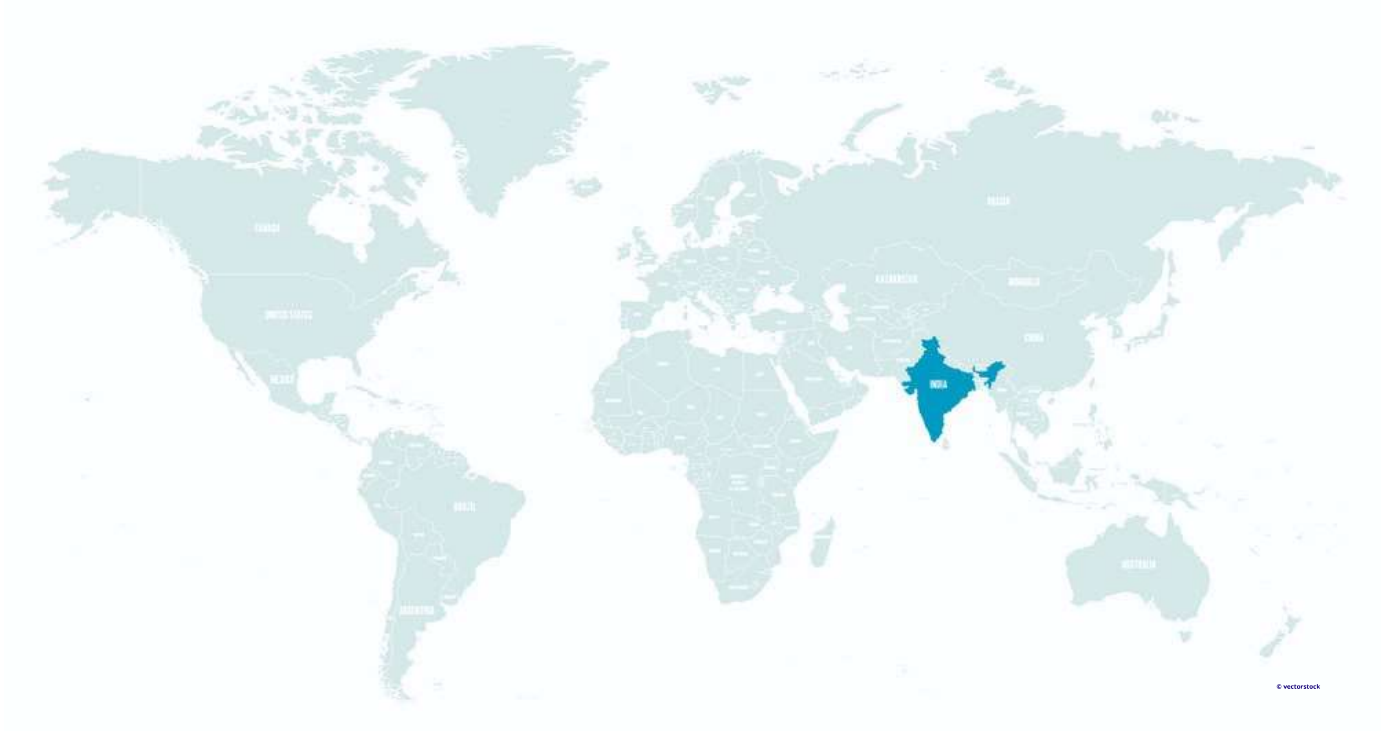

MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

The Private Life of the 'Unruly Horse': Challenging 'Transnational' Public Policy & 'Internationalist' Attitude in Private International Law

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DEPARTMENT OF RESEARCH

MAHARASHTRA NATIONAL LAW UNIVERSITY LAW MUMBAI

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The Private Life of the 'Unruly Horse': Challenging 'Transnational' Public Policy and 'Internationalist' Attitude in Private International Law

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Various interpretations of 'public policy' are gaining momentum in the jurisprudence of international arbitration as it is providing a foundation for the development of theories on party autonomy in the transnational system of arbitration. The functioning of recognition and enforcement of foreign judgments becomes more relevant in the era of globalization. However, the efficacy of international arbitration depends on the ability of national courts to act in compliance with it. I hope that the present work brings real value to our understanding of the workings of the public policy ground in international arbitration.

