

ENFORCEMENT OF ARBITRAL AWARDS AND PUBLIC POLICY:
SAME CONCEPT, DIFFERENT APPROACH?

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‘... one important loophole, which may long be troublesome.’¹

A. Introduction

Public policy is one of the most popular grounds commonly used by parties to international arbitration to resist enforcement of arbitral awards. Till today, it remains a highly debated, controversial and complex subject. This is because of the diverse approach taken by national courts in relation to the concept of public policy in international arbitration. Although over time, arbitration laws and practice have tried to align the concept of public policy so that parties may benefit from a universally accepted concept of public policy, the difference in attitude of national courts has made this task virtually impossible. In recent times, the difference in attitude has been most prominent in India, where a series of court decisions have hampered the development of an internationally accepted concept of public policy.

This article is divided into 5 sections, one of which is in turn divided into parts. Section B briefly explains the role of national courts in international arbitration at the enforcement stage. Section C considers the issue of public policy and its application by national courts from some of the leading arbitral jurisdictions such as the United States of America (the ‘US’) and France. It then analyses the parochial approach taken by the Indian courts on the same issue and highlight the problems that are faced by the international community as a result. Section D highlights the steps that have been or are being taken by India to rectify these problems in order to promote itself as an arbitration-friendly jurisdiction. Section E concludes the article by highlighting few recommendations as to how these problems may be addressed by the national courts.

B. The role of national courts

The prominent role of national courts in international arbitration has been recognised in almost every country, some more than the others. This is because arbitrations are regulated pursuant to national laws and, accordingly, have a close relationship with the national courts. As Dr. F A Mann suggested:

‘every arbitration is necessarily subject to the law of a given State. No private person has the right or power to act on any other level other than

¹ Straus referring to the public policy defence in Straus, ‘Arbitration of Disputes Between Multinational Corporations’, in *New Strategies for Peaceful Resolution of International Business Disputes*, American Arbitration Association (1971) 109 at 114.

that of a municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law.’²

It has been suggested that the role of the court is akin to that of an ‘*executive partner*’ to provide greater effectiveness to arbitral proceedings.³ Lord Mustill reiterated this point in *Coppée Levalin N.V. v Ken-Ren Fertilisers & Chemicals* when he said:

‘[T]here is the plain fact, palatable or not, that it is only a court possessing coercive powers which could rescue the arbitration if it is in the danger of foundering.’⁴

Although national courts play an important role at different phases of the arbitral process,⁵ their role is perhaps most prominent once the arbitral award has been rendered. This is particularly true at the enforcement stage where the arbitral award must survive certain statutory conditions for it to be successfully enforced. Once an arbitral award has been rendered, national courts may refuse to enforce it based on one of the grounds specified in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (popularly known as the ‘**New York Convention**’). These conditions have been incorporated in the national legislation of most countries signing the New York Convention and adopting the UNCITRAL Model Law. Since arbitration is a private process, the rationale behind these supervisory powers is to safeguard the basic elements of fairness and impartiality and has been described as a:

‘bulwark against corruption, arbitrariness, bias, improper conduct and—where necessary—sheer incompetence.’⁶

It has been argued by supporters of delocalised arbitrations that this review process acts as a further tier of review and is contrary to the parties’ intention when signing the arbitration agreement.⁷ However, there is little doubt that the court’s supervisory powers in this respect are necessary as it provides the arbitral process with a procedure of ‘*checks and balances*’⁸ to ensure a fair and impartial process.

Article V of the New York Convention safeguards the fundamental rights of the parties in international arbitration. It allows parties to challenge the enforcement of

² F.A. Mann, ‘Lex Facit Arbitrum’ in P. Sanders (ed.), *International Arbitration: Liber Amicorum for Martin Domke* (1967) 157 at 159.

³ M. Kerr, ‘Arbitration and the Courts: The UNCITRAL Model Law’, (1985) 34 *Int’l & Comp. L.Q.* 1 at 2.

