ENFORCEMENT OF ARBITRAL AWARDS RENDERED IN INTERNATIONAL COMMERCIAL ARBITRATIONS IN INDIA: A COMPARATIVE ANALYSIS OF THE 'PUBLIC POLICY' HURDLE

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INTRODUCTION

The consequences of globalization in India have seen endorsement of the internationalisation of legal proceedings. The growth in transnational business has seen an increase in both financial co-dependence, as well as corporate and financial disputes among transnational entities. The overburdening of Courts has, however, been prevented, to a great extent, by private recourses to the process of arbitration for dispute resolution[1]. The cost-efficient and time-saving benefits of the process, as well as its assurance of avoidance of rigidity of the courts' processes and frivolous applications by parties to delay proceedings[2], have contributed to the desirability for arbitration.

In India, the realm of enforcement of foreign arbitral awards has been widely affected by parties pleading the public policy defence to set awards aside. This is specially so in view of the lex loci, vide which contracts which courts regard as opposed to public policy are unenforceable and void[3]. The list of what forms a part and parcel of public policy is not a closed one, but historically[4], the Courts in India have been advisedly slow in adding more heads to the list. As such, jurisprudence regarding the applicability of the 'public policy defence' to set arbitral awards aside has gradually developed over the years. Consequently, there is an open-ended scope for this sword to be wielded by award-debtors, even as precedents have continued to indicate what may be considered 'public policy'[5].

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[1] P. Ghosal, *The Butterfly Effect - Expanding Domain of Public Policy Crippling Arbitration in India*, AS. DIS. REV. 104, 104 (Issue 4, 2008)

[2] F. Adekoya, *The Public Policy Defence to Enforcement of Arbitral Awards: Rising Star or Setting Sun?*, 2 BCDR INTL. ARB. REV. 203, 203 (Issue 2, 2015)

[3] S. 23, Indian Contract Act, 1872

[4] *Gherulal Parakh v. Mahadeodas*, AIR 1959 SC 781. Subbarao. J. delivering the judgment of the Court said:

> "Though the heads (of public policy) are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days."

[5] F.S. Nariman, *Problems of Public Policy - The Indian Perspective*, in COMPARATIVE ARBITRATION PRACTICE AND PUBLIC POLICY IN ARBITRATION, 3 ICCA

HISTORY OF THE PUBLIC POLICY DEFENCE

It was as early as 1746, when the juxtaposition of arbitration agreements and public policy had become apparent in England. The King's Bench, in *Kill v. Hollister*[6], had allowed an action on an insurance policy to proceed, in spite of an arbitration agreement, on the ground that an agreement between two parties could not oust the power of the Court. This decision became doctrinal in the following centuries, as it appeared to raise a broad public policy objection to arbitration and forum selection agreements. It also proved to be of significant support for both English and U.S. proponents of judicial hostility towards arbitration[7].

In the 19th century, commercial arbitration had gained prevalence as a means of dispute resolution throughout England and America. However, certain 19th century American courts had developed a puritanical understanding of English Common Law hostility towards agreements for arbitrating future disputes. Consequently, for some decades, numerous U.S. courts would cite contradiction to public policy as the reasoning while holding that agreements to arbitrate future disputes were revocable at will[8]. Eminent American jurist, Joseph Story, also reflected this attitude of American Courts in the 19th century. Story had even seemingly declared that agreements to arbitrate future disputes would violate public policy, as such suggesting denial of even claims of damages for breach of arbitration agreements. He rejected the idea of specific performance of such agreements deeming such action against public policy vide exclusion from the appropriate judicial tribunals of the State persons who, in the ordinary course of things, would have had a right to sue there[9]. The 20th century saw the advent of some of the most important pieces of international legislations in the arena of international commercial arbitration. Two of these were the Geneva Convention for the Execution of Foreign Arbitral Awards of 1927 (*hereinafter* Geneva Convention) and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (*hereinafter* New York Convention). Under the Geneva Convention, the award-creditor is required to show that the award had become "final" in the place of arbitration and that it is not contrary to the public policy of

