

Public Policy Barring the Foreign Arbitral Award: A Comparative Analysis between UK, USA & France

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Abstract: The concept of public policy in International Arbitration is still extremely contentious, controversial, and complicated in modern times. Although legislation related to arbitration and practise have attempted to harmonise public policy so that parties may benefit from a globally recognised idea, judicial courts have made this effort almost difficult by giving a very loose & broad definition in the name of public policy. Moreover, the New York Convention gives little direction to national courts on how to interpret the public policy claim. In the name of local contract laws and fundamental principles of a nation, judge keeps hampering the enforcement of foreign award. Internal Law Association attempted to resolve this contention but couldn't come up with a definite definition which limits the policy in a closed structure. Despite the ambiguity of the issue, national courts in most developed arbitral countries interpret public policy narrowly. Because industrialised countries' courts typically see arbitral awards as a separate aspect of public policy; they are pro-enforcement. In this article we will comprehensively elaborate this attitude, legislation and case law study of developed nations like USA, UK and France.

Keywords: Public Policy, Foreign Award, International Public Policy, Foreign Arbitral Award, Arbitration, Domestic Public Policy.

INTRODUCTION

The arbitration agreement is based on the authority of the parties. Party sovereignty refers to the ability of parties to construct dispute resolution procedures and to enforce awards once made (Sharma, 2009). Arbitral Awards are challenged by national arbitration legislation and international arbitration rules before they are implemented in a country. Both laws contain deterring features that hinder successful award recognition and enforcement (*Gherulal Parakh v. Mahdeodas Maiya*, 1959). The country's Public Policy is the main limiting factor. The concept of public policy is so broad that it is difficult to distinguish between what is and is not public policy (*United Paperworkers Int'l Union v. Masco Inc.*, 1987). Public policy, like country's best interest, is a vague notion difficult to define or explain at any one moment. It has a variable flow, whose boundaries are dictated by shifting social trends. Richardson case (*Richard v Mellish*, 1824-34) described it as an untamed horse that takes you anywhere it wants to go.

Public policy is defined as the obligatory regulations of any state or lois de police. According to Professor Phocion Francescakis, lois de police are regulations essential for the protection of every country's democratic, socioeconomic, and industrial structure.

This definition has been critiqued for being overly broad and vague. It was claimed that virtually every rule or regulation in the world preserves a social or commercial interest, therefore fitting the criteria (Karl-Heinz Bockstiegel, ICCA Congress Series 3). As a result, public policy is simpler to demonstrate than to define. Essentially, each state has to balance a foreign arbitral decision against its basic interests (*Kedar Nath Motani and Ors. v Prahlad Rai and Ors*, 1960). If an award includes bribery or corruption, it is not actionable since it goes against the state's interests. Other laws, such as those prohibiting dealing with an enemy during conflict, may deem such actions against the state's interests.

In International Commercial Arbitration, Article 3 of Geneva Protocol on Arbitration Clauses; Article 1(e) of Geneva Convention, 1927 on Convention on the Execution of Foreign Arbitral Awards and Article V (2) (b) of the New York Convention of 1958 stipulates that the recognition or enforcement of the award is not 'contrary to the public policy or to the principles of the law' of the country in which it is sought to be relied upon'.

The comparative analysis of the concept of public policy in the prevailing world sheds light on the fact that there are two approaches to public policy. One is monist approach under which international and domestic public policies are considered one and the same. India and Pakistan follow this approach.

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Whereas, under the dualist approach there are two public policies: one is for domestic arbitration, *i.e.*, domestic public policy or *interne ordre public* and another is for international arbitration, *i.e.*, international public policy or *ordre public international or order public extrene*. France, Portugal and 6 other countries are follower of this approach. If the issue at hand would be a public policy issue in many jurisdictions alike, it may be deemed to reflect international public policy (Kurkela, Matti and Turunen, 2005).

The bifurcation of public policy is necessary because application of the public policy conception formulated exclusively for domestic matters (including awards) and coated primarily with the state's public interest, will not allow courts to interpret it narrowly to the advantage of international awards (Resolution of International Law Association, 2003)

The French international public policy does not represent international consensus, but in some respects the French approach is the most arbitration-friendly and therefore, to quote the French regime as an example would be beneficial (Ullah, 2016). The USA Court of Appeal for the Second Circuit has also rejected in *Parsons and Whittemore Overseas Inc. v. RAKTA*, the argument that the enforcement of arbitral award should be refused on ground of severance of Egyptian and American relations holding that public policy defence cannot be read as a "parochial device protective of national political interests" or to enshrine "the vagaries of international politics under the rubric of public policy". The *Parsons* case is the landmark of the U.S. public policy case, showing that public policy should be construed narrowly. The USA tends to be reluctant to use the public policy as grounds for refusing the enforcement of the arbitral award.

Like the U.S.A., the English approach in public policy exceptions tends to construe narrowly and support the pro-arbitration basis. Even though the English court accepts the public policy defense in *Soleimany (Soleimany v. Soleimany, 1999)* later cases are likely to follow the theory in *D.S. T. v. Rakoil (1987)* which states that public policy offense must be "some element of illegality which is clearly injurious to the public good or, wholly offensive to the ordinary reasonable ..."