I would like to express my gratitude to Prof. (Dr.) Anil Variath for building up a research-friendly infrastructure and great community of academia at MNLU Mumbai. I would like to acknowledge my wholehearted thanks to Dr. Karuna Malaviya for heading the Legal Studies Research Paper Series. Our first reviewer Mr. Utkarsh Mishra is the touchstone for testing the intellectual honesty of the arguments that follow. My Research Assistant Mr. Adithya Variath has given this idea a life and a soul.

A law school must emphasize through research and publication by its faculty to bridge the wide gap between the theory and practical application of concepts through a learning process that is simulative, participative and multi-disciplinary. I'm grateful for the commitment and assistance of the Advisory Board and Reviewers. I hope that the inaugural legal studies research paper is the first in a series of enriching, thought-provoking policy reviews.

Prof. (Dr.) Dilip Ukey

Vice Chancellor, Maharashtra National Law University Mumbai

EXECUTIVE SUMMARY

Public policy as a ground for refusal of enforcement of awards has been interpreted differently in different jurisdictions. However, judicial decisions often tend to refer to a 'public policy' as a universal basis for refusing recognition and enforcement of an award under Article V (2)(b) of the New York Convention. The ground is used when the core values or fundamentals of a legal system have been deviated from. Even in the Indian legal system, public policy exception is used as an automatic escape in exceptional circumstances when it would not be possible for a legal system to recognize an award and enforce it without relinquishing the foundations of the law of the sovereign jurisdiction.

The nebulous identity of public policy and its potential for abuse by result-oriented courts have been recognized by private international law rules. This has also led to the reinterpretation of the identity and nature of the public policy. Different deciding factors on public policy grounds have led to the birth of international and transnational public policy doctrines. This difference between domestic and international public policy has been one of the controversial aspects in the process of enforcement of an award. This paper proposes a context-dependent form of public policy as a more favourable method of interpretation of the neologism 'public policy'.

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Part I.
INTRODUCTION

A. Interpreting Public Policy in Private International Law

> "The so-called '[public policy] law' ….is a mystique, and, of course, in modern times the elaborate pseudo-methodological pantomime of governmental interest analysis".[1]

Karl Von Savigny in his work *System of Modern Roman Law* talks about his approach towards the system of international private law and he writes "the existence of rights and obligations on the part of states, based on the law of nations itself."[2] Theory of Private international law or conflict of laws as a body of knowledge is the "body of conventions, model laws, national laws, legal guides, and other documents and instruments that regulate private relationships across national borders."[3] Since, private international law governs the legal relations between individuals, like any other rules of law, rules of private international law should also reflect public policy considerations. Researchers and practioners of private international law often conflict on the conditions on which choice of law may be departed from by reason of public policy.[4] For instance, the public policy engaged is only ever that of English law, but where it is engaged, it overrides or displaces the application of a foreign *lex causae*.[5] This applicability of public policy due to its flexibility and ambiguity demands some lines of demarcation.

Different national jurisdictions have adopted different approaches to interpret and develop the concept of public policy. As Alex Mills argues, "one approach suggests that usage of public policy has led to its usage as a justification or excuse for not applying or recognising the application of, an otherwise applicable rule of law."[6] Another approach finds support from thinkers like P.B. Carter who views "the development of public policy in private international law as relatively little reformatory

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[1] P. B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 2-3 (1993).

[2] FRIEDRICH KARL VON SAVIGNY. J, SYSTEM OF THE MODERN ROMAN LAW 67 (Vol. 1, 1867).

