CHAPTER 9

Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India

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A. ARTICLE V(2) OF THE NEW YORK CONVENTION

"Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

9.01 History of Article V. While discussing the form of the New York Convention, the delegates of various countries were of the view that their countries must have the right to reject awards whose enforcement would violate their country's notions of public policy.[1] Article V(2) protects the sovereign rights of the member states, and recognizes their internal principles of public order.[2] An enforcement court may, on its own motion, refuse the enforcement of an arbitral award if the subject matter of the award is not arbitrable in its forum [Article V(2)(a)] or if enforcement would violate its notions of public policy [Article V(2)(b)]. The burden of proving that such a ground exists, however, remains on the defendant.[3]

While it has been noted that arbitrability forms part of public policy and to that extent Article V(2)(a) may be superfluous,[4] for historical reasons, the drafters of the New York Convention have addressed arbitrability in a separate clause.

Further, it can be seen that the drafters of the New York Convention considered international public policy as a ground for refusal of awards as opposed to domestic public policy. This stems from the underlying fact that New York Convention makes

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1. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires - Summary Record of the Seventh Meeting*, at 7, UN Doc E/Conf 26/AC 42/SR 7 (29 March 1955) (comment of Mr Wortley, United Kingdom).
2. Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Preparatoires-Comments by Governments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, at 1*, UN Doc E/2822/Add 6 Annex (16 July 1956) (comment by the delegation for Yugoslavia).
3. *BezG Zurich* (2003), YCA XXIX (2004), 819 (at 828).
4. Albert Van den Berg, *The New York Convention of 1958*, Kluwer, 1981, at p 360.

no mention of the domestic legal principles unlike the previous Convention on the Execution of Foreign Arbitral Awards 1927 (**Geneva Convention**) which explicitly mentions "legal principles of enforcing country". Accordingly, the intention of the drafters of the New York Convention was to narrow the scope of grounds of refusal based on international public policy.

B. PUBLIC POLICY

9.02 **Doctrine of public policy.** The term public policy under Article V clearly refers to the public policy of the state in which the award is sought to be enforced. Further, it is important to note that the courts are only required to consider whether the enforcement of an arbitral award would result in a violation of public policy. However, the New York Convention is silent on what public policy entails.

The concept of public policy has acquired meaning through varied interpretations across jurisdictions, without any hard consensus. The interpretation of public policy is dynamic in nature, and has evolved with time. The English House of Lords described 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".[5] It is a "moral, social or economic principle so sacrosanct ... as to require its maintenance at all costs and without exception".[6]

The absence of any clarity on the term "public policy" under the New York Convention coupled with its broad interpretation has opened the door for parties in various jurisdictions to invoke this ground for refusal and setting aside of a foreign award.

9.03 **International Public Policy vis-à-vis domestic public policy.** The pre-dominant view taken by international jurists is that Article V(2) of the New York Convention refers to the concept of international public policy, the scope of which is narrower than domestic public policy. In other words, what is considered as public policy in domestic matters, is different from public policy in international matters.[7] In the context of enforcement of arbitral award, international public policy is increasingly referred to in legislations and court judgments. However, what constitutes international public policy is a matter to be decided by a national judge.

While the definition of international or transnational public policy is not necessarily the same as domestic public policy, the purpose of making such a distinction is always to narrow down the scope of the public policy which must be considered for assessing whether the enforcement of a foreign award is compatible or not. An exception seems to be Turkey where, while it is accepted that Article V(2)(b) of the Convention refers to international, rather than domestic, public policy, decisions by the competent Court of Appeal show that a narrow interpretation of the concept is not always adopted in the case of foreign awards.

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5. *Egerton v Brownlow* (1853) 4 HLC 1.
6. Cheshire and North, *Private International Law*, 13th edn, Butterworths, 1999, at p 123.
7. OP Malhotra and Indu Malhotra, *Law and Practice of Arbitration,* 3rd edn, Thomson Reuters, 2014, at p 1716.

The principles surrounding the violation of public policy have been differently expressed by courts depending on whether they are in civil law or common law jurisdictions. In the former, the definitions of public policy generally refer to the basic principles or values upon which the foundation of society rests, without precisely naming them. In common law jurisdictions, on the other hand, the definition often refers to more precisely identified, yet very broad, values, such as justice, fairness or morality.[8]

For instance, in jurisdictions such as United Kingdom, courts have been reluctant to precisely define public policy and have referred to certain fundamental values, setting out that: "[c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution ... It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."[9] On the other hand, in India, public policy has been given a much broader interpretation, and the enforcement of a foreign arbitral award may be refused by an Indian court on the ground of public policy if such enforcement would be contrary to: "(i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality".[10]

Domestic public policy consists of principles of morality and justice that are reflected in the constitution or other legal sources of a country. On the other hand, international public policy is a reflection of the justice seeking sentiment of a society and is a collection of values of a country and their violation cannot be tolerated by the society even in international affairs. Only a few countries have explicitly adopted the concept of international public policy in relation to enforcement cases. Usually, the fundamental or basic principles constituting public policy are those as existing in the country where enforcement is sought. This is explicitly stated in Article V(2)(b) of the New York Convention which refers to a situation where the recognition or enforcement of the award would be contrary to the public policy of "that country". Countries like France and Switzerland, differentiate between international and domestic public policy and consider international arbitral awards as part of international public policy.[11]

9.04 **Mandatory rules as public policy.** In many jurisdictions, courts note that public policy must be distinguished from domestic mandatory laws. The fact that an award is in contradiction with a mandatory rule of law in the country where enforcement is sought thus may not lead to refusal of enforcement of the award. Many countries have even permitted agreements between parties which violate

8. IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report on the Public Policy Exception in the New York Convention*, October 2015. Available at *http://www.newyorkconvention.org/news/report+on+the+public+policy+exception+in+the+new+york+convention+-+a+report+by+the+iba+subcommittee+on+recognition+and+enforcement+of+foreign+arbitral+awards+dated+october+2015.* Last accessed on 1 March 2017.
9. *Deutsche Schachtbau- und TiefbohrgesellschaftmbH v Ras Al Khaimah National Oil Co, Shell International Petroleum Co Ltd* Court of Appeal, 24 March 1987.
10. *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860: 1994 SCC Supl (1) 644.
11. *Ibid*, at p 83.

mandatory provisions and considered such agreements as valid for the purpose of enforcement of arbitral award, thereby clearly making out a distinction between domestic and international public policy, referring to the latter in regard to international arbitration.[12]

The criteria forming the basis of the determination as to whether mandatory national law constitutes public policy are often not specified by national courts. Commentators note that it is consistent with the letter and spirit of the New York Convention that, as a matter of principle, the mandatory rules of the enforcement forum should be considered as part of its public policy when they reflect that forum's fundamental concepts of morality and justice, from which no derogation can be allowed.[13]

9.05 Evolution of public policy and comparative jurisprudence. Enforcing countries, while interpreting public policy, rely on their own domestic notion of public policy, which remains in transition from time to time. Although several nations are relying on the concept of international public policy for enforcement of foreign awards, some countries like Malaysia, Turkey, Iran, Russia, etc. still rely on their national/domestic public policy notion while evaluating alleged violations. The lack of certainty and uniformity of law across nations adversely affects multi-national contracts and transactions. It is also not in line with the comity of nations and speedy dispensation of disputes through arbitration and the spirit of the New York Convention.