However, *Soleimany* is a sign showing that the English court still accepts the public policy defense, but that parties might have to work harder to get such a defense because England puts weight on international

comity rather than the defense. English courts will restrict themselves to reviewing the reasoning of the arbitral tribunal, instead of seeking to review the underlying facts. Unless it is clear from the award itself that there has been a breach of public policy, the award will not be overturned on that basis (Anusornsen, 2012).

DOMESTIC PUBLIC POLICY V. INTERNATIONAL PUBLIC POLICY

To comprehend the domain of Public Policy, we must first grasp the difference among the two public policies that regulate arbitration conflicts. First, domestic public policy includes any conduct that violates the required norms of applicable rules or the society's lofty and valued morals (Curtin, 1997). Second, international public policy refers to the objectives or values that govern international relations. Bribery, corruption, drug trafficking, and terrorism are examples of international public policy violations.

The New York Convention of 1958 states in Article V (2)(b) that the relevant authority in the country where recognition and enforcement is sought, if discovers that recognition and enforcement is against the public policy, would immediately refuse the award. The convention's framers anticipated that allowing courts to decline to implement international arbitral awards based on public policy would allow courts to utilise local norms to undercut the Convention's wide compliance objectives. They felt this exemption to execution was essential to protect state sovereignty if a foreign arbitral award was incompatible with the executing country's legal system (Caprasse and Hanotiau, 2008).

While there are still cases when foreign arbitral judgments are not implemented due to local restrictions, the tendency is changing towards a more global and even transnational interpretation of the public policy exception. Distinct nations have different criteria governing their respective public policy, resulting in wildly varying interpretations (Buchanan, 1988). While the public policy exception has created a significant gap weakening the Convention implementation, comparable interpretations and similar principles have urged courts not to reject enforcement purely on national and regional criteria.

Primarily, two factors cause courts to hardly ever deny the enforcement of a foreign arbitral decision. Firstly, domestic policy has been construed narrowly and secondly, as for domestic and international

policies; some nations have sought to adapt their own state's international public policy to foreign awards. As a result, a foreign arbitral verdict is more likely to be enforced than a local one. But a state's foreign public policy is neither "really international" nor "transnational." It is an approach that considers the country's own legislation or norms for dealing with a foreign arbitral judgement. (Fry, 2009)

TRANSNATIONAL PUBLIC POLICY

Critics see transnational rather than international public policy as thriving globally as a truly international. Transnational public policy is public policy that transcends state borders. Slavery, corruption, and terrorism are examples of basic ethical principles accepted by all civilised nations. Transnational public policy is usually considered narrower than international public policy (Sever, 1991).

Past decade has noticed a steady increase in support for transnational public policy. An award contaminated by fraud or corruption is sought not to be enforced. Transnational public policy may affect a court's viewpoint in interpreting arbitral judgments. However, a court's understanding of the extent of its state's foreign public policy in the light of transnational eyes may be more important than whole different transnational public policy. Contrary to the country's own rules or norms for administering foreign arbitral awards, a transnational viewpoint may urge courts to embrace wider views that, although not universally recognised, are generally regarded as benchmarks in the international arbitration community. As well as unifying the international system for ruling on foreign awards.

A realistic sense is that when a country is an aberration in comparison to other nations, there are economic consequences that may motivate a more transnational approach. International awards can be more reliable and more likely to be implemented when courts handle them consistently across boundaries. A transnational approach may also enhance the Convention's pro-enforcement bias and the security blanket that ensures only worthy awards are enforced. Uniformity in international public policy is not an easy case. However, today's improved technologies and the internet allow us to learn how courts in other states cope with the public policy exception and what the global arbitration platforms considers guiding principles for enforcing foreign awards. Therefore, courts in various jurisdictions are better equipped to

comprehend and fulfil standards in the international arbitration forums.

MONIST AND DUALIST APPROACHES

Comparative study of the idea of public policy in today's globe reveals that various nations have two distinct perspectives to public policy. One is a monist approach that combines international and domestic public policy. However, the dualist method has two public policies: one for domestic resolution of arbitration dispute and other for foreign arbitration disputes. This difference is typically made in law when the terms national or international public policy are used. NYC favours a monist approach (*COSID v. Steel Authority of India Ltd*, 1986).

However, other nations, like France and Portugal, use the term public policy when referring to domestic arbitration judgments and the phrase 'international' when referring to foreign arbitration rulings, endorsing the dualist approach. Algeria, Honduras, Lebanon, Paraguay, Peru, and Uruguay are six additional nations that are employing this term. The French approach is frequently referred to as such since it seems to be the first to embrace the notion of international public policy (*ordre public international*).

The International Law Association (ILA) likewise supports this method. On the other hand, the ILA's 70th Conference (ILA, Resolution 2/2002) urged that the finality of judgments given in arbitration proceedings be recognised unless in rare situations where recognition or execution of the award would be against international public interest. So, the international public policy comprises of the approved principles of the recognition forum. For instance, if a nation sets its policy on Islamic values, international public policy would only include those concepts shared by all Islamic states.