[3] Don Ford, Private International Law, ELECTRONIC GUIDE - AMERICAN SOCIETY OF INTERNATIONAL LAW (ASIL), (Aug. 8, 2021) https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf

[4] ADRIAN BRIGGS, THE CONFLICT OF LAWS 210 (2001).

[5] See 17 Article VIII, Section 2(b) and Private International Law, The Fund Agreement in the Courts, Vol. III: Volume III.

[6] Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW 201 (2008).

with regard to the performance in the area of forum jurisdiction."[7] P.B. Carter in his seminal paper on the 'role of public policy' discussed the approaches to public policy from a conflict of laws spectrum, he contends that, "these approaches denote that a forum may refuse to apply an otherwise applicable foreign law on the grounds of public policy, or it may on grounds of public policy decline to recognise a foreign judgment which would otherwise be entitled to recognition."[8] This right of the forum to not recognise has also led to terming of public policy as an escape route.[9] For readers of Private International Law, it is pertinent to understand that public policy has majorly operated predominantly in the domains of "choice of law" and "recognition and enforcement of foreign judgments."[10]

The functioning of recognition and enforcement of foreign judgments becomes more relevant in the era of commercialization. The last few decades witnessed commercial transactions seeing an unprecedented rise. The huge economic capital of businesses has generated an increased number of international contracts. It has directly or indirectly led to an enormous increase in complex cases of enforcement of judgements. This has also fuelled the development of international arbitration as a mechanism of dispute resolution. In this regard, Bernard Hanotiau writes "This has also led to the denationalization of arbitration, both procedurally and substantively, as well as to a convergence of national legislation and institutional rules, based on a consensus on a greater liberalization of the process."[11]

Various interpretations of 'public policy' are gaining momentum in the jurisprudence of international arbitration as it is providing a foundation for the development of theories

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[7] *Supra* note 1, at 2.

[8] See also Wasiq Abass Dar, *Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards*, 4 EUROPEAN JOURNAL OF COMPARATIVE LAW AND GOVERNANCE 2, 316 (2015).

[9] Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden) [1958] ICJ Reports 55 at 94 (Separate Opinion of Judge Lauterpacht). See also K. Lipstein, *The Hague Conventions on Private International Law, Public Law and Public Policy,* 8 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 506 (1959).

[10] See Barbosa F. Spaccaquerche, *The Enforcement of International Investment Arbitral Awards: is There a Better Way?,* 6 REVISTA BRASILEIRA DE ARBITRAGEM; COMITÊ BRASILEIRO DE ARBITRAGEM CBAR & IOB 21, 7-34 (2009); M. Clasmeier, *Arbitral Awards as Investments: Treaty Interpretation and the Dynamics of International Investment Law*, 39 INTERNATIONAL ARBITRATION LAW LIBRARY 53-142 (2016); A. RAJPUT, PROTECTION OF FOREIGN INVESTMENT IN INDIA AND INVESTMENT TREATY ARBITRATION 127-146 (2017).

[11] Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28 JOURNAL OF INTERNATIONAL ARBITRATION 2, 89-103 (2011).

on party autonomy in the transnational system of arbitration. One of the foundational instruments in International Arbitration is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["Convention"].

B. Public Policy Ground vis-à-vis Recognition and Enforcement of Arbitral Awards

Article I of the Convention states that "This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought." [12] This Convention was a remarkable step to unify methods of deciding the questions of 'whether/how/when' relating to recognition and enforcement of a foreign arbitral award.