There is a growing trend of courts of various member states moving towards a restrictive and narrow interpretation of public policy and applying the concept of international public policy. The courts of several civil law countries such as Germany, Italy and Switzerland expressly apply international public policy. For instance, in Lebanon, courts have held that international public policy is "formed of a set of rules of important nature that are applied in so many countries thus giving them an international character".[14] In the same vein, the Swiss Federal Tribunal held that an award contravenes public policy "if it disregards essential and widely recognized values which, according to the conceptions prevailing in Switzerland, should form the basis of *any legal order*" (**emphasis supplied**).[15]

Moreover, common law countries have also restricted the scope of public policy. In the famous US case of *Parsons & Whittmore,*[16] Judge Smith held that the enforcement of the foreign award should only be denied "where enforcement would violate the

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12. Sormeh Bouzarjomehri and EisaAmini, "*Public Policy as Ground for Refusal of International Arbitral Awards - A Comparison Between Different Judicial Practices*", Journal of Politics and Law, 2016, Vol 9, No 10, at p 82.
13. E Gaillard, J Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration,* 1996, at 996.
14. Beirut Court of Appeals, 7th Civil Chamber, Decision dated 7 October 2005, *The Lebanese Review of Arab and International Arbitration*, Issue No 33 page 31 *et seq.* **Also see**, Beirut of Appeals, 3rd Chamber, Decision No 32/2008, dated 10 January 2008, *Lebanese Review of Arab and International Arbitration*, Issue No 45, page 18 *et seq.*
15. *X SpA v Y SRL Federal Tribunal, Switzerland, 8 March 2006, Arrêts du Tribunal Fédéral (2006) 132 III 389*; Paolo Michele Patocchi, *The 1958 New York Convention: The Swiss Practice*, 1996 ASA BULLETIN 145, at 188-196.
16. *Parsons & Whittemore Overseas Co Inc v SociétéGénérale de l'Industrie du Papier (Rakta) and Bank of America* 508 F 2d 969 (2nd Cir 1974).

forum's state's most basic notions of morality and justice". The US Supreme Court in another landmark case of *Scherk v Alberto Culver Co*[17] recognised the difference between international and domestic public policy. It enforced an agreement to arbitrate a claim arising in international trade, although arbitration of a similar claim would have been barred had it arisen from a domestic transaction.

However courts in countries like Iran, China, Australia, India and Turkey have been known to apply the wider interpretation of public policy in the past to set aside foreign awards. The Indian Supreme Court, in *Renusagar Power Co Ltd v General Electric Co*[18], also interpreted public policy restrictively and held that in order to attract the bar of public policy, the enforcement of the award must invoke something more than the violation of the law of India. It held that the phrase "public policy" must be construed in the sense in which the doctrine of public policy is applied in the field of private international law; and that enforcement of a foreign award would be contrary to public policy if it was contrary to (a) fundamental policy of Indian law; (b) the interests of India; and (c) justice and morality.

In Australia, the judiciary has adopted the restrictive meaning[19] of public policy as prescribed by Section 8 (7) of The Arbitration Act, 1974[20] and is limited to fraud, corruption or violation of natural justice principles.[21] The scope was set out in the case of *Gutnick v Indian Farmers Fertiliser Cooperative*[22] where the Court of Appeal accepted that an arbitral award resulting in double recovery would be against public policy. An instance of wider interpretation of public policy is the technical ground of non-mentioning of the name of the award debtor.

In France, under Article 1514 of Book IV Arbitration, an arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy. The law mandates distinction between domestic and international public policy. The scope was enumerated in the case of *European Gas Turbines SA v Westman International Ltd*[23] where the Paris Court of Appeal held that enforcing an arbitral award related to an agreement based on bribery was against public policy. As per a wider interpretation, the Court of Cassation had decided that the violation of public policy must be "flagrant, effective and concrete",[24] but recent decisions have dropped the requirement of flagrancy.[25] Similar to the French position, in

17. *Scherk v Alberto Culver Co* 417 US 506 (1974).
18. AIR 1994 SC 860: 1994 SCC Supl (1) 644.
19. *Uganda Telecom Ltd v Hi-Tech Telecom Pvt Ltd* [2011] FCA 131.
20. Section 8(7) of the 1974 Act provides – In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that (b) to enforce the award would be contrary to public policy; Section 8(7A) of the 1974 Act provides – To avoid doubt and without limiting paragraph (7)(b), the enforcement of a foreign award would be contrary to public policy if (a) the making of the award was induced or affected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.
21. *Traxys Europes SA v Balaji Coke Industry Pvt Ltd* [2012] FCA 276.
22. [2016] VSCA 5: 306 FLR 386; *IMC Aviation Solutions Pvt Ltd v AltainKhuder LLC* [2011] VSCA 248, Supreme Court of Victoria – Court of Appeal.
23. REV ARB 359 (1994).
24. CA Paris, 18 November 2004, *Thalès v Euromissile* CA Paris, 22 October 2009, *Linde.*
25. See CA Paris, 26 February 2013, *Sprecher,* CA Paris, 4 March 2014, *Gulf Leaders.*

its decision granting enforcement of an award rendered in Belgium, the Court of Appeal ruled that enforcement would only be refused on public policy grounds if the violation was "flagrant, actual, and concrete."

In Hong Kong, Section 86 of the Arbitration Ordinance 2013 was interpreted narrowly to mean that there must be something more than substantial injustice arising out of an award, so shocking to the court's conscience as to render enforcement of an arbitral award repugnant.[26] In the alternative, reasons must be so extreme that the award falls to be cursed by bell, book and candle.[27] The scope was enumerated in *Pakilto Investment Ltd v Klockner East Asia Ltd*[28] where the court considered the denial of fair and equal opportunity in arbitral proceedings as a public policy violation. There has been no wider interpretation to the public policy doctrine by the Hong Kong courts.