⁴ [1994] 2 Lloyd’s Rep. 109, 116 (H.L.).

⁵ This article will only deal with the role of national courts in international arbitration from the enforcement perspective. For a thorough discussion on the role of national courts generally, see S Sattar, ‘National Courts and International Arbitration: A Double-Edged Sword?’, *Journal of International Arbitration*, (2010) Vol. 27(1) 51.

⁶ M. Kerr, note 4 above, at 15.

⁷ A. Tweeddale & K. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, (2005), at para. 7.59.

⁸ *Ibid*, at para. 7.84.

arbitral awards on various grounds. In relation to these grounds, Professor Berg in the most authoritative commentary on the New York Convention stated:

‘In fact, the grounds for refusal of enforcement are restricted to causes which may be considered as serious defects in the arbitration and award:

the invalidity of the arbitration agreement, the violation of due process, the award extra or ultra petita, the irregularity in the composition of the arbitral tribunal or the arbitral procedure, the non-binding force of the award, the setting aside of the award in the country of origin, and the violation of public policy.’⁹

As a result of the New York Convention, it is clear that parties are able to challenge the enforcement of arbitral awards relying on one of the specific grounds mentioned therein. One such ground relates to the country’s public policy, which forms the subject matter of this article and is considered in the next section.

C. Public policy and the approach of national courts

Public policy is one of the grounds mentioned in the New York Convention based on which a party can challenge the enforcement of a foreign arbitral award. The notorious nature of public policy is not an innovation of the modern age. From the beginning of the 21st Century, parties have been warned against relying on public policy:

‘public policy ... is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail.’¹⁰

Public policy is one of the most important weapons in the hands of the national court which allows it to refuse enforcement of an arbitral award which is otherwise valid. It is particularly notorious since this defence is incapable of being precisely determined and is entirely dependant upon the laws of individual states for its application. As a result, it varies from one state to another. Adding to this is the fact that the New York Convention does not provide any guidance for the national courts as to how the public policy defence should be interpreted.

As a result, national courts may interpret public policy entirely at their own discretion and much will depend on the attitude of the national court and the particular judge at the time. In order to deal with this problem, the International Law Association (ILA) tried to formulate a universally accepted concept of international

⁹ Van den Berg, *The New York Arbitration Convention of 1958* (1981) at 265.

¹⁰ *Richardson v Mellish* (1824) 2 Bingham 229 at 252.

public policy but failed to do so since it was unable to reach a consensus as to what should constitute international public policy.¹¹

Despite the pending uncertainty of this topic, it has been seen that, in most developed arbitral jurisdictions, public policy has been interpreted narrowly by the national courts. This is because the courts of developed jurisdictions generally bear a pro-enforcement attitude towards arbitral awards which they consider to be a stand-alone element of public policy itself. It has been explained as follows:

‘Interpretation and application of the public policy exception in most jurisdictions is usually on the side of enforcement. This is termed in international arbitration parlance as the pro-enforcement bias. *Pro-enforcement is itself a public policy.*’¹²

This pro-arbitration attitude of national courts is most apparent in the developed arbitral jurisdictions such as the US and France. They will be considered next.

1. The US approach

From a long time, the US courts have taken a conservative approach to interferences with international arbitration and the issue of public policy. The seminal case highlighting the American pro-arbitration public policy is the case of *Scherk v Alberto-Culver Co.*¹³ In enforcing the arbitration agreement, the Supreme Court held:

‘The invalidation of such an agreement in the case before us would reflect a parochial concept that all disputes must be resolved under our laws and in our courts. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.’

The case of *American Construction Machinery & Equipment Corporation Ltd. v Mechanised Construction of Pakistan Ltd.*¹⁴ is another example of the US courts’ pro-arbitration attitude. In that case, the Southern District of New York ignored the fact that a Pakistani Court had declared both the arbitration agreement and the ICC arbitral award invalid. Rather than setting aside the arbitral award, the Court stated that the American public policy would be violated if the arbitral award was not enforced. This case is particularly important as it highlights the US courts’ pro-arbitration attitude overriding considerations of comity.