CONG. SER., at 337 (Pieter Sanders ed., 1987)

[6] *Kill v. Hollister*, [1746] 95 ER 532, 532

[7] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 36 (2nd ed., 2014)

[8] *Home Ins. Co. v. Morse*, 87 U.S. 445, 451 (U.S. S. Ct., 1874); *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2nd Cir., 1959) (discussing U.S. courts' hostility to arbitration); J. COHEN, COMMERCIAL ARBITRATION AND THE LAW, 226-52 (1918); Sayre, *Development of Commercial Arbitration Law*, 37 Yale L.J. 595, 595-97 (1927-1928); *supra* n.7, 44-45 (2nd ed., 2014)

[9] J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA, Vol.2, at 1457 (13th ed., 1886) (citing *Kill v. Hollister* and its English progeny); See also *The Hope*, 35 U.S. 138 (U.S. S. Ct., 1836); *Parsons v. Ambos*, 48 S.E. 696, 697 (Ga. 1904); *supra* n.7, 45-46 (2nd ed., 2014)

the recognizing state[10]. The New York Convention of 1958, which is generally regarded as one of the most effective pieces of legislation in private international law[11], has been adopted by 157 countries worldwide[12]. Under the New York Convention too, recognition and enforcement of an arbitral award may be refused if the competent authority in the recognizing/enforcing country finds that the recognition or enforcement of the award would be contrary to the public policy of that country[13]. With the introduction of these instruments into the international scenario, however, the public policy defence has been started to be perceived as a relatively less potent hindrance to enforcement of arbitral awards. This has happened with more problems relating to enforcement of awards out of forum selection clauses, compared to the public policy limitation on forum selection mechanism[14]. As such, major progress was achieved in the 20th century as far as the public policy defence to enforcement of arbitral awards is concerned. However, the contours of public policy still remained undefined and susceptible to rigorous judicial attempts around the world to synthesize and sustain the same.

Subsequently, on 21st June, 1985, the United Nations Commission on International Trade Law (hereinafter UNCITRAL) adopted the UNCITRAL Model Law on International Commercial Arbitration. Vide Article 34(2)(b)(ii), the Model Law included public policy as a ground for the setting aside of an award by the courts at the seat of the arbitration. It also recognized contradiction to public policy of an enforcing state as a valid ground for refusing recognition or enforcement of an arbitral award[15]. The Model Law was the blueprint based on which the Indian Arbitration and Conciliation Act, 1996 was drafted. Today, it constitutes the modern root of the debates and discussions regarding the use of the public policy defence in the country.

INTERNATIONAL PERSPECTIVE OF THE PUBLIC POLICY DEFENCE

States may desire to have the right to refuse recognition and enforcement of arbitration awards that offend their own notions of public policy. In certain jurisdictions, the enforcing court is required to inspect the possibility of violation of a public policy, ex-officio[16]. Yet,

[10] Art. 1(e), Geneva Convention

[11] W. Stone, *Public Policy in the Enforcement of New York Convention Awards: A Hong Kong Perspective*, AS. DIS. REV. 71, 71 (Issue 3, 2011)

[12] United Nations Treaties Collection, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *entered into force* June 7, 1959, 330 U.N.T.S [hereinafter New York Convention], available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en

[13] Art. V(2)(b), New York Convention

[14] *supra* n.7, 77-78 (2nd ed., 2014)

[15] Art. 36(1)(b)(ii), UNCITRAL Model Law on International Commercial Arbitration

[16] *Decision of the Geneva Cour de Justice*, (1998) XXIII YBCA 764 (Dec. 11, 1997); N. Blackaby, C. Partasides, J.M. Hunter, A. Redfern, *Recognition and Enforcement of Arbitral Awards*, in REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION, 641 (6th Ed., 2015)

even today, the observation in *Richardson v Mellish*[17], which was adjudicated almost two centuries ago, that the public policy defence is only argued where all other points fail[18] seems to be of relevance, in certain circumstances.

