

# International Arbitration and Public Policy Exception

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**Abstract:** The author postulates the need to have arbitration-friendly jurisdictions and encourages foreign investment participation to improve countries economy by addressing public policy notion in international commercial arbitration field. It is necessary that the courts should properly interpret public policy exception due to the absence of its definition under the New York Convention. The article will highlight the necessity to have Public policy in the international commercial regime. Further, the author will reflect the international acceptance given to Public policy around the globe.

**IndexTerms–Commerce, International Commercial, New York Convention, Public Policy, UNCITRAL.**

## I. INTRODUCTION

Nowadays significant changes have taken place in the business community since globalization came into effect across the globe. Countries have made the initiative to have a good relationship with their neighboring countries by following the liberalization process in their country. This has opened the door for encouraging the practice of trade concerning goods as well as services worldwide. In order to maintain healthy trading, the nations have followed the guidelines of the United Nations, which reflects on the modernization of laws governing trade and commerce activities at international level.[1] For instance, the New York Convention and UNCITRAL Model Law are among the most prominent international instruments, which facilitate having a better legal framework. It becomes essential for the member nations to obey these international instruments. It has been observed that there are some countries that are finding it difficult to gain their recognition and acceptance in the commercial sector globally.

For maintaining harmony and cooperative environment the New York Convention has played a vital role to encourage fair practices in the international business community. Unfortunately, it has been observed that international principles such as public policy's interpretation have varied worldwide. Public policy has been considered as one of the important ground to be considered for setting aside a foreign award under the New York Convention and UNCITRAL Model Law. Due to the absence of a definition of public policy, this notion has been interpreted in broader as well as the narrow manner by the courts. This has caused uncertainty in understanding the notion of public policy in arbitration, which has affected the flow of money in the business world.

There is a need to understand the scope and necessity to have public policy exception in international trade activities. The objectives set behind the New York Convention and UNCITRAL Model Law should be kept in mind while interpreting public policy grounds. Public policy has been always a matter of discussion. In order to have certainty about the result, it has become significant that public policy exception should be understood with care and caution in order to encourage investor participation in the coming future.

## II. PUBLIC POLICY AND PUBLIC ORDER

One needs to understand that these are those principles on the bases of which the laws are framed. Its objective is to attain public good and if there is any damaged caused to it the contract or transaction will be held void.[2] It is to be noted that public policy is meant to be that policy, which is made by the government that causes the impact on every person of a country or state. They are confined to the general interest of society.[3] It focuses on policies, which are made by the government authorities, that affects the population as a whole.[4]

These are those principles, which are framed by the legislature, which focuses on the interest of the state as well as society. The courts are also the responsible body, which looks after them.[5] In other words, we can say that the policies are made by the legislature and among those, there is public policy in arbitration aspect, which focuses in the encouraging international trade practice by keeping in mind the interest of the society at large so there should not be any act contrary to it. One should always keep a note that public policy emphasizes on the public good and the interest of their nation. Public policy is mostly used in common law jurisdiction on the other hand public order which is also known as the *ordre public* is applied in the civil legal system.[6]

### III. SIGNIFICANCE OF INTERNATIONAL CONVENTIONS – PUBLIC POLICY

This section of the article reflects on public policy notion as one of the ground to set aside a foreign award under the New York Convention and UNCITRAL Model Law. This has provided international recognition to this notion in order to promote international trade and commerce. The New York Convention states that recognition and enforcement of an arbitral award can be refused when the competent authority consider the award is violating the country's public policy.[7]

The Model Law states that the court can refuse enforcing or recognizing the arbitral award when it acted against state's public policy.[8] Also the court can set aside an award when it finds out the award is against the state's public policy.[9] Recently in 2015 through the International Bar Association's Report, it has made clear that that public policy has not been intentionally defined.[10] Due to the absence of a definition of public policy this has caused a bad impact on the nation's economy and its growth.

### IV. INTERPRETATION OF PUBLIC POLICY EXCEPTION –DEVELOPED AND DEVELOPING COUNTRY

It is important to note the courts have interpreted public policy exception by keeping in mind the needs of their country. This part of the article reflects that the manner which public policy exception has been understood in developing and developed countries.

For instance, in Japan their laws rely on Model Law where emphasizes is made on basic principles.[11] The courts have strict approach while interpreting this exception. The Supreme Court has not defined the public policy notion. They have given significance to public policy or good morals of their nation.[12]

Under Italian circumstance, the courts have relied on factors, which are fundamental in nature and highlights the importance of ethical and social aspects. In addition, the focus is also made on political as well as economic parameters that are part of their legal order.[13]

German laws have reflected significance to fundamental norms related to the public as well as economic living either the exception will be based on fundamental principles, which run the legal order of Germany in order to be German public policy in arbitration regime.[14]

Singaporean courts have highlighted that this ground would include a focus on the practice of justice as well as morality.[15] The act should be favorable to Singaporean public policy another wise it would be contrary and the award will be refused by the court under such circumstances.[16] In addition, there should not be any act that causes shock to the forum's morality or its conscience another wise this will lead to a violation of the nation's public policy.[17] Only in rare situations where there is harm to public good will also be considered under this notion.