Winnie (JO-MEI) MA (2009), citing an essay by Julian Lew, believes that international public policy is a misnomer since it is a sub-unit of country's public policy. No matter what it always relates to a country and is enforced by its courts. Both ideas have uses. 'La violation' of one does not affect the other, as ruled by the Paris Court of Appeals (Code of Civil Procedure France, 2011). Because Article 1502 exclusively relates to situations in which the recognition or execution of an award would be adverse to international public policy, a violation of domestic public policy cannot be used to challenge a decision allowing

execution in France of a foreign award (Code of Civil Procedure, 1986).

In France, the only connection between international and domestic public policy is a negative one, since international public policy is regarded central to domestic policy, and a regulation that isn't even about domestic policy can't be called international (CA Paris, 1987). To execute an international arbitral judgement would be contrary to international public policy, even if it does not belong to domestic public policy, as stated in ILA guideline 1(b). The enforcement state should use transnational public policy against bribery to avoid any unfairness resulting from the execution of such fraudulent award.

IMPACT OF PROCEDURAL OR SUBSTANTIVE PUBLIC POLICY

According to ILA Resolution 2002, Public Policy is split into two sections, procedural public policy or substantive public policy. First one administers fairness in procedures while the second one governs the merits of conflicts. Procedural public policy strictly regulates that due process principles should be followed, equality among the parties should be maintained, and no deceit should be performed by the arbitrator. Yet, if a breach of these criteria is not brought to the arbitral tribunal's attention at the appropriate time, it cannot be brought later in the enforcement stage (Fouchard, Gaillard, Goldman and Savage, 1999).

Contrary to basic rules of law relevant to international arbitration are principles of substantive public policy applicable to dispute merit. They may be stated in broad terms, such as a tribunal judgement premised on religious or racial prejudice, or an award rejected on the basis of corruption, or an award that violates basic financial policy principles (Ali, 2014).

PUBLIC POLICY IMPACT ON USA

Legislation & Historical Development

Early US court judgments clearly disapprove arbitration, and only the New York Chamber of Commerce's efforts have provided the basis for a pro-arbitration trend. Section 10 of the Federal Arbitration Act lists reasons including corruption, deception, unfair means, and decisions where the arbitrators were obviously biased or dishonest are perfect stance to halt the enforcement of award. The term public policy was avoided directly.

The US ratified the New York Convention in 1970, and Congress enacted Chapter 2 of the FAA over it. Even when new arbitration-friendly rules were introduced, public policy remained a barrier. If the award clashed with other federal regulations, the national courts might refuse to implement it (Smutny and Pham, 2008).

Over time, arbitral practise has narrowed the definition of public policy. The non-arbitrable issues due to public policy were never addressed in the FAA or even in NYC. Some academics argue that in order to decide whether an arbitral award will be executed, the court must first establish whether Congress intended for the issue to be arbitrated (Greer, 2002). But Congress' intent is ambiguous and wavering. Precedents will be examined to determine the evolution of congress' willingness to enforce international arbitral awards and the role of public policy in the process.

Analysis of Case Law

Before assenting to NYC in 1970, the US courts expounded public policy broadly to preserve the country's interests. The US Supreme Court ruled in *Wiko v. Swan* (1953), that a securities claim was non-arbitrable. It feared that enforcing arbitration would weaken securities law safeguard.

In *MIS Breman* case law, the two parties entered into a towage agreement and agreed to arbitrate any issues. Exculpatory provision was provided in the contract, parties chose foreign tribunal to resolve the dispute. The opposing side argued the exculpatory provision violated public policy. The towing contract's exculpatory provision with selection of foreign tribunal was affirmed by US Supreme Court, but noted as contrary to US public policy (*MIS Breman v. Zapata Off-Shore Co.*, 1972).

It took four years till in another case (*Scherkv. Alberto-Culver Co.*, 1974) SC affirmed arbitrability of securities conflict. Supreme Court ruled that disqualifying an agreement containing securities issue will only showcase restrictive and monopolistic mind-set of judiciary, which isn't the case. Hence the arbitration regime turned towards pro-enforcement after this case. It also stated that global trade and international market can't follow their courts every time and only domestic rules in US can't rule over the world. SC also affirmed that parties in foreign contracts have the right to design their own dispute resolution procedures. This was the case of *Alberto*, being a true international contract. But the Court couldn't decide when a foreign interest trumped domestic one.

Afterwards, another case (*American Construction Machinery & Equipment Corporation Ltd. v Mechanized Construction of Pakistan Ltd*, 1987) took one step further for pro-enforcement mechanism. It disregarded the fact that a Pakistani court had ruled the arbitration agreement and the ICC verdict null and void. Rather than overturning the arbitral decision, the Court said that it would be against American national interest. This decision is significant because it shows the US courts' pro-arbitration stance overcoming comity.