In relation to public policy and the enforcement of arbitral awards, the Second Circuit decision in *Parsons & Whittemore Overseas Co., Inc. v. Société Générale de*

¹¹ O Ozumba, ‘Enforcement of Arbitral Awards: Does the Public Policy Exception Create Inconsistency?’, available at www.dundee.ac.uk.

¹² O Ozumba, note 12 above, at 9.

¹³ 417 US 506 (1974).

¹⁴ 659 F. Supp 426 (SDNY, 1987).

l'Industrie du papier (RAKTA),¹⁵ is seminal. In *Parsons & Whittemore*, the US based appellant (Parsons & Whittemore) was unsuccessful in restraining an Egyptian corporation (RAKTA) from enforcing an award arising out of an arbitration which had taken place under the ICC Rules. The matter eventually went to the Court of Appeals, Second Circuit where Smith J delivered the judgment of the Court. Smith J stressed on the general pro-enforcement bias present in the New York Convention and unequivocally held that a court may only refuse to enforce a foreign arbitral award under the public policy defence:

‘where enforcement would violate the forum state’s most basic notions of *morality and justice*.’

In particular, Smith J noted that an expansive construction would vitiate the New York Convention’s basic effort to remove obstacles to enforcement. Smith J said:

‘To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention’s utility.’

In *International Navigation Ltd. v Waterside Ocean Navigation Co Inc*,¹⁶ the Court of Appeals, Second Circuit, confirmed that the public policy defence must be interpreted in light of the overriding object of the New York Convention. The Court followed the *Scherk* case in holding that one of the main purposes of the New York Convention was to unify the standards by which foreign arbitral awards are to be enforced. The Court also applied the *Parsons & Whittemore* rationale and held that the public policy defence should apply only where enforcement of the award would violate the basic notions of morality and justice of the forum state.

These decisions of the US courts have all taken a restrictive approach in relation to the public policy defence. They have made it clear that any interference by the national court in international arbitration on this ground should be minimal and that the public policy defence under the New York Convention should be interpreted narrowly. The attitude and position of the US courts have not changed since the *Parsons & Whittemore* case as can be seen from the decision of the Southern District of New York in *Telenor Mobile Communications v Storm LLC*.¹⁷

In *Telenor Mobile Communications*, the Court rejected the argument that public policy required the court to decline to enforce a foreign arbitral award where the award had been overturned by a foreign court that colluded with one of the parties. In this connection, the Court noted that, to refuse enforcement, the decision would

¹⁵ 508 F.2d 969, 975 (2d Cir. 1974).

¹⁶ 737 F.2d 150 (Second Circuit, 1984); see also *Dandong Shuguang Axel Corporation Ltd. v Brilliance Machinery et al*, 2001 US Dist Lexis 7493 (ND California), where the court applied the *Parsons & Whittemore* approach and held that the defence should be applied narrowly since the American pro-arbitration public policy is strong.

¹⁷ 524 F. Supp. 2d 332 (SDNY 2007).

have to directly contradict the foreign law in such a way to make compliance with one a violation of the other. The Court placed great emphasis on the public policy argument in favour of encouraging arbitration and enforcing arbitration awards.

It is clear from the above that the American public policy is clear and unambiguous. In the US, the aim of promoting international arbitration and international business relations consistently outweigh public policy concerns in the enforcement of foreign arbitral awards.¹⁸ The position is similar in France where the courts have also maintained a conservative approach in refusing enforcement of arbitral awards on grounds of public policy. The French approach is considered next.

2. The French view

Before French case law is considered, it is important to note the landmark decision of the European Court of Justice ('ECJ') in *Eco Swiss China Time Ltd. v Benetton International N.V.*¹⁹ This is because the ECJ jurisprudence has an important effect on French case law in relation to public policy and the enforcement of arbitral awards.