Domestic tribunals across the globe have rendered different, and sometimes conflicting, opinions vis-à-vis the applicable scope of public policy in their jurisdictions. However, there has been no indication of coordinated efforts to harmonize the ambits stipulated in different countries. As such, in 2000 and 2002, the International Law Association's (ILA) Committee on International Commercial Arbitration (CICA) published a report and a resolution discussing public policy as a bar to enforcement of foreign arbitral awards[19]. The report offered guidance for the classification of public policy grounds as either procedural or substantive. Therein, potential procedural public policy grounds were provided to include[20] fraud in the composition of tribunals, breach of natural justice principles, lack of impartiality on part of the tribunal, lack of reasoning underlying the award, manifest disregard of the law and/or facts and annulment at the place of arbitration, among other grounds. The report further listed[21], as substantive public policy grounds, mandatory rules/*lois de police*, fundamental principles of law, actions not in conformity with good morals, and national interests/foreign relations. Thus, the CICA had seemingly provided probable broad boundaries within which countries could confine their perspectives of public policy.

Although the above-mentioned classification had merit, there was an apprehension that it might not be universally accepted as it emerged primarily from case law in a limited number of countries[22]. As such, sensing that there may be a further need for harmonisation, the CICA provided definitions of the concepts of 'public policy', 'international public policy' and 'transnational public policy'. It also recommended that finality of awards rendered in international commercial arbitrations ought to be respected, save in the exceptional circumstances of violation of international public policy[23]. The Committee further defined 'international public policy' as that 'part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award'[24]. However, national Courts across the globe have not utilised the ambit of public policy as

[17] *Richardson v Mellish*, (1824) 2 Bing 229 ([1824–34] All ER 258); *id*, Blackaby, Partasides et al., 641

[18] *id*, *per* Burrough J, at 224

[19] ILA, *Public Policy as a Bar to the Enforcement of International Arbitral Awards*, London Conference Report (2000), available at: www.ila-hq.org; S.M. Kröll, J.D.M. Lew, L.A. Mistelis, *Recognition and Enforcement of Foreign Arbitral Awards*, in COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, 722 (2003)

[20] *id*, ILA Report, 24-30; *id*, Kröll et al.

[21] *id*, ILA Report, 17-24; *id*, Kröll et al.

[22] *id*, Kröll et al.

[23] ILA, *Final Report of the Committee on International Commercial Arbitration on Public Policy*, (2004) 1 TDM; *supra* n.16, Blackaby, Partasides et al., 645

[24] *id,* ILA Report; *SA Compagnie commercial André v SA Tradigrain France*, [2001] Rev Arb 773; *id*, Blackaby, Partasides et al.

defined by the ILA. Instead, they have continued with independent attempts to mould the scope of public policy in their respective jurisdictions[25].

INTERPRETATIONS OF PUBLIC POLICY BY FOREIGN COURTS

Diverse meanings or interpretations have been accorded to 'public policy' by different Courts and tribunals around the globe. A comparative analysis of such interpretations shows that there are distinct traits peculiar to interpretations in certain jurisdictions.

- **England**

In the later half of the 20th century, the national courts of England were reluctant to excuse an award from being enforced on the ground of public policy. However, the exception arose and was applied in the famous case of *Soleimany v Soleimany*[26]. Herein, the Court refused to enforce an award that gave effect to a contract between a father and son, involving the smuggling of carpets out of Iran, in contravention of Iranian revenue laws and export controls. There existed an agreement to submit any contractual dispute to arbitration by the Court of the Chief Rabbi in London, which applied Jewish law. As per the applicable Jewish law, since the illegal purpose of the contract had no effect on the rights of the parties, the forum proceeded to make an award to enforce the contract. While declining to enforce the award, however, the English Court held that the parties cannot override integrity of the Court's process and abuse it by private agreement. It also held that they cannot use arbitration to conceal that they seek to enforce an illegal contract, as it is not allowed by public policy. In cases like these[27], the English Courts have seemingly refused to overlook the dispensation of justice in trying to demonstrate the pro-enforcement spirit.