Paramount in terms of public policy and execution of arbitral judgments is *the Second Circuit's Parsons & Whittemore Overseas Co., Inc.* In this case, appellant was US national (Parsons & Whittemore), who failed to stop an Egyptian company (RAKTA) from executing an award made under the ICC Rules. The case proceeded to the Second Circuit Court of Appeals, where Smith J issued the Court's ruling. It was ruled by Smith J that a court will only deny implementing a foreign arbitral decision under the public policy defence, when execution would offend the state's most fundamental conceptions of morals and fairness.

He further elaborated that using broad spectrum of public policy would undermine the New York Convention's fundamental goal of removing enforcement barriers. According to him, seeing the public policy defence as a narrow mechanism protecting political interests of the country would severely limit the Convention's usefulness. The Parsons case established a limited interpretation of public policy in the United States. Even though it did not provide any clear guidance on fundamental moral and legal principles at that time, US courts still started adopting Parsons as the norm to practise in subsequent instances.

The public policy claim must be construed in light of the New York Convention's overarching purpose (*International Navigation Ltd. v Waterside Ocean Navigation Co Inc*, 1984). By following the *Scherk* case formula, according to the Court, one of the primary objectives of the NYC was to standardise the criteria for enforcing international arbitral decisions. The Court followed Parsons & Whittemore and ruled that the public policy protection should only be used where enforcing the arbitral decision would contradict the forum state's fundamental moral and legal principles.

The positive approach of US courts regarding arbitrability of federal securities law cases was reflected in antitrust proceedings. The Supreme Court's

ruling in *Mitsubishi Motors* (1985) case left no doubt. Antitrust lawsuits against public policy resulting from foreign business transactions were arbitrable. The District Court used the *Scherk* judgement to mandate arbitration. The SC overturned the Court of Appeals' judgement on antitrust arbitrability. According to the court, the government policy strongly favouring arbitration reinforces the precedent in favour of enforcing contractual choice-of-forum clauses. The Court held that national courts must promote the foreign policies favouring commercial arbitration.

Since 1970, US courts have been extending the scope of arbitrability through cases like *Scherk* and *Mitsubishi*. In *Johnson Lane Corp.* (1991), the SC even made most employment disputes arbitrable. In the US, several courts now enable enforcing arbitration of family law issues; including alimony, property partition, and spousal support, if no children are concerned. Even specific criminal and fraud claims are arbitrable in the US. These US court judgments have all been limiting in regard to the public policy claim. So far as the NYC is concerned, they have said that the domestic courts should not intervene with foreign arbitration agreements and awards. The New York's judgement in *Telenor Mobile Communications v Storm LLC* shows the US courts' attitude and stance hasn't altered since Parsons & Whittemore.

In *Telenor Mobile Communications*, the Court rejected the notion that enforcing a foreign arbitral judgement was against public interest since a foreign court sided with one of the parties. For the award to be invalid, it must directly contravene the foreign legal system in such a manner that adherence with one would be a breach of the other. Court was generally in support of public policy case for promoting arbitration and enforcing arbitral decisions.

To show that the parties intended to submit the issue to arbitration the US Supreme Court recently ruled in *Rent-A-Center West, Inc. v. Jackson*, that arbitration clause in the contract document is sufficient to prove that contesting parties want arbitrator to resolve their dispute. The arbitrator may therefore rule on the agreement's compliance.

Since signing the NYC, US courts have established two criteria of ethics and fairness: domestic and global. In a global setting, the courts may be more lax. The precedent decisions that emerged following ratification of the NYC were generally pro-enforcement and seldom rejected. The court felt that awards should be

final. However, US courts still took out some loophole to delay the enforcement. If the courts deemed the award unenforceable, they rejected it (Reed and Freda, 2008). As seen above, American public policy is clear and unequivocal. In the US, the goal of strengthening international arbitration and commercial ties regularly surpasses public policy considerations.

PUBLIC POLICY IMPACT ON ENGLAND

Legislation & Historical Development

England has long desired international arbitration. It is considered as a centre with a large contemporary arbitration practise (Harris, Planterose and Tecks, 1999). But this hasn't the case in history where courts could interfere at any stage of the arbitral procedure. As a result of the Arbitration Act 1950, international arbitral awards took a shift in the country and could be enforced and were given legal status as judicial decisions. These awards could also be binding, maintaining their finality (The English Arbitration Act, 1950). To enforce a foreign arbitral decision, the issue must be able to be arbitrated in England. England enacted the Arbitration Act 1975 in adoption of the NYC. Currently the Arbitration Act of 1996 runs in the country, which has given light to party sovereignty at a higher level. It allows the parties to resolve their differences in a way that is not detrimental to public policy. It also stresses the tribunal's power to resolve all procedural and evidentiary issues, subject to the parties' rights to agree.

In England, there is no consensus on what constitutes public policy. The definition of public policy varies by state. It is therefore feasible to identify another state where the same factors do not apply for the purpose of public policy and get your award enforced there. This contentious method was used in England in many instances when the same court ruled on separate arbitral awards despite the identical facts (The English Arbitration Act 1996). In certain circumstances, foreign arbitral judgments were founded on unlawful contracts, and the courts were asked to deny execution because they were against England's public policy. They didn't take one-opinion stand in these instances. Their stances varied with the arrival of new case.