In Malaysia, the narrow interpretation of Section 39 of the Arbitration Act 2005 based on UNCITRAL Model Law,[29] is that the statutory jurisdiction of the court in remitting an award is a limited one and challenge should be allowed only in exceptional circumstances.[30] The wider interpretation is that the only refusal of award on grounds of public policy can be based on the violation of principles of natural justice or material violation of the provisions of the Act.[31] The scope has been detailed in *Harris Adacom Corporation v Percom Sdn Bhd*, where the High court of Malaysia opined that while considering enforcement of an award, Malaysian law, moral values and governmental policy must be looked at. In this case, enforcement of an award involving an Israeli company was considered against Malaysian public policy which prohibits trade with Israel.[32] Further, the merits of the case cannot be examined in the garb of public policy intervention.[33]

9.06 Substantive public policy and procedural public policy. In applying Article V(2)(b) of the New York Convention, courts where recognition and enforcement of an

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26. *A v R* [2010] 3 HKC 6; *KarahaBodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)* [2007] 5 HKC 91; *Hebei Import & Export Corp v Polytek Engineering Co Ltd* (1999) 2 HKC FAR 111.
27. *Gao Haiyan & Anor v Keeneye Holdings Ltd* [2011] HKCU 708.
28. [1993] 2 HKLR 39.
29. Section 39(1)(b)(ii) – Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked if the High Court finds that the award is in conflict with the public policy of Malaysia.
30. *Harris Adacom Corporation v Perkom Sdn Bhd* [1994] 3 MLJ 504 HC, the court held that an award already registered in another jurisdiction would not contrary to public policy when the party sought to enforce the award in Malaysia as long as the enforcement does not constitute double claim. The plaintiff in this case has registered the US award in the Superior Court of Columbia and its registration was done only for the protection of the plaintiff's interest and not for the purpose of a double claim; *Colliers International Property Consultants (USA) v Colliers Jordan Lee and Jaafar (Malaysia)* [2010] MLJU 650 HC, the court rejected the contention by the defendant that the enforcement of the UK arbitral award is violated the provision of the Valuers, Appraisers and Estate Agents Act 1981. The court further opined that even if they did there was nothing conflicted with fundamental principle of justice or morality or otherwise offensive to the public policy of Malaysia; *Goldcourse Sdn Bhd v Asaztera Sdn Bhd* [2011] 9 MLJ 700, HC; *Open Type Joint Stock Company Efirnoye ("EFKO") v Alfa Trading Ltd* [15] [2012] 1 CLJ 323, HC.
31. *Open Type Joint Stock Company Efirnoye ("EFKO") v Alfa Trading Ltd* [15] [2012] 1 CLJ 323, HC.
32. *Equitas Limited v Allianz General Insurance Company (Malaysia) Berhad* [2009] MLJU 1334.
33. *Sami Mousawi v KerajaanNegeri Sarawak* [2004] 2 MLJ 414.

arbitral award is sought review not only the substantive outcome of the award but also the procedure leading to the award. Public policy allows the courts to consider the merits of an award so as to satisfy themselves that there is nothing in the award that would infringe the fundamental values of that State. In addition, the courts must also ensure that the procedure followed by the arbitral tribunal is in line with basic procedural fairness.

(i) **Substantive public policy.** Substantive public policy comprises of the mandatory and fundamental laws of a state, public order and morality, and national interest. It deals with irregularities concerning the subject matter of the award and its compatibility with the fundamental norms and principles of the state enforcing the award. A fundamental law is one that is of such importance to the domestic regulation of a state that the state deems it irrelevant whether it was a law governing the dispute. In other words, the generally narrow scope of public policy for international disputes is irrelevant for the purposes of a fundamental norm.

For instance, in *Soleimany v Soleimany*,[34] the English Court of Appeal refused to enforce a foreign award as the decision was in contravention of a mandatory law in England. In this case, a dispute arose from a contract between a father and a son regarding the distribution of profits from the sale of smuggled Iranian carpets. The arbitral tribunal, while acknowledging the illegality of the object of contract, was of the view that it did not undermine the underlying contractual obligations of the parties. The court refused to enforce this award on the ground of violation of public policy, stating that "where public policy is involved, the interpretation of an arbitration award does not isolate the successful party's claim from the illegality which gave rise to it".

Similarly, several judicial decisions across the globe have rejected the application of awards on the basis of their contravention with the morality of that state. Being entirely dependent on cultural backdrops, this standard varies greatly from state to state. For instance, in *USA Productions et al v Women Travel*,[35] the Chinese Courts refused to enforce an award of China International Economic and Trade Arbitration Commission regarding a contractual breach disallowing a heavy metal band to perform in China. The refusal to enforce was based on the public policy of China, whereby the performance of the band would have been anti-nationalistic and against Chinese national sentiment.

The principle of national interest has often been considered by courts when assessing the enforcement of foreign awards. For instance, in *United World Ltd Inc v Krasny Yakor*,[36] the enforcement of an arbitral award was resisted by the Russian Federal Court on the ground that payment of the damages awarded could lead to the bankruptcy of *Krasny Yakor*, a state-owned

34. *Soleimany v Soleimany* [1999] 3 All ER 847.
35. Supreme People's Court of the P R of China [1997] Jing Ta No 35.
36. *United World Ltd v Krasny Yakor* (*Pan v Russ*) Fed Com Ct of Volga-Vyatka Cir Case No A43-10716/02-27-10isp (2003).

company which manufactured products for national security, which would consequently have a negative influence on the social and economic stability of the Russian Federation.

Although parties often argue that the foreign relations of a state should have a role to play in enforcement of arbitral awards, this is rarely accepted as a ground for rejection. For instance, in the *Parsons Whittemore Overseas* case[37], the question was regarding the enforcement of an arbitral award keeping in mind the severed diplomatic relations between Egypt (the home State of the Respondent) and US Holding in favour of enforcement of all awards under the New York Convention, the American court stated that the public policy defense must always be understood narrowly, especially in cases of foreign awards. Similarly, in the case of *Dalmia Dairy Industries Ltd v National Bank of Pakistan*[38] the English Court rejected the argument that an award should not be enforced because the nationals of the two concerned countries were at war.

In India, several of the aforementioned grounds of substantive public policy have been made applicable. Courts have often rejected the enforcement of awards on the basis of their "patent illegality", ie because these awards were in violation of a mandatory norm in India. The Amendment Act has clarified that only domestic awards may be set aside on the basis. Even the ground of public morality finds its place in Indian jurisprudence, and has been included as one of the statutory meanings in case of both domestic and foreign awards.