The existence of a pro-enforcement bias is, in itself, considered a matter of public policy, as the English courts confirmed in the matter of *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd*[28]. The enforcement of the award was challenged on the grounds of alleged corruption and lobbying. The English courts rejected the challenge to enforcement, both at first instance and in the Court of Appeal, because the arbitral tribunal had examined the allegations of bribery and found that they had not been substantiated. Moreover, lobbying was not an illegal activity under the governing law that had been chosen by the parties. As such, the Court was ultimately faced with international arbitration awards that had been upheld by the Swiss Federal Tribunal, and, therefore, had to juxtapose the public policy of discouraging international commercial corruption against

[25] IBA Subcommittee on Recognition and Enforcement of Arbitral Awards, *Report of the Public Policy Exception in the New York Convention* (Oct. 2015), available at: http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspz

[26] *Soleimany v Soleimany,* [1999] QB 785; *id*, Blackaby, Partasides et al., 641

[27] See also *David Taylor & Son Ltd. v. Barnett*, [1953] 1 Lloyd's Rep. 181; *supra* n.2, 209

[28] *Westacre Investments Inc. v Jugoimport-SPDR Holding Co. Ltd*, [1999] 2 Lloyd's Rep 65 (CA)

the public policy of enforcing international arbitration awards. Although this decision of the English Court of Appeal has received critical commentary[29], it serves as a popular instance that highlights the pro-enforcement attitude of English Courts.

- **France**

The French courts (including the French Cour de Cassation) seem to have taken a narrow approach to the impact of EU competition law on the scope of enforceability of awards. They have set aside awards rendered in relation to EU competition law only on the grounds of 'flagrant, specific and concrete breach' of French international public policy[30]. In certain other cases, French Courts have drastically constrained the very functional ambit of public policy. The decision of the Paris Court of Appeals in the matter of *Thalès v. Euromissile*[31] is an apt example. Herein, the Court had observed that the public policy exception could be invoked only in circumstances where the enforcement of the award would be deemed as contrary to the "French legal order" or would cause "violation of a fundamental rule of law." In the instant case, the Court had also made it clear that, in the absence of fraud, it could not examine the merits of the dispute as that would prejudice the finality of the arbitrator's decision. This position was subsequently confirmed by the Paris Court of Appeals in the *SNF SAS v. Cytec Industries*[32] case, where the court held that as far as violation of international public policy is concerned, only the recognition or the enforcement of an arbitral award needs to be examined by the judge, with respect to its compatibility with public policy, whereas control is limited to the flagrant, effective and concrete character of the alleged violation.

The decisions of French Courts are embodiments of a highly cautious approach to interferences with arbitral awards under the guise of public policy. They indicate an attitude of considering such interferences forbidden, unless strictly necessary. National courts are apprehensive to interfere with valid arbitral awards only on the basis of public policy defence.

- **United States of America**

Courts in the U.S.A have historically followed a pro-enforcement policy with regard to arbitral awards, and other awards that involve potential interference into international trade and commerce. The two landmark judgments of the Supreme Court in the cases of *M/S*

[29] Rogers & Kaley, *The Impact Of Public Policy In International Commercial Arbitration*, 65 J CIArb 4 (1999); *supra* n.16, Blackaby, Partasides et al., 642

[30] *Thales Air Defence BV v GIE Euromissile et al.,* Paris Cour d'Appel, (Nov. 18 2004); *SNF SAS v Cytec Industries BV (Holland)*, Cour de Cassation, Ch. Civ. 1ere (June 4, 2008); *id,* Blackaby, Partasides et al., 645-46

[31] *Thalès v. Euromissile*, Cour d'appel [CA] [regional court of appeal] Paris (Nov. 18, 2004); *supra* n.2, 210

[32] *SNF SAS (France) v. Cytec Industries BV. Netherlands*, Cour de Cassation [CC] [Supreme Court] First Civil Chamber, Appeal No. 03-15320 (June 4, 2008)