Article V (1) of the Convention details the grounds on which "at the request of the party against whom it is invoked" can resist the recognition and enforcement. Article V (2) contains grounds on which "an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought".[13] Although, public policy as a ground to refuse recognition received international attention with the Convention, the public policy ground finds several references in national laws as a ground to resist enforcement of arbitral awards.[14] Margaret Moses in his piece 'Public Policy: National, International and Transnational' argues that,

> "The public policy basis for refusing to enforce an arbitration award has for the most part worked as the drafters intended. The drafters knew that by permitting courts to refuse to enforce foreign arbitral awards based on public policy, they were opening the possibility that

[12] See also Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the UN Convention, General Assembly resolution 61/33 of 4 December 2006
[13] *Id*.
[14] A. TWEEDDALE & K. TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES: INTERNATIONAL AND ENGLISH LAW AND PRACTICE 7, 59 (2005)

> courts might use idiosyncratic local rules to undermine the broad enforcement goals of the Convention."[15]

The drafters believed that the "public policy exception would act as a necessary safety valve to prevent intrusion on state sovereignty" if a foreign award goes against the principle of law and justice of the enforcing country's legal structure.[16] One of the factors that have shaped the development of enforcement of foreign arbitral awards procedure is the perplexity of local rules. Many believe that there is a tendency of States to lean towards a more transnational understanding of the public policy exception.[17]

Today, the debate surrounding the nature of 'public policy' has evolved due to several interpretative innovations mainly at the national level. Trakman, in his survey of the case law and literature on the public policy exception,[18] has noted that various competing approaches are apparent about the exception:

> "Some argue that…. [the public policy exception] ought to be construed restrictively, encompassing only the localized interests of…. [State parties] …Others contend that it should be construed expansively to include transnational public policy considerations as well. …Yet others worry that national courts invoking mono-localized interests to annul international arbitration awards may do so partially and in deference to the state's executive. …These different

[15] Margaret Moses, *Public Policy: National, International and Transnational*, KLUWER ARBITRATION BLOG (Nov. 12, 2018), http://arbitrationblog.kluwerarbitration.com/2018/11/12/public-policy-national-international-and-transnational/. See ICC, Preliminary Draft Convention: Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 195.

[16] See Committee meetings in New York [E/AC.42/3 - Committee on the Enforcement of International Arbitral Awards: Provisional Agenda]; Report of the Committee, recommending a Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

[17] See also GAR's The Guide to Challenging and Enforcing Arbitration Awards, 2019.

[18] Leon E. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 TULANE LAW REVIEW 207 (2018). See also the Committee on International Commercial Arbitration, "Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards" in International Law Association, Report, 69th Biennial Conference (London 2000), 340 at 347-350. The International Law Association Committee on International Commercial Arbitration, in its "Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards", offered guidance on the scope of "international public policy" - International Law Association, Report, 70th Biennial Conference (New Delhi 2002), 352 at 359-361.

> perspectives raise the question of whether the public policy defenses adopted by courts of state …[parties] to the N.Y. Convention includes, or prevail over, transnational conceptions of public policy."[19]

A liberal approach interprets the term public policy as a sub-structure having elements beyond the national legal structure. For instance, several arbitration statutes, as well as international instruments, refers to public policy as "international (or transnational) public policy".[20] The 'transnational public policy' reflects the "convergence of global consensus on fundamental economic, legal, moral, political, and social values."[21] This idea has also found its shades in Anthony E Cassimatis's seminal paper on "Public Policy Under The New York Convention - Bridges Between Domestic and International Courts and Private and Public International Law".[22]

The authors through this policy review argue that public policy should be defined to encompass only those sets of socio-economic and moral-political values considered fundamental by a domestic jurisdiction. The authors argue that the content of transnational public policy is not static and the context of an "international or trans-nationalist" attitude to public policy cannot be developed as a *grundnorm* to be adapted by changing structures and beliefs of societies.

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[19] Leon E. Trakman, *Aligning State Sovereignty with Transnational Public Policy*, 93 TULANE LAW REVIEW 208-209 (2018).

[20] James D Fry, *Désordre Public International under the New York Convention: Wither Truly International Public Policy*, 8 CHINESE JOURNAL OF INTERNATIONAL LAW 81 (2009); Sir Jack Beatson FBA, *International Arbitration, Public Policy Considerations, and Conflicts of Law: The Perspectives of Reviewing and Enforcing Courts*, 33 ARBITRATION INTERNATIONAL 175.