In New Zealand, when the arbitration agreement is against its public policy or their laws the matter will not be settled through arbitration.[18] Moreover, it has confined itself to grounds like cardinal principles of law, justice, illegality, fraud, and corruption.[19] Also, if it is in conflict with the public good and there is abuse that has influenced their legal system and enforcement process will also be under the ambit of violation of the nation's public policy.[20]

On the other hand, in a developing country like Pakistan, the focus is made on five groups under the ambit of Pakistan's public policy. It has included illegal objects, which are declared by common law or through legislation. Also, when an object is harmful to good government in domestic either international affairs. Moreover, when the object is affecting the justice system. In addition, if the object has a harmful impact on family life. Lastly, when the object is affecting the public interest in an economic manner. However, under South Korean perspective this exception is narrowly followed where the emphasizes is made on good morals and maintaining social order.[21] Whereas, the Peruvian courts have addressed that grounds such as the principles as well as institutions that are important for state and is beneficial for their legal system will be considered under this exception.[22] Under the Mexican scenario, the courts have given significance to legal institutions and norms that are helpful for the state's growth.[23]

In Indonesia, the focus is made on three aspects that are included under public policy among that is when there is an act that is opposite to their laws and regulation. Secondly, when there is any bad impact on their national interest. Thirdly, when there is an act that is opposite to their nation's sovereignty.[24]

Chinese courts have given emphasizes on factors like the fundamental interest of their society. Importance has to be given to China's safety and its sovereignty. One needs to follow good social customs. The Chinese courts have given a narrow understanding of public policy.[25] Also, the courts have stressed on the need to protect the social and political interest of the nation. However, the laws on arbitration neither CPL has stated any definition of public policy.[26]

The Vietnamese Act has not mentioned the word public policy but has included fundamental principles of the nation.[27] The award should not be in conflict with their basic principles related to their conduct and should not cause any bad impact on their development and laws too. The Vietnamese courts have illustrated a wider interpretation of public policy exception until now.[28]

Mexican courts have decided the disputes related to public policy on a case-by-case basis.[29] The Commerce Code has given authority to the judges to decide the matter on such aspect. One needs to focus on society's interest and social coexistence.[30]

By keeping this perspective in mind, one needs to focus on the World Investment Report of 2019, which has elaborated that the FDI inflow in developed nations is \$712.4 billion as compared to developing economies, which is only \$670.7 billion. On the other hand, the outflow of FDI is \$1,009.2 billion in developed economies but in developing nation it is \$380.8 billion.[31] For having better and secure future of the nations it is essential countries around the world must follow the uniform approach in applying New York Convention and Model Law in order encourage the investor interest in their country by making themselves arbitration friendly.

## V. ROLE OF PUBLIC POLICY IN INTERNATIONAL ARBITRATION

It is essential that there should be a rise in the capital in order to improve country's economy and this can be possible if the laws are arbitration friendly among of which is public policy ground which encourages that there should participation of investors through international trade practices.[32] The government should encourage the practice of maintaining harmony in conducting commercial activities. The courts should not be burden with pending cases, therefore, alternative resolution modes play a remarkable role to settle down the disputes within a reasonable time. This has motivated in having time and cost saving mechanism, which is beneficial in promoting the growth of the business community. By maintaining transparency and encouraging equal treatment which motivates the foreign investor to freely participate.[33] There is a need to have a proper understanding of public policy in order to strengthen trade relations across the globe in order to maintain a cooperative environment.

One needs to keep in mind that this exception should not be disused. In order to have international recognition, it is essential that there should be a system, which is cost and time-saving. In order to maintain privacy and to maintain equity, it is important that public policy as ground should be welcomed by the legal system of all the countries for setting aside an award. In order to be arbitration friendly country one need to maintain ethical commerce. [34] One needs to understand the scope of this exception and protect it from getting diluted. It is the need of the hour that one should keep in mind the merits of having public policy ground in international arbitration practice.

## VI. CONCLUSION

In order to have more flow of investment at an international level and to protect parties' interest, this exception should be properly understood and applied.[35] It is necessary that public policy as a ground should be applied in a uniform manner for having predictable results.[36] There has been an increase in a number of disputes concerning international commercial arbitration aspect, which comprises of the huge amount at stake. By following the uniform approach of public policy one would be able to lessen the challenges, which the courts and parties are facing at present. In order to have fairness in trade practices, one should keep in mind the objectives of the international conventions in order to improve countries performance level internationally.

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