In the *Eco Swiss* case, the European Court dealing with questions submitted to it by the Supreme Court of Holland in the context of an action to set aside an award held:

'it is in the interest of efficient arbitration proceedings that review of arbitration awards should be limited in scope and that annulment of or refusal to recognise an award should be possible *only in exceptional circumstances.*'

Moreover, in the European context, Professor Schlosser clearly said that:

'[T]he recourse to public policy is only justified where the non-conformity with *basic principles of morality and justice* ... is evident.'²⁰

This test, which is similar to the one applied in *Parsons & Whittemore*, has been consistently applied by national courts in Member States in relation to enforcement proceedings.²¹ In line with this approach, the French courts have generally maintained a very conservative approach in interpreting the public

¹⁸ L Reed and J Freda, 'Narrow Exceptions: A Review of Recent US Precedent Regarding the Due Process and Public Policy Defenses of the New York Convention', *Journal of International Arbitration*, (2008) Vol. 25(6) 649 at 656.

¹⁹ Case C-126/97, *Eco Swiss*, 1999 E.C.R. I-3055.

²⁰ Peter F. Schlosser, 'Arbitration and European Public Policy' in: *L'Arbitrage et le Droit Européen* (1997) 81 at 86.

²¹ Cour de Cassation 19.11.1991, *Société des Grands Moulins de Strasbourg c/ Société Compagnie Continentale France*, Rev. de l'Arb. 1992 76 at 77.

policy defence. In *Gallay v Fabricated Metals*,²² the Paris Court of Appeals refused to set aside an award based on a purported violation of European competition law. The Paris Court of Appeals stated that the arbitrators had addressed the issue and had decided that there was no violation.

In some cases, the French courts have drastically limited the very scope of public policy.²³ The decision of the Paris Court of Appeals in *Thalès v Euromissile*²⁴ is a good example of this. In that case, the award ordered Thalès to pay damages to Euromissile in a dispute concerning a licence agreement. None of the parties had argued that the agreement was incompatible with European competition law before the arbitral tribunal. Later, Thalès applied to have the award set aside on the ground that, *inter alia*, the agreement breached European competition law. As a result, the award which gave effect to the contract violated public policy. The French court, referring to the *Eco Swiss* case, took a narrow approach on the public policy issue and refused to grant the request. According to the court, the public policy exception could only be invoked in circumstances where the enforcement of the award would be contrary to the French legal order or would entail the violation of a fundamental rule of law.

Moreover, in relation to the review of the arbitrator's decision, the French court in the *Thalès* case made it clear that it cannot, in the absence of fraud, carry out an examination of the merits as it would interfere with the finality of the arbitrator's decision. This position was confirmed recently by the Paris Court of Appeals in the *SNF/CYTEC* case, where the court held that at the enforcement stage, the national courts should only exercise an extrinsic review of the award.²⁵ The court made it clear that, in the absence of a flagrant breach of public policy, there was no reason to substitute the court's view in place of the arbitrators.

The US and the French decisions paint a pleasant picture where interferences by national courts with arbitral awards under the guise of public policy are considered to be a form of taboo and, unless strictly necessary, national courts are reluctant to interfere with a valid arbitral award on grounds of public policy. Unfortunately, the situation is not the same in India and some recent decisions of the Indian Supreme Court paint a completely different picture.

This is particularly important for the international community and arbitration users given India's economic rise in the global markets and frequent involvement of Indian parties in cross-border transactions. In recent times, India is considered to be the 4th largest economy with regard to GDP at PPP, and 12th largest economy in terms of nominal

²² CA Paris, April 16, 1996, *Gallay v Fabricated Metals*, Cass. Fr., January 5, 1999, Rev. Arb. 805 (2001).