[21] C.B. Lamm, et al., *Fraud and Corruption in International Arbitration*, in FERNANDEZ-BALLESTER, M.A. AND LOZANO, D.A. (EDS.), LIBER AMICORUM BERNARDO CREMADES (2010).

[22] Anthony E Cassimatis, *Public Policy Under The New York Convention – Bridges Between Domestic and International Courts and Private and Public International Law*, 31 (1) NATIONAL LAW SCHOOL OF INDIA REVIEW 32-52 (2019)

Part II.
FROM TRADITIONAL INTERPRETATION TO TRANSNATIONALITY OF PUBLIC POLICY

A. Contextualising Public Policy in Arbitration Law

The development of Belgian realism in the 16th century which gave birth to the Dutch doctrine of "international comity" is considered to be the early instance of Private International law literature. Dutch thinkers have also referred to public policy, but not in its concrete sense.[23] According to Ulricus Huber, "the sovereignty of a state involved its absolute power over all goods and persons found even temporarily within its dominions".[24] An interpretation of this postulate signifies a way of restriction and exception to the general rules that require the application of foreign law to international business.[25]

The term public policy being open-ended in nature has led to misapplications of public policy as a ground of decision. For the purpose of foreign awards, public policy ground is the highest of all the interests of the State to reserve the right to set aside awards that are incompatible with justice or morality as locally conceived. The public policy essentially is employed differently in domestic systems in the context of conflicts cases. In the modern legal system, "public policy is judicially administered exceptions to the usual commitment of individual nations to recognize and give effect to foreign law in circumstances deemed appropriate by the forum."[26] It is an important principle under Arbitration law that the power to enforce acquired foreign rights is subject to the reserved power of the forum. Construing public policy from a traditional sense, public policy as a ground should not be invoked in private international law in a purely domestic context, unless "the internal law of the forum is the *lex causae.*"[27] This idea is based on the philosophy that transnational contexts are not always appropriate in a local context. P.B. Carter propounding this way of thought argues that:

> "The automatic injection of standards applicable in a domestic situation into a transnational situation may be seen, at best as an

[23] STORY, COMMENTARIES ON THE CONFLICT OF LAWS 6 (7th ed. 1872).
[24] WESTLAKE, PRIVATE INTERNATIONAL LAW (5th ed. 1912); DICEY, DIGEST OF THE LAW OF ENGLAND WITH REFERENCE TO THE CONFLICT OF LAWS 3 (2d. ed. I908); WHARTON, TREATISE ON THE CONFLICT OF LAWS 2 (3d ed. 1905).
[25] J. Kosters, *Public Policy in Private International Law*, 29 THE YALE LAW JOURNAL 7 (1920).
[26] A. NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW 9 (1943).
[27] D. St. L. Kelly, *Localising Rules and Differing Approaches to the Choice of Law Process*, 18 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 2, 249 (1969)

> exercise in mechanical jurisprudence, and at worst as blatant judicial chauvinism."[28]

The phrase "contrary to public policy" which is commonly used in the escape clauses has found its traces in various Hague Conference Conventions. As Justice Benjamin N. Cardozo remarked in *Loucks v. Standard Oil Co.*:[29]

> "The courts are not free to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the commonwealth."[30]

However, different national systems have viewed this "manifestly contrary to public policy" differently. In the case of *Tampico Beverages Inc. v. Productos Naturales de la Sabana S.A. Alquería*, the Supreme Court of Colombia was tasked with the responsibility to enforce an ICC award that "had been challenged as a violation of public policy because of an arbitrator's conflicts of interest."[31] The Columbian court acknowledged that "enforcement under these particular circumstances might violate Colombia's domestic public policy", however, it concluded that "the country's international public policy was different and that the court should look to international authorities to determine if there was a violation". The Columbian Court used the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration as an archetype of international practices. The judgement deserves special attention and critique primarily for the approach adopted by the Court to use international soft law instruments to determine a sovereign state's international public policy violation.[32] This also raises concerns on what exactly constitutes 'transnational' public policy.