(ii) Procedural public policy. Procedural public policy deals with infirmities in the rules governing arbitration and comprises of matters such as fraud and corruption, due process, res judicata, and annulment at the venue of arbitration. Courts have found a violation of public policy in cases where they considered that the right to be heard had been breached. For example, the Canadian courts have refused recognition and enforcement of an award where the tribunal had granted a remedy not requested by the parties on the basis that it violated the principle of *audiatur et altera pars*.[39]

As with substantive public policy, applications to refuse recognition and enforcement on the basis of procedural public policy have a high threshold. In *Osuuskunta METEX Andelslag v Türkiye Electrik Kurumu Genel Müdürlügü General Directorate*,[40] an arbitration conducted by Swiss law was not enforced by the Turkish Supreme Court on the ground that the award violated the public policy of Turkey by not following the procedure prescribed by Turkish law. This judgment was collectively criticized by the international community, especially because the procedural law adopted by the parties did not have an impact on the outcome of the case.

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37. *Parsons & Whittemore Overseas Co Inc v Societe Generale de L'Industrie du Papier* (Rakta) 508 F 2d 969 (1974).
38. [1978] 2 Lloyd's Rep 223.
39. *Louis Dreyfus SAS v Holding Tusculum BV Superior Court of Quebec, Canada, 12 December 2008, 2008 QCCS 5903.*
40. Decision of the 15th Civil Chamber, 10 March 1976, No 1617-1052.

The category of fraud and corruption has been subject to a lot of debate, owing to its ambiguous contours. While some States treat bribery and corruption as grave wrongs, others see it as a matter of executive failing. Despite this, there is a general consensus that awards based entirely on fraud must not be enforceable. The point where most jurisdictions differ is whether or not this fraud must be proven as having had an impact on the fairness of the proceedings.

Due process includes within its ambit both natural justice and improper procedure. Article V(1)(b) of the New York Convention provides that enforcement may be refused if a party was not given proper notice of the constitution of the tribunal. Several jurisdictions across the globe adopt some form of due process as a part of public policies, but the exact contours are hard to define. For instance, in the case of *Hebei Import and Export Corporation v Polytek Engineering Co Ltd*[41] the Hong Kong Court of Final Appeal, while rejecting the fairness of a tribunal as a ground for refusal in case of a foreign award, opined that arguments regarding the fairness of the tribunal should have been raised before the tribunal itself.

Res judicata refers to the anomaly to enforce an arbitral award pertaining to an issue that has already been addressed by a domestic court. For instance, in the case of *Hemofarm DD, MAG International Trade Holding DD, Suram Media Ltd v Jinan Yongning Pharmaceutical Co Ltd*[42] the dispute between the parties was first submitted to the Jinan Intermediate People's Court, where the court rejected the challenges to jurisdiction. After this, the parties filed for arbitration before the ICC, and the award was challenged before the Court. Setting aside the award, the Court opined that a tribunal could not ignore a Chinese Court's ruling regarding jurisdiction, and an order made in this manner would be violative of China's public policy.

Policy annulment at the venue of the arbitration has been recognised as a part of public policy under Article VI(1)(e) of the New York Convention. For instance, in the case of *The Arab Republic of Egypt v Chromalloy Aeroservices Inc*[43] it was held that the enforcement of an award that has been annulled at the place of arbitration would not be contrary to the public policy of France. Similarly, in the *Pemex*[44] ruling, the US Court of Appeals enforced an award made and subsequently set aside in Mexico, thus reiterating that public policy favours the enforcement of arbitral awards.

In India, fraud and corruption have been recognised statutorily as being a part of the public policy for both domestic and foreign awards. In Venture Global, for instance, the court famously held that the fact that fraud has been statutorily made a part of public policy is a "stable man in the saddle" on the unruly horse of public policy. On the grounds of due process, foreign awards have not

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41. [1999] 2 HKC 205.

42. *Guide Book on Foreign-related Commercial and Maritime Trial*, 2009, Vol 1, 2009, People's Court Press, pp 124-134.

43. Decision dated 14 January 1997, (1997) XXII Yearbook 691.

44. *Corporacio'n Mexicana de Mantenimiento Integral, S de RL de CV v Pemex-Exploracio'n y Produccio'n (Pemex)*, No 10 CIV 206 AKH, 2013 WL 4517225 (SDNY 27 August 2013).

been enforced by Indian courts owing to lack of proper notice, fair hearing, or ability to present a case otherwise. In *Centrotrade Minerals and Metals Inc v Hindustan Copper Ltd*[45] a challenge was allowed by the court because a party was unable to effectively present his case for no fault of his own.

9.07 Statutory evolution of public policy in India. Despite being a party to the New York Convention, India has long been held in disrepute for being a state where it can be difficult to enforce international arbitral awards.[46] This is partly because of the lack of a clear understanding of the Public Policy exception. The 1940 Indian Arbitration Act dealt with domestic arbitrations, while the 1961 Foreign Awards Act dealt with the enforcement of foreign awards passed under the New York Convention. However, this regime was plagued by excessive judicial intervention and gave way to the Act, which was introduced to align the law regarding arbitration in India with its economic aspirations.

Section 48 of the Act states that the enforcement of a foreign award may be refused if the enforcement of the award would be contrary to the public policy of India. The statute itself does not make any reference to international public policy. It is pertinent to note that the earlier statute mentioned only "public policy" and not the "public policy of India", indicating that the legislature made a conscious change in 1996 to qualify the public policy exception for foreign awards.

The Act was substantially overhauled when the Amendment Act was introduced. An explanation to the public policy exception was included in the Act, which clarified that an award would deemed to be in conflict with the public policy of India, only if-

(i) the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 (confidentiality) or Section 81 (admissibility of evidence); or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

Additionally, the 2015 Amendment clarified that Indian Courts are not permitted to review the merits of a dispute when making an assessment regarding the setting aside of an award on the basis of public policy.

9.08 Distinction between domestic and foreign awards. The Indian Supreme Court, in *Renusagar Power Co v General Electric Co*[47] held *that* "a distinction must be drawn while applying the said rule of public policy between a matter governed by domestic law, and a matter involving conflict of laws. The application of this doctrine in the field of conflict of laws is more limited, and the courts are slower to

45. 2006 (2) Arb LR 547 (SC): (2006) 11 SCC 245.
46. Queen Mary, University of London, 2008 Survey "International Arbitration: Corporate ttitudes and practices", School of International Arbitration, PricewaterhouseCoopers, available at *https://www.pwc.co.uk/assets/pdf/pwc-international-arbitration-2008.pdf.* Last accessed on 1 March 2017.
47. 1994 AIR SC 860 at para 51: 1994 SCC Supl (1) 644.

involve public policy in the cases involving a foreign element, than when a purely municipal legal issue is involved."