²³ B Hanotiau and O Caprasse, 'Arbitrability, Due Process and Public Policy Under Article V of the New York Convention', *Journal of International Arbitration*, (2008) Vol. 25(6) 712 at 735.

²⁴ CA Paris, November 18, 2004, *Thalès v Euromissile*, J.D.I. 357 (2005).

²⁵ For an analysis of the decision and a full translation in English, see P. Heitzmann & J. Grierson, 'SNF v CYTEC Industrie: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Article 81 EC', 2 *Stockholm Int'l Arb. Rev.* 39 (2007).

GDP.²⁶ Economic reforms have made India into one of the fastest growing countries of the world in current times. In line with its economic liberalisation strategy in 1991, the Indian Arbitration and Conciliation Act 1996 (the ‘**Indian Arbitration Act**’) was introduced with a view to modernise Indian arbitration law and align it with international practice.

Although these initiatives were seen as a welcome change by the international business community, recent decisions by the Indian Supreme Court on the *misinterpretation* of the Indian Arbitration Act have raised serious doubts as to India’s progress in the field of international arbitration. This issue is particularly alarming in the public policy context and will be considered next.

3. *The Indian stance*

In relation to the position of arbitration in India before the Indian Arbitration Act was introduced, Professor Paulsson once said:

‘... the courts of India have revealed an alarming propensity to exercise authority in a manner contrary to the legitimate expectations of the international community’²⁷

In line with the ethos of the UNCITRAL Model Law, the Indian Arbitration Act was introduced with the hope that there will be minimal judicial intervention in the arbitral process. Despite this, the Indian courts have shown a great propensity towards interfering with international arbitration. In this connection, judicial intervention at the award enforcement stage on grounds of public policy is the most controversial.

There is little doubt that the Indian Supreme Court decision in *Renusagar v General Electric*²⁸ has always been the starting point whenever one considers the topic of Indian court intervention on grounds of public policy. In that case, the Supreme Court made it clear that:

‘Applying these criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) *fundamental policy of Indian law*; or (ii) *the interests of India*; or (iii) *justice or morality*.’

This decision was based on private international law and was in line with international practice commonly accepted in most developed arbitral jurisdictions such as the US and France, as discussed above. This decision confirmed the position that, only in exceptional circumstances, should the national courts interfere with arbitral awards on grounds of public policy. Also, the Supreme Court clearly held that

²⁶ M Kapur, ‘Judicial Interference and Arbitral Autonomy: An Overview of Indian Arbitration Law’, *Contemp. Asia Arb. J* (2009) Vol. 2(2) 325 at 327.

²⁷ J. Gaya, ‘Judicial ambush of arbitration in India’, (2004) *Law Quarterly Review* 571 at 571.

²⁸ (1994) AIR SC 860.

the courts should not use the public policy defence to review the merits of an arbitral award.

However, in contrast to its earlier decision in the *Renusagar* case and disregarding the commonly accepted principles of public policy, the Indian Supreme Court took a different approach in *Oil & Natural Gas Corp v Saw Pipes*²⁹ and misinterpreted the public policy defence. The case of *Saw Pipes* arose out of a domestic dispute concerning the payment of liquidated damages under a supply contract. The matter was referred to arbitration and an award was rendered by the tribunal which held that ONGC was not entitled to any liquidated damages since it had failed to establish any loss as a result of the late supply by Saw Pipes. ONGC applied to set aside the arbitral award before the Indian court on grounds of public policy.

In that case, the Indian Supreme Court held that the ground of public policy was required to be given a wider meaning than in the *Renusagar* case because the concept of public policy connoted matters which concerned public good and public interest. The Supreme Court noted that, as a matter of law, ONGC was not required to prove its loss and, therefore, was entitled to the liquidated damages. As a result, the Supreme Court set aside the award on grounds of public policy on the basis that the arbitral tribunal had erred when it concluded that ONGC had to prove its loss in order to seek liquidated damages. The Supreme Court felt that an award which violated the law could not be said to be in the public interest, because it was likely to adversely affect the administration of justice. The Indian Supreme Court held that, in addition to the three heads set forth in the *Renusagar* case, an arbitral award may be set aside on grounds of public policy if it is patently illegal. It held that an award was patently illegal if the award was contrary to the substantive law, the Indian Arbitration Act and/or the terms of the contract. The effect of this was that these included any error of law committed by the arbitrators.