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[28] P. B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 2-3 (1993).

[29] Court of Appeals of the State of New York, 224 N.Y. 99 (N.Y. 1918) 120 N.E. 198

[30] "The cause of action in its nature offends our sense of justice or menaces the public welfare", 224 N.Y. 101.

[31] No. 16088/JFR/CA

[32] KATIA FACH GOMEZ, 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES 22 (2019).

B. Transnational Public Policy and the reflection of Global consensus

From the contemporary perspective, "'Transnational public policy' is not the public policy of any particular state, but rather involves public policy that transcends state boundaries. Such public policy arises out of an international consensus on universal standards as to norms of conduct. These norms often are generally recognized as unacceptable in most civilized countries." Transnational public policy can be defined as:

> "a reflection of global consensus- deriving from the convergence of national laws, international conventions, arbitral case law and scholarly commentary- on fundamental economic, legal, moral, political, and social values".[33]

Investment arbitral tribunals in the past have acknowledged the existence of the transnational public policy and defined it as:

> "[a]n international consensus as to universal standards and accepted norms of conduct that must be applied in all fora or as a series of fundamental principles that constitute the very essence of the State, with the essential function….to preserve the values of the international legal system against actions contrary to it."[34]

It has been argued that a transnational perspective can help the domestic legal system to broaden a court's approach to public policy. Countries interested in change can embrace the elements of transnational perspective into practices of the international community of nations. It is argued that when courts use a transnational understanding of public policy it could foster a better understanding of domestic jurisprudence and can make the decisions more predictable and enforceable. However, this is a utopian hypothesis based on assumptions and presumptions.

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[33] P. Lalive*, Ordre public transnational (ou réellement international) et arbitrage*, 6 REVUE DE L'ARBITRAGE 3, 329-374 (1986); C.B. LAMM, ET AL., FRAUD AND CORRUPTION IN INTERNATIONAL ARBITRATION 707 (2010).

[34] A RIGO SUREDA, PRINCIPLES, INVESTMENT TREATY ARBITRATION: JUDGING UNDER UNCERTAINTY 99-108 (2012).

Part III.
INTERNATIONAL COMMERCIAL ARBITRATION AND TRANSNATIONAL PUBLIC POLICY

A. International Conventions on the Recognition and Enforcement of Foreign Arbitral Awards

In a globalised economy, enforcement of a foreign award is receiving greater emphasis by the international commercial arbitration community. The two international conventions on enforcement of foreign awards have been enacted in the law by Statutes in England and other common law countries, including India.

The 1985 UNCITRAL Model Law on International Commercial Arbitration provides grounds for refusing recognition or enforcement under Article-36(i)(v)(b). It reads:

> "36(1). Recognition or enforcement of an award, irrespective of the country, in which it was made, may be refused only:
>
> (v)(b) If the Court finds that:
>
> (i) The subject matter of the dispute is not capable of settlement by arbitration, under the law of the state, or
>
> (ii) The recognition or enforcement of the award would be contrary to the public policy of this state."

Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards states,

> "2. 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."

The language of Article V(2)(b) was redrafted multiple times by the Working Group before finalizing that, "The recognition or enforcement of the award would be contrary to the public policy of that country". The literal interpretation of the language of Article V(2)(b) shows "that country" means the country where recognition and enforcement

are sought. The legislative intent of the drafting committee leans towards a national public policy or *ordre public* of the state of the enforcing court.[35] It means that 'public policy' within the meaning of Article V (2)(b) of the New York Convention refers to the public policy of the *lex forum*.[36] However, various courts have used national, international and even transnational interpretations differently to interpret public policy exceptions. It has been interpreted varyingly primarily because the Convention does provide for a definition of public policy. So, the public policy of one country will be different from another country, because of the different standards used by domestic courts to define their national public policy.[37]