In *Oil and Natural Gas Ltd v Saw Pipes Ltd*[48] the Supreme Court further solidified the distinction between the ambit of domestic and international arbitrations for the purposes of public policy. While following the distinction created by *Renusagar*, much to the disappointment of the international community, the Court added another ground on which enforcement could be refused – the ground of patent illegality. Following this decision, courts could examine the merits of the dispute in review and refuse to enforce an award if it was in complete contradiction to the fundamental laws of India. This extension, however, applied only to domestic arbitrations.

Subsequently, in the case of *Bhatia International v Bulk Trading*,[49] the Court held that the remedies under Part I must be made available to international parties as well. This resulted in blatant abuse of public policy in the case of *Venture Global Engineering v Satyam Computer Services Pvt Ltd*[50]

In *Venture Global*, an award had been made in London and the governing law of the contract was the law of Michigan. Following *Saw Pipes*, the Court allowed an application under the wide Section 34 for an international commercial arbitration. In doing so, the Court set aside a foreign award on the basis of patent illegality, which was an aberration even for domestic arbitrations. Further, it was held that the application of Section 34 to a foreign award would not be inconsistent with Section 48 of the Act, in effect equating the previously distinguishable concepts of public policy for international and domestic arbitrations in India. Another impact of this ruling was that the parties to international commercial arbitrations were given an opportunity to reopen their cases on the basis of alleged contraventions of Indian law, thereby unreasonably extending the scope of judicial interference.

This position of the court drew heavy criticism, and was amended in *Bharat Aluminium Co v Kaiser Aluminium Technical Services Inc*[51]. Subsequently, in the Amendment Act, Section 34 was amended to be explicitly made inapplicable to international commercial arbitrations. Additionally, it has been clarified that in case of a Section 48 application, a court cannot delve into the merits of the case, excluding the application of the ground of patent illegality. In *Associate Builders v Delhi Development Authority*,[52] the Supreme Court limited the scope of public policy even for the purposes of domestic arbitrations and held that arbitral awards could be set aside only in very limited cases where the domestic award in question was either capricious, arbitrary or shocked the conscience of the court.

Therefore, as the law stands today, the scope of public policy for both domestic and foreign arbitrations has been narrowed down considerably, and brought in line with internationally accepted standards.

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48. AIR 2003 SC 2629: [2003] 3 SCR 691.
49. [2002] 4 SCC 105: [2002] 2 SCR 411.
50. *Venture Global Engineering v Satyam Computer Services Pvt Ltd* AIR 2010 SC 3371: 2010 (6) ALT 50.
51. Civ App 3678 of 2007.
52. (2014) 4 Arb LR 307 (SC): (2015) 3 SCC 49.

C. ARBITRABILITY

9.09 Doctrine of arbitrability. Arbitrability separates types of disputes that may be resolved by arbitration and the ones which belong exclusively to the domain of the courts.[53] It is concerned with the question of whether a dispute is capable of settlement by arbitration under the applicable law.[54] The necessary pre-requisite for determining non-arbitrability is therefore the existence of a rule that establishes the mandatory jurisdiction of a State court to the exclusion of arbitration.[55] It derives its roots from public policy issues[56] and constitutes grounds of fundamental importance to the institution of arbitration as a whole.[57]

The concepts of non-arbitrability, the validity of the arbitration clause, and the public policy exception are often inter-mingled, thereby causing confusion. Arbitrability is one of the issues where the contractual and jurisdictional nature of international commercial arbitration collide head on.[58] Non-arbitrability has been systematically treated as a problem of conflict of law rather than conflict of jurisdiction.[59]

The absence of this factor can render the entire arbitral proceedings meritless, as it forms grounds for setting aside or refusal to enforce arbitral award, despite the existence of an arbitration agreement. In other words, arbitrability is a condition of validity of the arbitration agreement and consequently of the arbitrator's jurisdiction.[60]

Further, the issue of arbitrability centers around the prioritisation of competing interests. "[T]he legislators and the courts in each country must balance the importance of reserving matters of public interest (such as human rights or criminal law) to the courts against the public interest in the encouragement of arbitration in commercial matters. The other side of the coin includes the need to reduce the burden on overloaded courts, promote the country as a venue for international arbitrations, promote international trade generally and maintain respect for international comity."[61]

9.10 Drafting history. Article 1 of the Geneva Convention provided for the recognition of international arbitration agreements where "the subject matter of the award is

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53. Loukas A Mistelis and Stavros L Brekoulakis, *Arbitrability: International and Comparative Perspectives*, Kluwer Law International, 2009.
54. **See** Alan, Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration,* 1991, Sweet & Maxwell.
55. Hanotiau, 'L'arbitrabiliteet la *favor arbitrandum:* un reexamen' (1994) *J D Int* 899 at pp 933 (no I 11) and 938.
56. Karl Heinz Bockstiegel, *Public Policy and Arbitrability,* ICCA Congress Series No 3 *(Deventer: Kluwer Law and Taxation, 1987).*
57. P Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions,* 2nd edn, Sweet & Maxwell, 2005, at p 274.
58. Loukas A Mistelis and Stavros L Brekoulakis, *Arbitrability: International and Comparative Perspectives*, Kluwer Law International, 2009.
59. Homayoon Arfazadeh, *Arbitrability under the New York Convention: The Lex Fori Revisited,* Arbitration International, 2001, Vol 17, No 1, LCIA.
60. Hanotiau and Van den Berg, *The Law Applicable to Arbitrability*, (2014) 26 SAcLJ.
61. **See** Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration,* 138 (1991), at 137.

capable of settlement by arbitration under the law of the country in which the *award is sought to be relied upon*" (**emphasis supplied**). Arbitrability was also a distinct ground in relation to recognition and enforcement of an award under Article IV(a) of the ICC Draft Convention of 1953 and Article IV(b) of the United Nations Economic and Social Council Draft Convention of 1955.[62] In the same vein, Article II(1) and Article V(2)(a) of the New York Convention provide that an international arbitration agreement and/or an award shall only be recognised if the subject matter is capable of settlement by arbitration.