Analysis of Case Law

The Rakoil case has been exemplary case concerning public policy. In it, *DST and Rakoil* were at odds over an oil exploration deal. The both sides

agreed to arbitrate the issue via the International Chamber of Commerce (I.C.C.). The ICC arbitration panel sent the case to Swiss arbitrators, as is customary in international oil drilling arbitrations. Rakoil claimed in front of an English court that the arbitrator used vague and non-specific international standards relying on common practice in licencing agreements rather than utilising statutory law of the particular jurisdiction. It was therefore against English public policy.

The court of appeal overturned the claim, reasoning that it must be proved in an English court that contract or the award had any nature of criminality or that its enforcement would be harmful for the public welfare, or against the common logic; and where the parties didn't mention rules of law to be applied in arbitration, the arbitrator is free to utilise rules common in different countries' laws to regulate commercial interactions. In this instance, the English courts held that a public policy exemption required a violation of an already justifiable public interest (Belohlavek, 2009). The court must ensure that recognising and enforcing awards does not jeopardise the state's residents' interests. Therefore, any public policy exemption that cannot convincingly demonstrate how legal effect may harm the country's national good will not be entertained.

This case, like Parson & Whittemore in the United States, is a milestone in public policy in regard to international arbitral awards. The D.S. T. case established boundaries of public policy in arbitration. Although less vague than the US criterion, it does not specify what is obviously hurtful or totally obnoxious. The D.S. T. decision highlighted that English courts differentiate between foreign and domestic public policy (*Omnium de Traitement et de Valorisation SA. (OTV) v. Himarton Ltd.*, 1999).

In *Soleimany v. Soleimany*, the arbitral judgement was thrown aside for violating Iranian law. The lawsuit included a commercial cooperation between Sion and Aber Soleimany. Both had agreed to share earnings from selling Persian and other Oriental carpets to England. Aber, an Iranian resident, would smuggle goods to his father, Sion, in England, violating Iranian tax and export control laws. Aber afterwards sued for non-payment via arbitral tribunal. The issue was arbitrated by the Beth Din, in a Jewish court. Because Jewish law does not recognise lawlessness as a factor in deciding who is entitled to what, the arbitrator ruled that the father was liable for the earnings. Aber attempted to pursue the award in England, but Sion

argued that owing to the contract's lawlessness, execution would be against English public policy. The English Court of Appeal ruled that the award won't be implemented in England's jurisdiction since it is founded on an unlawful consideration. This was ruled against public policy by the court.

Noted in the case of *Westacre Invs. Inc. v. Jugoimport-SPDR Holding Co. Ltd.* (1999) was, by using its actual authority to secure contracts for the supply of military weaponry and technology to the Kuwaiti state, a Yugoslavian state-owned business engaged Westacre, a Panamanian firm. The Yugoslavian company cancelled the deal and refused to pay Westacre. To follow with the arbitration clause, Westacre brought the case to ICC tribunal in Paris, where the panel ruled in Westacre's benefit under Swiss legislation. The Yugoslavian authorities argued that enforcing the judgement in England was against public interest since the basal transaction included bribery to induce the selling accord. So this contract was unlawful in Kuwait. Enforcing the judgement would be against the concept of global conciliation and against English public policy.

The English lower court and Court of Appeal uniformly differed with the Yugoslavian state on the public policy exemption and the doctrine of acceptance of international arbitral judgments under the NYC. They argued that England's arbitration clauses permitted a national court in the country to execute a contract even though it was against Kuwaiti public policy, provided it was not against the public policy of the controlling law (Swiss legislation) or England (Wade, 1999). An agreement to buy personal authority was not unlawful in Switzerland or in England. The court also ruled that only severe widely denounced acts like terrorism, narcotics smuggling and sex trafficking would violate English public policy (Thomas, 1981). The Yugoslavian case was not one of them. The court has to promote public policy by upholding international arbitration agreements (Wade, 1999). The court concluded that the public interest of upholding international arbitration agreements trumped the public objective of preventing corruption (Westacre, 1999). So the award was enforced.

In comparison, Soleimany case yet having similarity from the surface with Westacre one, are different in essence and awards awarded. The arbitral panel in Westacre deemed the disputed contract was not unlawful, while the agreement in Soleimany case was declared absolutely illegal. In *R v. V* (2008), R and V

had a consultancy contract. In exchange for payment, V agreed to secure permits from a North African country's national oil firm for R's development ambitions. Although R had already paid V twice, but declined to pay a third charge. The contract required ICC arbitral tribunal and used England's law. V filed a suit with the ICC in London. Following the tribunal's decision, it was held that R must pay V the pending third fee. It was claimed under public policy that the consultancy contract was illegal since V was simply encouraging the selling. R then challenged the tribunal decision in court, using Section 68 (2) (g) of the English Arbitration Act 1996. The court dismissed R's claim centered on Westacre. The tribunal's finding that the consultancy contract was not unlawful under the *lex loci solutionis* was upheld by the court. Also, that the arbitration agreement wasn't against the English public policy.

