adopt virtually all of them and presented the "Arbitration and Conciliation (Amendment) Bill, 2003."

Following the Justice Saraf Committee's report, the Bill was forwarded to the “Department Related Standing Committee on Personnel”, “Public Grievances”, “Law and Justice” for additional consideration. The Departmental Related Standing Committee finally concluded that several of the Bill's provisions were insufficient and controversial, and that the Bill should be withdrawn in its current form and reintroduced after considering its suggestions. After exhausting all other options and buckling down, the Arbitration Amendment Act of 2015 was enacted.

Along the lengthy line of legislative attempts, public policy, like the arbitration code itself, has been written and unwritten endlessly until it was eventually casted into its current condition under s.34 of the Arbitration Amendment. The Amendment's goal is obvious and admirable: to bring high-definition arbitration standards to the Indian market. It aimed to rebrand India as an arbitration-friendly country. Now, "public policy" is no longer a wide justification for opposing the enforcement of international commercial awards or foreign awards in India, and this may well be the concluding chapter of India's "public policy."

The goal of this study is to examine at how foreign arbitral decisions are executed in India. The New York Convention was widely regarded as a principle convention, not only because of the several of that have ratified it, but also because of a number of key provisions that required only the most basic conditions to be met by parties seeking to enforce the convention, obviating the requisite of double exequatur. The requirement that the award be deemed enforceable in their place of origin gives rise to presumptions in support of the legality of arbitral judgments, with the onus falling on the party opposing implementation. This allows a winning party to rely on a local legislation or treaty that is more beneficial to the enforcement of international arbitral decisions than the New York Convention. As a result, India's adoption of the New York Convention indicates that its legal system is conducive to recognition and execution of international agreements.

The purpose of this study was to examine international commercial arbitration and the enforcement of foreign arbitral decisions in India in detail. The author of this study first went through the language of international commercial arbitration and how it is administered in India, as well as the relevant agreements and laws. Later in the article, the mechanism for enforcing international arbitral decisions is discussed, as well as the grounds for refusal. The role of public policy and its interpretation by the Indian court was one of the study's main goals.

In the First Chapter the author has discussed about the subject of the research and its objective. The first chapter discusses as to why the study of Public Policy and its dual interpretation by the Indian Judiciary is important.

In the second chapter, we study about the meaning of “international commercial arbitration” why has it become a vogue alternative method of dispute resolution. In the course of studying about the international commercial arbitration, we study about how it is regulated in India and its history along with it the New York Convention of 1958 and UNCITRAL Model Law, after which the Arbitration and Conciliation Act 1996 is based. This chapter also discussed how the arbitration proceedings are held in India. Here the execution of foreign arbitral awards and judicial intervention is studied in relation with the Indian scenario.

In the third chapter, the researcher has discussed about the challenges that are faced during implementation of foreign arbitral awards the country. In order to appropriately understand the process the chapter discusses what are awards and how are they regulated. It also discusses that there are separate provisions for the execution of domestic awards and foreign awards.

One of the major challenges that has defined the opinion of Indian judiciary during implementation of foreign arbitral awards in the country is the role of public policy. The role of public policy is argued in the third chapter. The debate here is whether the narrow sense of the interpretation of the term public policy or wider sense shall be adopted by the Indian judiciary. The chapter discusses the role of national courts in this matter since the Indian judiciary are given the discretion to interpret the meaning of the term. It later discusses the conundrum around the subject and defines 'patent illegality' and the impact of such wide interpretation and how it affects the efficiency of arbitration in India with regards to International Commercial Arbitration.

In the fifth chapter, the paper is almost at the verge of completion where the current legal position of public policy is discussed. It discusses the 246th Law Commission Report and the subsequent Amendment of 2015.

Over the last half-decade, India has improved its image for the implementation of international arbitral decisions thanks to the joint efforts of the judiciary and legislature. Only on limited grounds and in a few situations have the courts intervened to prohibit enforcement. The Supreme Court's recent rulings in the Vijay Karia and Vedanta cases are arguably the most important. These decisions clarify the restricted and restrictive extent of a party's right to raise objections to a foreign arbitral judgement according to the 48 of the Act.

Furthermore, in view of the high costs imposed on the infringing parties in Vijay Karia, the practise of litigating parties approving numerous attempts to impede the implementation of foreign judgements will be minimised to the greatest degree feasible. Finally, the Supreme Court has enhanced India's status as an arbitration-friendly country by declaring that courts have discretion to execute a foreign arbitral judgement even if specific reasons for opposing enforcement are shown. Even yet, India has a long way to go in being the friendliest of nations when it comes to arbitration.

Many cases scheduled for hearings in 2020 and early 2021 have been rescheduled as remote hearings using video conferencing technology. While video conferencing is not new in international arbitration, hearings conducted fully remotely, with each participant in a different

location, pose special obstacles. The parties to an arbitration should be capable of presenting their case to the arbitral panel under majority of national legislation, and the arbitral panel should enable the entry of relevant and material evidence. Furthermore, arbitral tribunals must guarantee that the methods used are applied equally to both parties and do not favour one party over the other.

In this study the author has made an observation that the Covid 19 pandemic has introduced a lot of challenges in arbitration sector and its procedure. All such changes play a critical role since the enforcement of the arbitral awards shall be executed once the proceedings are conducted fairly and effectively.

In order to keep the enforcement of arbitral awards relevant in covid times it is essential that the authorities are following the required measures i.e. Virtual Hearings and e-filing. And it is the also of great importance to make sure all parties gets a fair chance to make their arguments. An party has an advantage over the other party due to travel restrictions or postal restriction neither any technical hindrance.

To summarise, the purposes and objectives of Parliament's 1996 Arbitration and Conciliation Act are fundamental, and the use of patently illegal as a basis under public policy would be a clear breach of the Act's essential structure. It will obliterate arbitration's two pillars: award finality and minimal judicial interference. It also opposes expanding arbitration in the courtroom and fails to take the required moves to improve “Dispute Settlement Mechanisms”. As a result, the patently illegal defence should not be utilised and should be reversed by a court of law or legislation.

India is working to build trust in its judicial system, which is a need for any country to be selected as a venue for international arbitration. To keep up with economic changes, it goes without saying that arbitration statutes would need to be revised on a regular basis. Given that India has recently made the essential measures in this regard, the present need is for reforms in the judiciary's implementation of legislative changes as well as the country's institutional capacity development. Until then, we won't be able to "resolve in India."

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