The drafting history of Article V(2)(a) provides limited guidance in interpreting the provision of the New York Convention. It is not surprising that there is no agreement, either internationally or otherwise, about what arbitrability entails, or about what kinds of subject matter or disputes fall within the various understandings of the concept.[63] However, differing from the treatment of all commercial matters being arbitrable under the Geneva Convention, the New York Convention may categorise both commercial and other types of subject-matter as non-arbitrable, depending on national laws.[64]

Article V(2)(a) and (b) calls for two different types of scrutiny. The first pertains to the jurisdiction of a State authority, and constitutes an absolute procedural bar to the recognition of an arbitral award, irrespective of its findings. Article V(2)(a) of New York Convention permits the enforcing court to refuse to enforce an award on its own motion, if the subject matter of the difference is not capable of settlement by arbitration under its law, ie if the law governing the enforcing country does not allow arbitration as a way of dispute resolution. Non-arbitrable subject-matters vary from country to country. The second pertains to the merits, and sets standards to be respected by arbitrators and their awards.[65]

9.11 **Law governing arbitrability.** The determination of the law governing arbitrability is of considerable importance to determining the arbitrability of a dispute, as a subject matter may be arbitrable under the laws of one country, but not in another. The law governing arbitrability of a dispute depends on where and at what stage of proceedings the question arises. Tribunals may apply different criteria than courts in determining this law and the criteria applied by courts at the post-award stage may differ from those at the pre-award stage. While the law of the place of arbitration (the *lex loci arbitri*) is more often than not the law that determines the issue of arbitrability, certain national systems may allow the law governing the arbitration agreement to determine this issue.[66]

Article V(2)(a) of the New York Convention explicitly provides that enforcement of an award may be refused only if "the subject matter of the differences is not

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62. Poudret and Besson, *Comparative Law of International Arbitration*, 2nd edn, Sweet & Maxwell, 2007, p 284.

63. Mustil and Boyd, 2001, 71.

64. Chapter 6: "Nonarbitrability and International Arbitration Agreements" in Gary B Born, *International Commercial Arbitration*, 2nd edn, 2014, at pp 943 – 1045.

65. Homayoon Arfazadeh, *Arbitrability under the New York Convention: The Lex Fori Revisited*, Arbitration International, 2001, Vol 17, No 1, LCIA.

66. *Ibid*, at 146.

capable of settlement by arbitration under the law of that country" ie the *lex fori* of the enforcement court.[67] An award is non-enforceable if the *lex fori* gives a local court or recognises a foreign authority's sole jurisdiction over the subject-matter to the exclusion of arbitration.[68]

Non-arbitrability is recognised as a ground for state courts to refuse recognition or enforcement under Article 36 (1)(b)(i) of Model Law though no consensus was reached on the definition of the term.[69]

9.12 **Civil and common law divide.** There has been significant development in the interpretation of arbitrability, with both civil and common law countries broadly converging on the concept, although there still remain some differences. There has never been a general theory for distinguishing disputes that may be settled by arbitration from those which may not,[70] and must be determined on a case-by-case basis. The function of excluding matters of public policy from the ambit of arbitration was fulfilled to a large extent by the idea that an arbitration clause in contract that violated public policy was void.[71]

In civil law countries, specifically carve outs were made like Article 2060 of the French Civil Code which provides that disputes involving public entities may not be subject to arbitration.[72] Similarly, Article 139 of the Iranian Constitution authorizes public entities to enter into arbitration agreements which are valid only on the condition that it is allowed by the Cabinet of Ministers.[73] German law initially held that every claim is arbitrable which is capable of settlement by parties, however with time, both German and Swiss laws have developed the law through judicial decisions. These have been interpreted liberally and now allow all claims that involve an "economic interest"can be adjudicated by arbitration.

Other national arbitration legislations have also extended the scope of arbitrable matters and treat non-arbitrability as a narrowly applied exception. In France, Switzerland, Germany and USA, a presumption of arbitrability test is applied and disputes involving public policies or mandatory laws are not excluded from arbitration. The English Arbitration Act 1996, is silent on the subject of arbitrability. The Supreme Court of Belgium has held that a State court may apply its own law

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67. Homayoon Arfazadeh, *Arbitrability Under the New York Convention: the Lex Fori Revisited*, Arbitration International, Vol 17, No 1, LCIA, 2001, *available at http://web.law.columbia.edu/sites/default/files/microsites/columbia-arbitration-day/files/04_2001_-_arfazadeh.pdf.* Last accessed on 1 March 2017.
68. *LIAMCO* Case (1981) 5 YB Comm Arb 248.
69. *Supra* at note 54.
70. Lord Michael J Mustill and Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England* 149,1989, 2nd edn.
71. Matthias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 2004, Columbia Journal of Transnational Law.
72. Code Civil of 1804 (20 February 2004), Article 2060: "On ne peutcompromettre (...) ousur les contestations intéressant les collectivitéspubliques et les établissements publics (...)", Available at *http://www.legifrance.gouv.fr/affichCode.do;jsessionid=1A406A060EAB87349C77BDBBD784F36B.tpdjo14v_1?cidTexte=LEGITEXT000006070721&dateTexte=20120531.* Last accessed on 1 March 2017.
73. J Seifi, *The New International Commercial Arbitration Law in Iran. Towards Harmony with UNCITRAL Model Law*, (1998) 15 Journal of International Arbitration 2, at p 12.

(*lex fori*) to decide, at the stage of a denial of jurisdiction, whether a dispute may be referred to arbitrators.[74]

9.13 Subjective and objective arbitrability. Subjective arbitrability or *ratione personae* pertains to the contractual capacity of an individual or a State entity to enter into a valid arbitration agreement. This is applicable on the basis of national laws especially in case of persons needing protection such as minors or certain State institutions. There is no specific provision in the New York Convention dealing with subjective arbitrability. However, Article V(1)(a) is relevant since it provides that recognition and enforcement may be refused if the parties to the agreement were under some incapacity or if the said agreement is not valid.[75]

Objective arbitrability refers to whether specific classes of disputes are not allowed to be solved by arbitration. The objective arbitrability, which determines the range of arbitrable disputes, is set up by mandatory substantive, material rules of private international law.[76] The restrictions based on the subject matter in issue determine the issue of objective arbitrability. Certain disputes may involve such sensitive public policy or national interest issues that they may be dealt only by national courts. Non-arbitrable matters have included disputes concerning competition law, intellectual property, securities regulations, etc. When a non-arbitrable issue is raised, judicial intervention may be involved. This is recognised under the New York Convention. Article II of the Convention provides that,

> "*Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.*"

Article 2060 of the French Civil Code provides that parties may not agree to arbitrate disputes in a series of particular fields (eg family law), and "more generally in all matters that have a public interest."[77] As per Belgian law, the arbitrability of a dispute must be assessed by courts under the *lex fori* at the stage of the recognition of the arbitration clause and/or the stages of recognition and enforcement of the award. Certain Arab countries accord special protection to contracts between a foreign corporation and its local agent by law and, to reinforce this protection, any disputes arising out of such contracts may only be resolved by the local courts.[78]

Both with regard to objective and to subjective arbitrability, the exclusion of arbitration as a means for settling disputes may be considered of such fundamental importance that it becomes part of public policy of the applicable law.