Another lawsuit (*Soleimany v. Soleimany*, 1999) arose from a contract in which OTV hired Hilmarton as a consultant for a drainage project in Algeria. When OTV got a public works project, it had to pay Hilmarton, OTV barely paid Hilmarton half of the stipulated payments. As a result, an arbitration panel in Geneva handled their case which rejected Hilmarton's plea of rest half of the payment. The Swiss Federal Court upheld the Geneva Court of Appeal's decision to reverse this award.

Again arbitration tribunal sat to resolve the dispute, and this time award went to Hilmarton. Hilmarton was granted permission to enforce it in England. However OTV attempted to block enforcement, claiming the award is against English public policy since it is based on a forged agreement. The court ruled that it was not deciding the contract itself. There was a prime conflict of raised issue of illegality and English Court had to decide whether such award was contrary to public policy or not. Consequently, court ordered for the enforcement of award.

To contrary, Soleimany case dealt with enforcement of domestic English award while the other two cases (Westacre and Hilmarton) had to deal with enforcement of foreign awards (Swiss court awards) in the England. The defendants contested at the same note in the thrice cases, claiming that enforcing the arbitral judgement would be against English public interest since it was based on an unlawful contract. In Soleimany, the defendant successfully contested the award, and enforcement was denied. On appeal in Westacre and Hilmarton, the defendants lost and enforcement was permitted (Brown, 2000).

These cases depict that an English court may decline to enforce a foreign arbitral judgement if the relative contract or arbitration agreement is illegal (Davidson, 1999). Notably, in all of these instances, the execution of a foreign award was not rejected uniformly and distinction was still present. What constitutes unlawful in each instance varies. In *Soleimany*, the English court denied enforcement if the award was clearly unlawful. In *Westacre*, the court distinguished between two types of illegality. Illegality based on generally rejected grounds and illegality centered on domestic factors that breaches public policy norms. Illegality is classified according to its offensiveness. Unlawful contracts entering the domain of first type of illegality, under English law, are rejected enforcement in all cases irrespective of whether the award is enforceable under the appropriate contract law, arbitration law, or law based on location of performance. So long as the agreement's fundamental law of contract or *lex arbitri*, isn't violated, the award will be enforced in England (Enonchong, 2000).

It followed that if an award is founded on an unlawful contract and that illegality is generally recognised (come sunder first type); an English court will decline to enforce it (see *Westacre v Soleimany*). As opposed to class one, class two awards are enforced by English courts if they are clearly founded on unlawful contracts. Thus, the *Soleimany* case provides guidance for the *Westacre* issue insofar as the illegality is globally rebuked but not in domestic jurisdiction. *Hilmarton* case, like *Westacre*, centred on whether to enforce the award and also on *Soleimany* case, whether to reject it. *Soleimany* was an improper decision, the court concluded in *Hilmarton*. Corruption or criminal activity was evident in the *Soleimany* instance, but was not in the *Hilmarton* case.

In *Soleimany*, as being against the English public policy, the English court declined to enforce the arbitral judgement. Notably, the court did not distinguish between a domestic and a foreign award, or between national and international public policy. On the contrary, in *Westacre* and *Hilmarton* cases collectively, foreign arbitral award was enforced, if it is not contradictory to the law of the country where it was made, even if it is in conflict with English law or the law of the location where award would be conducted. The court also differentiated between local and foreign public policies. As a result of this, English courts are increasingly considering awards that violate international or local public policy.

Westacre case following *Leminda* case (1988) noted: all parties agree that a foreign arbitral judgement will be implemented even if the relative contract violates English public policy. According to the *Leminda* ruling, public policy was divided into two groups in the *Westacre* case. First, a foreign award is never enforced by an English court due to international public policy. Secondly, domestic public policy don't have any authority to nullify the foreign award unless the contract on which award is granted is unlawful under domestic law of England or illegal under the law where the performance of award will take place. Waller J (1999) emphasised that If an arbitration court implements a contract that does not invalidates English domestic public policy under the laws of contract act or *lex arbitri* (arbitration laws), even though English domestic public policy has a different stance, it is justified to deduce that none can infuriate English domestic public policy. The degree of offensiveness was proposed in the *Westacre* case to differentiate between international and domestic public policy. Terrorism, narcotics smuggling, sex trafficking, child sexual misconduct, and deception are all examples of international public policy, in English Arbitration regime. So it can be inferred that the English laws recognises and enforces foreign arbitral judgments in accordance with international public policy only.

On the grounds of public policy, the court in *Leminda* case, devised two paths to execute or not enforce a foreign unlawful contract. The first path focuses on global moral standards (international public policy), whereas second path centres on domestic concerns (domestic public policy). A foreign award will not be implemented in England if it violates public policy under first path. However, if the award is adverse to both English and foreign land (location of operation) law under second path, the English court will refuse to accept and implement it.

The *Leminda* case denoted that enforcement is denied simply if the contract is against the domestic public policy of England and or contrary to the foreign location of operation. Currently UK courts firmly allege that public policy should be interpreted narrowly. The English Court of Appeal recently said in *Sinocore case (RBRG Trading (UK) Ltd v Sinocore International Co Ltd, 2018)* that it is commonly acknowledged that the public policy basis to reject award should be interpreted conservatively, as in *Dicey, Morris & Collins*. Sir John Donaldson MR remarked in a case (*Deutsche Schachtbau v National Oil, 1987*) that public policy elements are never comprehensively elucidated, that's why should be addressed with great care.