The case of *Saw Pipes* has been criticised by many distinguished commentators.³⁰ It has been widely condemned for its wide interpretation of the public policy defence. The Indian Arbitration Act does not include error of law as a ground for setting aside arbitral awards and it has been widely accepted in India that an arbitrator's decision cannot be reviewed on such grounds.³¹ By clearly stating that the public policy ground includes errors of law by the arbitral tribunal, the *Saw Pipes* case went beyond the scope of the Indian Arbitration Act and created a new ground for setting aside arbitral awards. By bringing errors of law within the ambit of public policy, the Indian courts have created a backdoor to review the merits of an

²⁹ (2003) 5 SCC 705.

³⁰ S. Kachwaha, 'Enforcement of Arbitration Awards in India', (2008) 4 *Asian International Arbitration Journal* 65; N. Dewan, 'Arbitration in India: An Unenjoyable Litigating Jamboree!', (2007) 3(1) *Asian International Arbitration Journal* 99.

³¹ *Lakshmi Mathur v Chief General Manager, MTNL* (2000) Arb. L.R (Bom) 684.

arbitrator's decision, which is in clear contravention of arbitration law and practice.³² Also, as a result of the *Saw Pipes* case, more parties will now be able to challenge arbitral awards on grounds of public policy before the Indian courts. In effect, this will flood the Indian courts with claims by the losing party unhappy with the arbitral tribunal's decision.

The case of *Saw Pipes* is particularly worrying for the international community since the Indian Supreme Court did not expressly exclude foreign awards from its reasoning. Moreover, in *Bhatia International v Bulk Trading*,³³ the Supreme Court held that provisions of Part 1 of the Indian Arbitration Act (which applies to domestic arbitrations only) would also apply to foreign awards under Part 2 of the Indian Arbitration Act, unless specifically excluded by the parties. The case of *Bhatia* generated much debate since it reversed the accepted position that Part 1 of the Indian Arbitration Act would not apply to international arbitration.³⁴ This meant that parties, relying on *Bhatia*, could use the 'patently illegal' ground of public policy added by *Saw Pipes* to resist enforcement of foreign arbitral awards.

In 2008, the Indian Supreme Court, extending its earlier decision in the *Bhatia* case, held that a foreign arbitral award could be set aside on grounds of public policy as formulated in the *Saw Pipes* case.³⁵ The *Satyam* case has severely hampered India's progress towards establishing itself as an arbitration friendly jurisdiction. The case of *Satyam* concerned a joint venture dispute which ended up in an international arbitration seated in London. An arbitral award was rendered in favour of Satyam which Satyam sought to enforce in the US. In the meantime, Venture Global filed an application to set aside the foreign award before the Indian courts on grounds of public policy. The matter went all the way before the Indian Supreme Court which held that even though there were no provisions in Part 2 of the Indian Arbitration Act providing for challenge to a foreign arbitral award, a petition to set aside the same could lie under Part 1 of the Indian Arbitration Act. The Indian Supreme Court held that the losing party could bring an independent action in India to set aside a foreign arbitral award on the expanded grounds of public policy as set out in the case of *Saw Pipes*. The *Satyam* case has been described by Nariman, one of India's most renowned arbitrators, as simply '*inexplicable*' and one which '*cannot be defended*'.³⁶

Cases like *Saw Pipes* and *Satyam* demonstrate the Indian court's approach on the issue of public policy and arbitral awards. It seems that the Indian courts have consistently *misinterpreted* the provisions of the Indian Arbitration Act in a manner contrary to the spirit of the New York Convention. These decisions have caused a great deal of anxiety for the international community involved in business with an

³² For example, in the *Mitsubishi* case (473 US at 638), the US Supreme Court made it clear that '*the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal.*'

³³ (2002) AIR SC 1432.