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74. *Supra* at note 60.
75. Bernard Hanotiau, Olivier Caprasse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention*, Available at *http://www.kluwerarbitration.com.ezproxy.library.qmul.ac.uk/CommonUI/print.aspx?ids=ipn30692*. Last accessed on 1 March 2017.
76. Professor Sajko, *On Arbitrability in Comparative Arbitration- An Outline*, available at *hrcak.srce.hr/file/90244*. Last accessed on 1 March 2017.
77. *Supra* note 76.
78. Cass B, 16 November 2006, RDJP 13 (2007); RDC 889 (2007) and note by L Mertens.

9.14 **The tests and parameters of arbitrability are different across jurisdictions.** The law and jurisprudence surrounding arbitrability is constantly evolving and reflects a degree of variance, both across countries as well as within jurisdictions. Failure of the dispute being arbitrable may lead to the award being rendered unenforceable on grounds of contravention of public policy.

The traditional justification for the non-arbitrability of certain disputes has been that only a court could correctly interpret public law, particularly a statute, and give effect to it according to the wishes of the national parliament.[79] Based on this, only matters that fell within the private domain could be arbitrated.

(i) **Australia**. Non-arbitrable issues are not specifically identified in Australia's arbitration legislation, and specific legislations have been referred to determine the matters that are "capable of settlement by arbitration" as well as depending on the relief sought.[80] Parties may refer claims under Australian statutes, including in relation to the Competition and Consumer Act 2010 (Cth), to arbitration.[81] Winding-up[82] and insolvency issues have been considered to lie in the exclusive jurisdiction of the relevant court as it involves issues of public interest and requires court involvement. The arbitrable scope of domestic employment disputes has not specifically been excluded in statute, nor rejected by the courts. They are arbitrable only before the Industrial Relations Commission, depriving the parties, therefore, from the choice of other arbitrators or arbitral fora.[83]

(ii) **England.** The English Arbitration Act conspicuously omits any treatment of the subject[84] and preserves the common law position in respect of arbitrability.[85] The arbitrability of competition law claims has been affirmed in *ET Plus SA v Jean-Paul Welter*[86]. Additionally, shareholder disputes have been considered arbitrable.[87] However, an arbitral tribunal is unable to wind up a company or make orders affecting third parties.[88] Therefore, insolvency procedures are non-arbitrable. Matters involving payment of monies towards bribe are also non-arbitrable in England.[89]

(iii) **United States.** The Federal Arbitration Act does not address the issue of arbitrability[90] and it has generally been left to judicial decisions and provisions in other legislations to define the limits of arbitrability under United States law. Recently, the arbitral tribunal was vested with the power of deciding on this

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79. **See** Justice Andrew Rogers, *Arbitrability*, 1992, 1 Asian Pac L Rev 1.
80. Hilary Birks, *Comparative Study of 'Arbitrability' under the New York Convention, Research Project, 2016*, available at *www.ibanet.org/Document/Default.aspx?DocumentUid=7247CB41-3498-4601*. Last accessed on 1 March 2017.
81. *Francis Travel Marketing Pvt Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160, 166-167.
82. *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170.
83. *Metrocall Inc v Electronic Tracking Systems P/L* (2000) 52 NSWLR 1.
84. Mustill and Boyd, *Commercial Arbitration*, 2nd edn, 2001 p 70.
85. English Arbitration Act 1996 (UK) Section 81(1)(a).
86. [2005] EWHC 2115 (Comm) (QB).
87. *Fulham Football Club (1987) Ltd v Richards* [2011] EWCA Civ 855.
88. *Ibid.*
89. Mustill and Boyd, 1989, p 149.
90. *Zimmermann v Continental Airlines Inc* 712 F 2d 55 (3d Cir 1983).

issue though the parties can call upon a court to decide whether a particular matter can be submitted to arbitration at any stage of the arbitral process.

The American courts have taken differing views on the arbitrability of claims under the US securities law. While the US Supreme Court set out in *Wiko v Swan*,[1] that such claims were non-arbitrable as the strength of securities law protection would be reduced, if such matters could be referred to arbitration. However, the US Court began to develop a more favourable view of arbitration and arbitrability in *Prima Paint Corp v Flood & Conklin Manufacturing Co*[2] by emphasising that the arbitration agreement was irrevocable and enforceable under the Federal Arbitration Act. Thereafter, in *Scherk v Alberto-Culver Co*[3] the Supreme Court confirmed that securities disputes were arbitrable post accession to the New York Convention. The Supreme Court in *Scherk*, found the *Wilko* precedent factually inapplicable and upheld the arbitration provisions.

In *American Safety Equipment Corp v JP Mcguire & Co*[4] the Court held that "the public interest in enforcement of the anti-trust laws and the nature of the claims that arise in such cases...make anti-trust claims...inappropriate for arbitration."[5] This led to the doctrine that federal anti-trust claims are not arbitrable.[6] The US Supreme Court in *Mitsubishi*[7], rejecting the prevailing consideration that arbitration was not suited to resolve anti-trust issues being confidential and private in nature, concluded that "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context." The above cases reflected a growing trend towards expanding the scope of arbitrability.

Most employment disputes were rendered arbitrable by the Supreme Court's decision in *Gilmer v Interstate/Johnson Lane Corp*[8] Other disputes considered arbitrable include certain criminal and fraud claims,[9] intellectual property disputes as well as patents.[10] The pro-enforcement policy of US courts is consistently applied notwithstanding the variety of legal

1. *Wiko v Swan* 346 US 427 (1953).
2. 388 US 395 (1967).
3. 417 US 506 (1974).
4. 391 F 2d 821 (2d Cir 1968).
5. The New York Court of Appeals in In re *Aimecee*, 21 NY 2d 621, 630 (1968), held essentially the same as *American Safety.*
6. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense,* 1981, 2 CARDOZO L REV 481.
7. *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* US Supreme Court, 2 July 1985, 105 SCR (1985), Yearbook Commercial Arbitration, XI, 555 *et seq* (1986).
8. 500 US 20 (1991).
9. *Shearson/American Express Inc v Mcmahon* 482 US 220 (1987) (finding RICO claims arbitrable); *Meadows Indemniry Co v Baccala & Shop Ins Services*, 760 F Supp 1036 (EDNY 1991) (finding fraud claims arbitrable).
10. William Grantham, *The Arbitrability of International Intellectual Property Disputes*, 1996, Berkeley Journal of International Law, Vol 14, Issue 1.

enforcement mechanisms. US courts continue to construe the terms of the New York Convention so as to achieve a uniformity and direction indicative of the precedent set by *Scherk* and confirmed by *Mitsubishi*.[11]

In the *LIAMCO* case[12], Libya had opposed enforcement of an arbitral award on the ground of nationalization not being subject to arbitration. The Court refused to enforce the award as it would involve reviewing the validity of nationalisation and the act of state doctrine. However, in *Parsons & Whittemore*[13] this argument was rejected. The Court held that the "mere fact that an issue of national interest may incidentally figure into the resolution of a breach of contract claim does not render the dispute non-arbitrable." The defense of non-arbitrability of the subject-matter is unique and restricted to few areas such as nationalisation decrees, and thus cannot demonstrate a general policy on the part of US courts against enforcement of arbitral awards.