PUBLIC POLICY IMPACT ON FRANCE

Legislation & Historical Development

Arbitration in France is governed by the French Code of Civil Procedure (NCCP) (Koch, 2009). NCCP calls that French courts will accept or enforce foreign arbitral awards or French arbitral awards if they do not violate international public interest. Other than public policy, the reasons for refusing to recognise or enforce domestic and foreign awards are identical. Public policy exception for awards given domestically is regulated by Article 1484, while Article 1502 deals with International Public Policy (Code De Procédure Civile, France).

In recognition and enforcement of international arbitral judgments, the French court appears to favour local arbitration laws of the nation above the NYC, even though it has signed the convention. Apparently for the sake of reaping profits from the award, courts think that enforcement through domestic legislation will give prime benefits.

Previously, French Civil Code formerly prohibited conflicts to be adjudged under the arbitration which had public policy element involved in them. Though, French courts' judgments contributed to undermine this rule. A landmark decision was taken in 1950, in which Court of Cassation decided that one may arbitrate a dispute even though it is subject to public policy norms (Kirry, 1986). Later cases developed a whole new arbitration regime for France which will be explored underneath.

Analysis of Case Law

In France, the Hilmarton case of 1990s is seen as milestone in the arbitration field. In the respective case, France courts accepted the Swiss award as they deemed it to be international rather than incorporated into Swiss law, hence it was enforced in Hilmarton notwithstanding the Swiss court's revocation, because its validity was recognised even though cast aside and its acceptance in France was not adverse to international public policy.

In other words, what's really called public policy in domestic contracts is not always public policy in foreign transactions (Hanotiau and Caprasse, 2008).

In the country, domestic conflicts involving collective behavior and public settlements cannot be arbitrated. But international arbitration hasn't embraced this idea. France has its own unique International Public Policy, which includes all of the basic norms and issues that

the French judicial framework needs to follow even in international circumstances (Lebanese Traders Distributors v. Reynolds, 1994).

From time to time, the French court appears to modify its position in favour of arbitration. The French court has seldom overturned an arbitral judgement based on public policy ground. Between 1981 and 1990, the Paris Court of Appeal invalidated just 2 out of 40 awards for public policy reasons (Giovannini, 2000). One was related to bankruptcy, where the tribunal lacked to distinguish international public policy appearance in the contested dispute and hence called that a bankruptcy individual or legal entity person cannot be sued by the arbitral tribunal (*Cour de cassation, Sociite Thinet v. Labre/y Rev. Arb*, 1988). In the second case, the arbitral judgement was thrown aside for violating investment control regulations (*Cour d' Appel de Paris, Soc.Courrges Design v. Andre Courreges*, 1990).

With regard to the French arbitration regime, the Paris Court of Appeals set up very essential element (*CA Paris, European Gas Turbines SA v. Westman International Ltd.*, 1993) by stating that deception to the arbitrator by a party involved in arbitration, like by presenting fabricated and wrong documents, would be deemed as clear breach of international public policy, even though such deception came to the arbitrator's attention after the award was given. Further, all the contractual agreements containing corruption, bribery, indecency and against public ethics would be considered as void asking for arbitration as they stand invalid in International Public Policy. Any foreign award bringing in these elements won't be enforceable in France.

Paris Court of Appeals asserting that the public policy exemption under Article 1502 (5) of the NCCP applies to all facts and legal procedures of the case, supporting the application of the international public policy norm, also including verification of the contract's legitimacy and legality. In this instance, the court invalidated the award because the parties were involved in agreement of bribe. Beyrard (*Cour d' Appel de Paris, Republique de Cote D 'voire et autre v. Beyrard*, 1993) highlighted this court judgement, and the Paris Court of Appeal ruled that there is a core notion of international public policy of enforcing contracts in due diligence.

Today, these judgments seem isolated as French courts have formed a very narrow definition of public

policy defence. In the *Ganz* case (1991), the Court of Appeal of Paris ruled in 1991 that the accusation of fraud or expropriation did not bar the arbitral tribunal's authority. In 1996, the Paris Court of Appeal denied the revocation of the verdict in *Gallay* case (1996), which concerned about prejudiced and unjust competition. The 2004 *Thales* (2004) judgement by the Paris Court of Appeal also authenticates restriction of public policy in this way. The arbitrators directed Thales to compensate Euromissile for a licencing dispute. Thales challenged the award, claiming the deal broke European competition law. The award came from an unlawful transaction that went against international public policy. The court declined to vacate the judgement and declared that only clear, real, and tangible breaches of French public policy would be authorized.

Moreover, the French jury in the *Thales* case openly stated that it cannot examine the arbitrator's judgement on the issue in the non-existence of fraud since it would interfere with the finality of the award. In the latest *SNF/CYTEC* (2007) decision, the Paris Court of Appeals reaffirmed that national court could only conduct external review of arbitrator's decision. The court declared it perfectly clear that, absent a blatant violation of public policy, it had no cause to overrule the arbitrators.