B. Transnationality and the Changing Character of Public Policy

Article V (2)(b) explicitly refers to "the public policy of that country, in reference to the country where recognition and enforcement are sought."[38] With regards to identifying the character of public policy, several national jurisdictions recognize that "a mere violation of domestic law is unlikely to amount to the ground to refuse recognition or enforcement on the basis of public policy."[39] On the question of the character of public policy, i.e. universal or transnational, different jurisdictions have taken different

[35] Lionello Cappelli-Perciballi, *The Application of the New York Convention of 1958 to Disputes Between States and Between State Entities and Private Individuals: The Problem of Sovereign Immunity*, 12 THE INTERNATIONAL LAWYER 1, 197 (1978).

[36] See Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court, Australia, 23 March 2012, [2012] FCA 276; IPCO (Nigeria) Ltd. v. Nigerian National Petroleum Corp., High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726; Gao Haiyan & anor v. Keeneye Holdings Ltd. & anor, Court of Appeal, Hong Kong, CACV 79/2011, 2 December 2011. See also ANTON G. MAURER, THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION 54 (2012).

[37] Renusagar Power Co. Ltd. v. General Electric Company & anor., Supreme Court, India, 7 October 1993, 1994 AIR 860; Brostrom Tankers AB v. Factorias Vulcano S.A., High Court, Dublin, Ireland, 19 May 2004, XXX Y.B. Com. Arb. 591 (2005); A v. B & Cia Ltda. & ors, Supreme Court of Justice, Portugal, 9 November 2003, XXXII Y.B. Com. Arb. 474 (2007); Federal Tribunal, Switzerland, 10 October 2011, Decision 5A_427/2011; Agility Public Warehousing CO. K.S.C., Professional Contract Administrators, Inc. v. Supreme Foodservice GmbH, Court of Appeals, Second Circuit, United States of America, 6 September 2012, 11-5201-cv.

[38] See BCB Holdings Limited and The Belize Bank Limited v. The Attorney General of Belize, Caribbean Court of Justice, Appellate Jurisdiction, 26 July 2013, [2013] CCJ 5 (AJ).

[39] See Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd., Federal Court, Australia, 23 March 2012, [2012] FCA 276; Petrotesting Colombia S.A. & Southeast Investment Corporation v. Ross Energy S.A., Supreme Court of Justice, Colombia, 27 July 2011; Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha, Court of Appeal of Paris, France, 16 October 1997; K.M. v. UAB A. Sabonio Žalgirio krepšinio centras, Court of Cassation, Lithuania, 4 November 2011.

approaches. For example, the Indian Supreme Court in *Renusagar* case has observed that "providing a transnational definition of the concept of public policy is unworkable and accepted the principle that public policy in Article V (2)(b) of the New York Convention should be taken to mean the public policy of the enforcement forum."[40]

On the other hand, the Italian courts held that "public policy refers to a body of universal principles shared by nations of the same civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions".[41]

The Russian Federation's Highest Arbitrazh Court has referred to public policy as "constituting universally recognized moral and ethical rules"[42] or "fundamental and universal legal principles of highest imperative nature, of particular social and public significance, and forming the basis of the economic, political and legal system of the State".[43] In Switzerland, the Federal Tribunal in 2006 held that "an award is incompatible with the 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".[44]

India enacted the FARE to give effect to the New York Convention. Section 7 (1) of the FARE provides that:

> "A foreign award may not be enforced under this Act -
>
> (b) if the court dealing with the case is satisfied that:
>
> (ii) the enforcement of the award will be contrary to public policy."