Bremen v. Zapata Off-Shore Co.[33] and *Scherk v. Alberto-Culver Co.*[34] testify to the existence of this status quo. The need to narrowly interpret public policy, as far as provisions of the New York Convention are concerned, was first emphasized upon in the case of *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*[35]. The Court rejected the claim of Parsons & Whittemore that enforcement of an award predicated on the completion of a project they had abandoned in Egypt would violate U.S. public policy. The Court specifically held that the public policy defence was not meant to "enshrine the vagaries of international politics under the rubric of 'public policy'"[36]. Finally, it was the Supreme Court's famous decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[37] that consolidated America's pro-enforcement stand. The Court cited "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"[38] as compelling factors that require it to enforce parties' agreement, even if a contrary result would seem forthcoming in a domestic context. The American proclivity towards enforcement has incremented its reputation as a safe haven for enforcement of international commercial arbitral awards.

- **Russia**

Russian courts are regarded as prone to giving the public policy defence a very wide interpretation. For instance, in *United World v. Krasny Yakor*[39], the Russian Court had refused recognition of a foreign arbitral award on the ground of the public policy defence, while holding that the enforcement of the award would lead to Krasny Yakor, a state-owned entity, being rendered bankrupt. Since Krasny Yakor manufactured goods important for national safety and security, its bankruptcy would adversely impact the social and economic stability of Russia as a whole. In another case[40], the court stalled the recognition and enforcement of a foreign arbitral award because it was ambiguous whether the respondent had been operating using the funds of its parent company, which was a state-owned entity. Since the funds belonged to the State, it was held that the enforcement of the award would indirectly damage national assets and, thereby, would be in contradiction of the public policy of Russia. Eminent authors have addressed Russian courts as 'notorious for expansive interpretations of the notion of public policy'[41]. This is because Russian courts have shown a tendency of decline in enforcement of arbitral awards

[33] *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972)
[34] *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974)
[35] *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974)
[36] *id*, at 974
[37] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*, 473 U.S. 614 (1985)
[38] *id*, at 629.
[39] *United World Ltd., v. Krasny Yakor (Pan. v. Russ.)*, Fed. Com. Ct. of Volga-Vyatka Cir., Case No. A43-10716/02-27-10isp (2003)
[40] *Moscow National Bank Ltd. v. MNTK Microhiryrgiya Glaza*
[41] *supra* n.19, Kröll et al, 645

where amount of damages awarded under foreign law was 'punitive' or 'disproportionate to the breach', in the eyes of Russian courts[42].

- **Hong Kong Special Administrative Region (HKSAR)**

In Hong Kong, the position regarding effect of public policy on enforcement of arbitral awards made under the New York Convention is governed by the dictums propounded in *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd.*[43] and *Karaha Bodas Co. LLC v. Persusahaan Pertambangan Minydak Dan Gas Bumi Negara*[44]. In summary, the terminology is accorded a narrow meaning in Hong Kong, for what would be "contrary to the fundamental conceptions of morality and justice of the forum"[45]. As such, Courts there have always treated submissions regarding public policy as resistance to enforcement with scepticism. There exists a presumption that this defence is expressive of a conduct of convenience that is considered intrinsically unacceptable by the Courts[46].

INTERPRETATIONS OF THE PUBLIC POLICY DEFENCE BY INDIAN COURTS

The Indian Arbitration and Conciliation Act, 1996 (hereinafter 'the Act'), was designed primarily to give domestic effect to the provisions of the UNCITRAL Model Law on International Commercial Arbitration[47]. The Act initially came as a respite, given the prevalent widespread discontent about extensive judicial intervention allowed by its predecessor, the Arbitration Act of 1940[48]. However, since then, there have been both progressive and regressive interpretations of the Act's provisions concerning the public policy defence, which has created an atmosphere of uncertainty and confusion among observers of the state of affairs.