³⁴ R. Sharma, 'Bhatia International v Bulk Trading S.A.: Ambushing International Commercial Arbitration Outside India?', (2009) 26(3) *Journal of International Arbitration* 357.

³⁵ *Venture Global Engineering v Satyam Computer Services* (2008) S.C.A.L.E. 214.

³⁶ F Nariman, 'India and International Arbitration', (2010) 41 *The Geo. Wash. Int'l L. Rev.* 367 at 376.

Indian connection, who generally prefer the quick disposal of their disputes through arbitration rather than engaging in lengthy litigation before the Indian courts.

More recently in 2010, the Bombay High Court in *Western Maharashtra Development Corporation Ltd. v Bajaj Auto Ltd.*,³⁷ relying on the *ONGC* case, set aside an arbitral award on the ground that it was contrary to the substantive provisions of law and, as a result, patently illegal. In deciding whether the court should interfere with the award, the Bombay High Court analysed the Supreme Court decision in the *Saw Pipes* case and held that the award could be set aside on grounds of public policy. The Bombay High Court felt that, *inter alia*, the arbitrator did not apply the provisions of the Indian company law correctly and, as a result, the award contradicted the substantive provisions of law and was patently illegal. This decision highlighted yet another example of undue court intervention under the guise of public policy. Although rendered in the domestic context, so long as cases like *Bhatia* remain in place, the approach taken by the Indian court in *Western Maharashtra Development Corporation Ltd.* pose a serious threat to international arbitration with an Indian connection.

These decisions have sparked a considerable amount of controversy and anxiety both onshore and offshore with legal practitioners worldwide noting that such decisions, if left unaddressed, would heavily tarnish India's image internationally. These decisions, in effect, took India back to England's pre-1979 period when the English courts could review the merits of the arbitrator's decision through the case-stated procedure thereby posing a serious barrier to the use and growth of international arbitration.

These concerns were quickly identified by the Government of India which realised that its dispute resolution system needed to keep pace with its rapidly growing economy. Recently, the Government of India decided to take certain initiatives to bring about legislative changes in order to address the problems created by these decisions. These are discussed next.

D. The beginning of a new dawn

Recently, the Government of India launched a 2010 consultation paper recommending changes to the Indian Arbitration Act in order to deal with, *inter alia*, the issues posed by excessive judicial intervention.³⁸ The paper clearly acknowledges that the Indian courts have *misinterpreted* the provisions of the Indian Arbitration Act in such a way so as to defeat its object and purpose.³⁹ The consultation paper proposes to rectify the problems posed by decisions such as *Saw Pipes*, *Bhatia* and *Satyam*. Two

³⁷ [2010] 154 ComCas 593 (Bom).

³⁸ For a thorough discussion of the changes contemplated by the consultation paper, please see P Nair, 'India at a gateway?', *GAR Vol. 6(1)* available at <http://www.globalarbitrationreview.com/journal/article/28916/india-gateway/>. The author's discussion of the consultation paper is based on Nair's article in the *GAR*.

³⁹ P Gandhi and A Kashyap, 'India: Round up 2010/2011', *Practical Law Company* available at <http://arbitration.practicallaw.com/9-504-6908?q=&qp=&qo=&qe=>.

changes proposed in the consultation paper are particularly noteworthy for the purpose of this article.

The first important change proposed by the consultation paper is to annul the effects of the *Bhatia* case. In order to achieve this, the paper proposes to introduce clear language in the Indian Arbitration Act to the effect that Part I of the Indian Arbitration Act would apply 'only' to arbitrations seated in India. This would apply strictly apart from two provisions which have been specifically excluded in order to aid the arbitral process. The two provisions are sections 9 and 27 of the Indian Arbitration Act, which deal with the Indian courts' powers to grant interim measures in support of arbitrations.