Thus, the public policy defence of NCCP will be utilised to annul the award if the award's execution runs contrary to a lawful order, any legislation, or basic tenet in an undesirable way. A French court will examine public policy if it violates the French legal system's core tenets. Even if there is proof of basic law dispute, the French court cannot overturn the award unless the disagreement is apparent, real, and tangible. For example, the French courts may regard the *Thales* and *SNF* decisions as *Stare Decisis*.

CONCLUSION & RESULTS

Public Policies of the Developed Nations, particularly the civil and common advanced nations, have shown significant interest in International Trade and not letting public policy hamper the enforcement of foreign arbitral award in their state. For this purpose, France has gone one step ahead by forming its separate International Public Policy for the awards which host foreign parties in arbitration. It has devised separate rules of public policy for the foreign kind of arbitrations. The quicker a country reforms its' polices to mould according to modern world's international

demands, the apt it would be to develop friendly harmonious foreign investment relations with other states. The US and French judgments create an amiable image of national courts reluctantly interfering with legitimate arbitral awards on grounds of public policy. Their first preference is always letting the arbitrator play his sovereignty.

Despite the fact that US courts typically limit public policy, they did not offer much advice on which claims had a better shot. Therefore, the opposition side may still appeal the award if it believes it should be reversed. Several considerations, including efficiency, global collectiveness, and contract autonomy, will be treated differently by US courts in regard to international or domestic award. Taking all of this into consideration, US courts prefer to follow the *Stare Decisis* theory.

US and England's public policy exclusions are restrictive in nature and follow the pro-arbitration regime. Though in start, English courts were following the precedent in *Soleimany* case by taking in public policy claims positively but all of this turned over after the *Rakoil* case, whereby, it was denoted that public policy claim could only be called upon when some concrete lawlessness occur which is obviously harmful to the public welfare or is repugnant to basic rationale. As a result of this, claimants may have to put more effort to obtain a public policy appeal since England prioritises global comity above the defence. English courts will only examine the arbitral tribunal's rationale, not the fundamental facts. The award will not be reversed except if it is obvious that there has been a violation of public policy.

If the contract is claimed to have been obtained by fraud or bribery, English and French courts do not deem arbitration agreements as invalid at the referral step. Arbitration may therefore be used in certain cases like these, though an arbitral judgement upholding an unlawful contract or obtained via fraud and bribery will be deemed contrary to public policy in the annulment and enforcement phases. An English or French arbitration mechanism construes public policy awfully restrictive when confronted with accusations of fraud or criminality.

Since the 19th century, France has widened its perspective of public policy. The entry into arbitration proceeding is forbidden regarding matters disallowed under public policy is a basic rule in the country but that rule does not imply that every matter that in some way

relies on laws depending on public policy is non-arbitrable. Considering domestic awards, French courts decided that the same won't be true for foreign arbitral judgments. Public policy defence can be brought upon cordially in domestic arbitration but for foreign award calling it in won't be an easy task. Competition Law was also made arbitrable in Thales, saving it from non-enforcement due to public policy exception.

The supremacy of immunity policy of an independent state decides the extent of the issue that may be arbitrated. While majority of the jurisdictions seem to prefer a limited interpretation of the public policy exemption, it is still possible that some others favour a wide interpretation. We cannot dispute the presence of judicial contradiction in applying the public policy exemption, though these cases are not powerful enough to counter the pro-enforcement tendency. Worldwide, it has been a hot debate to limit the applicability of public policy claim to some particular definite issues.

In nations where rigorous public policy is enforced, a revised definition of public policy is required, since the NYC currently allows governments to have too much autonomy when enforcing the public policy defence. As a consequence, the arbitration simply cannot fully accomplish its role in determining the certainty of an award, because a domestic court might bring this up to prevent the decision from being enforced. Even if there is a good chance that the public policy exclusion will be international rather than domestic, state courts may nevertheless use their authority to decide whether to employ domestic or international public policy norms. This leaves a vacuum that enables a deceitful opponent to utilize public policy as a strategy to resist the enforcing of an award, as it's hard to determine which subjects are deemed public policy in each nation without vagueness.

Developed nations needs to lay out the subject-matters which are in contradiction with the foreign public policy of other nations like gambling, wine making, corruption or other illegalities. Proper public policy parameter should be developed for them. This recommendation is specifically for USA and UK, who are also still competing for codified set of definite principles to be applied on these matters. Rather than case-to-case deviation of these elements, one core rule should be given.

Every nation has taken a distinctive perspective to arbitration. States should work to expand a

collaborative international public policy by implementing it stringently as the world economy becomes more interconnected. At the last, one's hopes can be pinned on the fact that the relevant jurisdictions' supervisory courts will embrace this stance. Consequently International Arbitration will reach enforcement stage and all the awards given in a foreign jurisdiction will be implemented by the nation as followed by the international principles in the worldwide judicial and economic system. Thus, rather than functioning as an unreliable instrument, public policy defence will accomplish its goal.

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