- **The Renusagar dictum**

[42] Presidium of Supreme Commercial Arbitrazh Court, *Information Letter No. 96*, s. 29 (Dec. 22, 2005); Presidium of Supreme Commercial Arbitrazh Court, *Information Letter No. 156*, s. 6 (Feb. 26, 2013)

[43] *Hebei Import & Export Corp v. Polytek Engineering Co. Ltd.*, (1999) 2 HKCFAR 111

[44] *Karaha Bodas Co. LLC v. Persusahaan Pertambangan Minydak Dan Gas Bumi Negara,* [2007] 4 HKLRD 1002

[45] *supra* n.43

[46] William Stone, *Public Policy in the Enforcement of New York Convention Awards: A Hong Kong Perspective*, AS. DIS. REV. 71, 77 (Issue 3, 2011)

[47] Preamble, Arbitration and Conciliation Act, 1996, *entered into force* Aug. 22, 1996, Act No. 26 of 1996

[48] *Food Corporation of India v Joginderpal Mohinderpal*, AIR 1989 SC 1263; A. Ray & D. Sabharwal, *What next for Indian arbitration?*, THE ECONOMIC TIMES, Aug. 29 2006, available at: http://economictimes.indiatimes.com/artricleshow/msid-1933720,prtpage-1.cms (last visited Aug. 1, 2017); *supra* n.1, 105

The judgment of a 3-judge bench of the Supreme Court in the matter of *Renusagar Power Co. Ltd. v General Electric Co.*[49] (hereinafter '*Renusagar*') can be considered as the beacon of a pro-arbitration stance taken by an Indian Court, specially with regard to the applicability of the public policy defence. The question regarding the scope of the public policy defence was in relation to the provision for the same under Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. The ambit of applicability of this judgment was specific to enforcement of foreign awards (which is presently governed by Part II of the 1996 Act). Considering the scope of Article V(2)(b)(ii) of the New York Convention, Section 7(2)(b)(ii) of the Foreign Awards Act and a catena of Indian and foreign judgments[50], the Court had held that 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, (ii) the interests of India, or (iii) justice or morality. This narrow scope created for interpretation of public policy, however, was not religiously followed by Indian Courts thereafter, leading to both conflicting and overlapping opinions.

- **The Road to Venture Global**

The Supreme Court's demonstration of a pro-arbitration judicial stance in *Renusagar* was followed by certain unfortunate judgments that, once again, shrouded the interpretation of the public policy defence under a large blanket. The Court's judgment in *Oil and Natural Gas Corp Ltd v Saw Pipes Ltd.*[51] (hereinafter '*Saw Pipes*') added another ground of 'patent illegality' to the grounds mentioned in *Renusagar.* This meant that an award could be set aside if it was so unfair and unreasonable that it shocks the conscience of courts. This decision of the Court was only propelled through the decision in *Bhatia International v Bulk Trading S.A. & Anr.*[52] (hereinafter '*Bhatia*'), wherein it was held that parties could bring an action to set aside a foreign arbitral award on the ground of "patent illegality". These decisions created the leeway for courts to discretionarily set awards aside or refuse enforcement if the award seemed patently illegal to them. An example is a Rajasthan High Court decision[53] in which it was held that although arbitration is not strictly bound by rules

[49] *Renusagar Power Co. Ltd. v General Electric Co.,* AIR 1994 SC 860

[50] *Central Inland Water Transport Corporation Ltd. & Anr. v. Brojo Nath Ganguly & Anr.*, (1986) II LLJ 171 SC; *Gherulal Parakh v. Mahadeodas Maiya & Ors.*, (1959) Supp. 2 SCR 392; *Murlidhar Agarwal & Anr. etc. v. State of U.P. & Ors.*, (1975) 1 SCR 575; *Rattachand Him Chand v. Askar Nawaz Jung (Dead) by LRs & Ors.*, (1991) 1 SCR 327; *Vervaeka v. Smith*, 1983 (1) A.C. 145; *Louchs v. Standard Oil Co. of New York*, 224 NY 99 (1918); *Dalmia Dairy Industries Ltd. v. National Bank of Pakistan*, (1978) 2 Llo. L.R. 223; *Deutsche Schachtbauund Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co.*, [1987] 2 All ER 769; *Parsons & Whittemore Overseas Co. Inc. v. Societe Generala De L'Industrie Du Papier (Rakta) & Bank of America*, (1974) 508 F.2d 969; *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc.*, 87 L. Ed. 2d 444