The second change relates to negating the effect of the *Saw Pipes* case by limiting the scope of public policy as a ground for setting aside arbitral awards. According to the proposal, the position should be brought back in line with the *Renusagar* case, which reflects the common understanding of public policy in modern developed arbitral jurisdictions. According to the consultation paper, an award would be contrary to public policy only if it violates the fundamental policy of India, the interests of India or justice and morality. The amendment would not allow Indian courts to find a breach of public policy on the *Saw Pipes* ground of 'patent illegality' going forward.⁴⁰

These proposals by the Government of India point towards a new beginning for India and a welcome change from the recent past. The Indian Government has recently stated that it wants to bring about the proposed changes to make India a hub for international arbitration and to overcome hurdles created by the Indian court decisions. It has been observed that the Bill is expected to be tabled in 2011 and there is a good possibility that the Bill will be enacted later in 2011.⁴¹ However, as Nair points out:

'For India to establish itself as an attractive arbitration jurisdiction, the development of a professional "culture of arbitration" is crucial. A robust statutory framework alone will not achieve the aim.'⁴²

However, it seems that, with the beginning of this new dawn, the Indian courts have started showing due deference to arbitral awards. The most recent case on this issue signals a welcome change in the attitude of the Indian courts dealing with public policy and enforcement of arbitral awards.

In *Penn Racquet Sports v Mayor International Ltd.*,⁴³ the Delhi High Court rejected a challenge to the enforcement of an ICC award, holding that the award was not contrary to the public policy of India. In reaching its decision, the Indian court held that the ground of public policy for the purposes of enforcement of foreign

⁴⁰ The proposal excludes the ground of 'patent illegality' from the ambit of public policy, but retains it only for challenges to domestic arbitral awards in a more restrictive manner.

⁴¹ P Gandhi and A Kashyap, note 40 above.

⁴² P Nair, note 39 above.

⁴³ 2011 (122) DRJ 117.

awards should be interpreted narrowly. The Delhi High Court held that to successfully invoke this ground, the applicant must show some cause which is more than a mere violation of Indian law. The arbitral award must violate the fundamental policy of Indian law or be contrary to the interests of India, justice or morality.

In relation to public policy, this decision is considered to the most recent contribution by the Indian courts to help India regain the confidence of the international arbitration community. This decision along with the Government of India's recent initiatives highlight the willingness of the Indian courts to tackle the problems of the past and bring the Indian arbitration law back in line with the approach taken in the *Renusagar* case, which is similar to the prevailing view in the most developed arbitral jurisdictions such as the US and France.

E. Conclusion

Even today, public policy remains an important weapon in the hands of a national court wishing to interfere with the arbitral process. The reason being that public policy differs from one state to another and, so far, there is no universal agreement as to what its contents should entail. Whilst it is true that public policy is an unruly horse which can lead you astray, it is not impossible to tame this unruly horse.

This can be done in a number of ways. First, more international initiatives like that of the ILA should be initiated so that more countries can come together to reach an agreement as to the parameters of the public policy defence. Loose-ended guidelines will never be sufficient to achieve the certainty that this ambiguous area of law demands. Second, proper education and training should be made available to judges dealing with arbitration cases. Only through proper training will one become aware of this concept, its contents and the circumstances in which this discretion should be exercised. Judges should be made aware that the law of arbitration is self-contained and that the reason why arbitrations exist is because they are recognised by law and is essential for the quick resolution of disputes. Last, but not least, judges should be made aware of the adverse consequences that undue interferences in international arbitration have on the country's economy and overall growth.

With the right approach, India, like the US and France, will soon become one of the leading arbitral jurisdictions of South-East Asia. This is evident from the sincere efforts taken by the Government of India and the change in approach of the national courts dealing with arbitration matters. The new era for international arbitration in India is already in sight.