(iv) Belgium. The Belgian courts refused enforcement of an award made in Switzerland as Belgian law precluded an agreement for the submission of a dispute to arbitration before the end of the contract from which it arose, with the result that the dispute was not arbitrable.[14] Despite the parties having agreed that any arbitration was to be conducted in Switzerland pursuant to Swiss law, since the underlying contract was one for granting of a motor vehicle sales franchise, wholly or partially within Belgian territory, it was closely regulated by Belgian law.

The attitude towards non-arbitrability has changed over the years from being fairly restrictive to being more arbitration friendly. Civil law countries such as France, Italy, Jordan and Egypt consider a matter arbitrable if the parties have the power to dispose of their rights or to reach a compromise.[15]

(v) India. The essential criterion to decide non-arbitrability is the subject-matter of the dispute. This has been dealt with in detail in Chapter 5. The determining factor is whether resolution of the dispute by way of arbitration would be contrary to law and public policy. In short, the Supreme Court of India has held that rights *in personam*, ie a right enforceable against a specific person or persons, are arbitrable.[16]

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11. Joseph McLaughlin, Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention - Practice in US Courts*, Berkeley Journal of International Law, 1986, Vol 3, Issue 2.
12. *Libyan American Oil Co v Libya* 17 ILM 3 (1978), 4 YB COM ARB 177 (1979).
13. *Parsons & Whittemore Overseas Co v Societe Generale De L'industrie Du Papier (rakta) and Bank of America* 508 F 2d 969 (2d Cir 1974).
14. *Audi-NSU Auto Union AG (FR Germ) v SA Adelin Petit &Cie (Belgium)* 5 YB Com Arb 257.
15. Karl Heinz Bockstiegel, *Public Policy and Arbitrability*, ICCA Congress Series No 3, *Deventer: Kluwer Law and Taxation*, 1987.
16. *Booz Allen and Hamilton Inc v SBI Home Finance Ltd* (2011) 5 SCC 532 at para 23: AIR 2011 SC 2507.
    "(i) whether the disputes are capable of adjudication and settlement by arbitration? That is, whether the disputes, having regard to their nature, could be resolved by a private forum chosen by the parties (the arbitral tribunal) or whether they would exclusively fall within the domain of public fora (courts).
    (ii) Whether the disputes are covered by the arbitration agreement? That is, whether the disputes are enumerated or described in the arbitration agreement as matters to be decided by arbitration or whether the disputes fall under the 'excepted matters' excluded from the purview of the arbitration agreement.

Footnote 16 Contd. on next page

Specifically, non-arbitrable disputes include matters in relation to winding up of a company,[17] oppression and mismanagement,[18] and disputes arising between beneficiaries or trustees of a trust[19], where the statute comprehensively and adequately covers remedies available to get grievances settled. Dispute relating to specific performance of sale agreements are also arbitrable.[20]

The arbitrability of fraud and intellectual property rights have been a matter of debate. While the Bombay High Court had previously opined that copyright disputes pertained to rights *in personam* and hence were arbitrable,[21] a decision held that claims of infringement of copyright cannot be made the subject-matter of arbitration and set aside awards in relation to payment of royalty.[22]

With regard to fraud, the position is clear in case of foreign seated arbitrations and fraud remains arbitrable in proceedings under Part II of the 1996 Act.[23] In India seated arbitrations, allegations of fraud are now arbitrable, unless they are serious and complex in nature, as long as the allegations of fraud are not made against the arbitration agreement.[24] The Law Commission in its Report[25] recommended that issues of fraud be expressly made arbitrable and proposed amendments to Section 16 of the Act, which now form a part of the Amendment Act.

Footnote 16 Contd. from previous page

(iii) Whether the parties have referred the disputes to arbitration? That is, whether the disputes fall under the scope of the submission to the arbitral tribunal, or whether they do not arise out of the statement of claim and the counter claim filed before the arbitral tribunal. A dispute, even if it is capable of being decided by arbitration and falling within the scope of arbitration agreement, will not be 'arbitrable' if it is not enumerated in the joint list of disputes referred to arbitration, or in the absence of such joint list of disputes, does not form part of the disputes raised in the pleadings before the arbitral tribunal."

17. *Haryana Telecom Ltd v Sterlite Industires (India) Ltd* (1999) 5 SCC 688: AIR 1999 SC 2354.
18. *Rakesh Malhotra v Rajinder Kumar Malhotra* Company [2015] 192 Comp Cas 516 (Bom): Appeal (L) No 10 of 2013.
19. *Vimal Kishor Shah v Jayesh Dinesh Shah* AIR 2016 SC 3889: 2016 (5) ABR 737.
20. *Olympus Superstructures Pvt Ltd v Meena Vijay Khetan* 1999 5 SCC 651: AIR 1999 SC 2102.
21. *Eros International Media Ltd v Telemax Links India Pvt Ltd* 2016 SCC OnLine Bom 2179: 2016 (6) Arb LR 121 (Bom).
22. *Indian Performing Rights Limited v Entertainment Network (India) Limited* Arbitration Petition No 341 of 2012.
23. *World Sport Group (Mauritius) Ltd v MSM Satellite (Singapore)* AIR 2014 SC 968: [2014] 1 SCR 796.
24. The decision of the Supreme Court in *A Ayyasamy v A Paramasivam* AIR 2016 SC 4675: 2016 (5) Arb LR 326 (SC) has crystallised the position by **holding** that the decision in *Swiss Timing Limited v Organizing Committee, Commonwealth Games* 2014 (6) SCC 677: 2014 (7) SCALE 515 decided matters of *simpliciter* fraud and therefore **did not overrule** *N Radhakrishnan v Maestro Engineers* (2010) 1 SCC 72: 2009 (13) SCALE 403, which opined that serious fraud is best left to be determined by court.
25. Available at *http://lawcommissionofindia.nic.in/reports/Report246.pdf*. Last accessed on 1 March 2017.