[51] *Oil and Natural Gas Corp Ltd v Saw Pipes Ltd.*, (2003) 5 SCC 705

[52] *Bhatia International v Bulk Trading S.A. & Anr.,* (2002) AIR SC 1432

[53] *Jagmohan Singh Gujral v Satish Ashok Sabins*, 2004 (2) Raj 76

of evidence, these rules cannot be disregarded as they are founded upon fundamental principles of justice and public policy. Such decisions gradually diminished the scope of acute interpretations of the 1996 Act and widened the scope for liberal interpretations of public policy to hinder enforcement of awards, an eventuality that the Act had not intended.

- **The Venture Global mishap**

In *Venture Global Engineering v Satyam Computer Services*[54] (hereinafter '*Venture Global*'), the Supreme Court held, extending its decision in the *Bhatia* case, that a foreign arbitral award could be set aside on grounds of public policy as formulated in the *Saw Pipes*. In *Venture Global*, a tribunal seated in London had rendered the award in favour of Satyam. While Satyam sought to enforce the award in the United States, Venture Global filed an application in an Indian court, based on public policy grounds, to set the award aside. Thereafter, the Supreme Court, complementing the Bhatia case, held that a party could bring an action against a foreign arbitral award under Part I. The Court also held that an aggrieved party could bring an independent action in India to set aside a foreign arbitral award on the ground of "patent illegality", as devised in *Saw Pipes*. This decision of the Supreme Court, following its decision in *Saw Pipes*, makes it seem like the Indian Courts tend to interpret the provisions of the Indian Arbitration Act in a manner contrary to the 'pro-enforcement spirit' under the New York Convention.

CONCLUSION AND SUGGESTION: THE UPHILL ROAD BEYOND VENTURE GLOBAL

In the initial years after *Venture Global,* Indian Courts used the dictum to refuse to enforce or to set aside foreign awards without much application of mind to the facts of the case or to the repercussions of the judgment[55]. However, the landmark decision of a 3-judge bench of the Supreme Court in *Shri Lal Mahal Ltd. v Progetto Grano Spa*[56] (hereinafter *Progetto Grano*) marked a change of the judiciary's stand to a pro-enforcement one, once again, as far as foreign awards are concerned. The Court held that the dictum in *Saw Mills* only applies to enforcement under Part I of the Act. It further held that the *Renusagar* dictum applies squarely to enforcement of foreign arbitral awards, thus implying that public policy ought to be given a narrow meaning in such scenarios. This decision of the Supreme Court has paved the path for other courts of the country to adopt a pro-enforcement policy, as far as foreign arbitral awards are concerned[57].

[54] *Venture Global Engineering v Satyam Computer Services*, (2008) SCALE 214

[55] For example, *Western Maharashtra Development Corporation Ltd. v. Bajaj Auto Ltd.*, (2010) 154 ComCas 593 (Bom)

[56] *Shri Lal Mahal Ltd. v Progetto Grano Spa*, (2014) 2 SCC 433

[57] For example, *POL India Projects Limited and Ors.v Aurelia Reederei Eugen Friederich GmbH Schiffahrtsgesellschaft & Company KG & Ors.*, (2015) 7 Bom CR 757; *Cruz City 1 Mauritius Holdings v Unitech Limited*, 2017 SCC OnLine Del 7810

There exists an urgent need to ensure that all international commercial arbitral awards in India are perceived through a pro-enforcement lens by the courts. The distinction between domestic and foreign awards that has been crystallised by *Progetto Grano* is far-reaching vis-à-vis creation of a pro-enforcement regime for foreign awards. However, there should be a similar attempt to create a friendly regime for enforcement of awards enforceable under Part I of the Act. Such an attitude reflects the legislative intent behind adoption of the UNCITRAL Model Law on International Commercial Arbitration, of efficiently settling disputes arising in international commercial relations[58].

[58] G.A. Res. 40/72, UN GAOR, 40th Sess., U.N. Doc. A/RES/40/72 (1985)