A clarification on the issue was formulated by Indian Supreme Court in the case of *Renusagar Power Co. Ltd. v. General Electric Co.* The court interpreted that "the term

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[40] See Renusagar Power Co. Ltd. v. General Electric Company & anor., Supreme Court, India, 7 October 1993, 1994 AIR 860. See also Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., Court of Final Appeal, Hong Kong, 9 February 1999, [1999] 2 HKC 205

[41] Allsop Automatic Inc. v. Tecnoski snc, Court of Appeal of Milan, Italy, 4 December 1992, XXII Y.B. Com. Arb. 725.

[42] Ansell S.A. v. OOO MedBusinessService-2000, Highest Arbitrazh Court, Russian Federation, Ruling No. VAS-8786/10, 3 August 2010.

[43] Presidium of the Highest Arbitrazh Court, Russian Federation, Information Letter No. 156 of 26 February 2013.

[44] X S.p.A. v. Y S.r.l., Federal Tribunal, Switzerland, 8 March 2006, Arrêts du Tribunal Fédéral (2006) 132 III 389, 395.

'public policy' in Section 7(1)(b)(ii) means the public policy of India". Nicholas Poon argues that, "The State's policy to promote international arbitration must be respected by the courts, but this should not result in the exploitation of arbitration as a medium to circumvent the court's protection of the State's fundamental public policy."[45] In this regard, Redfern and Hunter proposed that "a legitimate public policy for the purpose of setting aside an award must be one which is not only so fundamental to domestic matters, but also to matters with foreign elements."[46]

The Drafting Committee of the New York Convention formulated 'public policy' as "distinctly contrary to the basic principles of the legal system of the country where the award is invoked".[47] New York Convention commentator Van Den Berg was of the opinion that "even if public policy is acknowledged to be 'international', its basis is national".[48] The fundamental question to be answered is whether State's public policy can be contravened for the promotion of arbitration policy, and if not, how to construe a harmonious balance between them.[49] Constructing an equilibrium may not be easy, but striking a balance is a legal necessity.

[45] Nicholas Poon, *Striking a balance between public policy and arbitration policy in international commercial arbitration: AJU v. AJT*, SINGAPORE JOURNAL OF LEGAL STUDIES 185 (2012).

[46] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 423 (4th ed., 2004).

[47] United Nations Commission on International Trade Law OR, Report of the Committee on the Enforcement of International Arbitral Awards, UN Doc. E/2704 and E/AC.42/4/Rev.l. See also JEAN-FRANCOIS POUDRET & SEBASTIEN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 856 (2nd ed., 2007); Mayer & Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Awards*, 19 ARBITRATION INTERNATIONAL 249, 251, 252 (2003).

[48] ALBERT JAN VAN DEN BERG, NEW YORK ARBITRATION CONVENTION 1958 360 (1981).

[49] EMMANUEL GAILLARD & JOHN SAVAGE, FOUCHARD, GAILLARD & GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 1647 (1999); JULIAN LEW, STEFAN KROLL & LOUKAS MISTELIS, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 17-33 (2003).

Part IV.
THE INDIAN EXPERIENCE: THE JUDICIARY'S APPROACH IN *RENUSAGAR CASE* AND THE WAY FORWARD

A. Development of the Jurisprudence on 'Contrary to Public Policy'

The very principle of sovereignty empowers the domestic courts to retain the right to refuse the application of foreign law or recognition or enforcement of a foreign judgment on the grounds of inconsistency with public policy. According to the general rules of private international law, "the law which would ordinarily be applicable under the choice of law rules may be denied application where it is manifestly incompatible with the public policy or *ordre public* of the forum".[50] Any foreign judgment can be refused recognition on the grounds that "such recognition is manifestly contrary to public policy in the state in which recognition is sought".[51]

The public policy exception is everywhere[52] and has grown to develop into an essential element of modern private international law.[53] Alex Mills argues that "As a 'safety net' to choose of law rules and rules governing the recognition and enforcement of foreign judgments, it is a doctrine which crucially defines the outer limits of the 'tolerance of difference' implicit in those rules."[54]

The pattern and approaches of national legal systems using public policy as a ground for setting aside the arbitral awards differ from country to country. However, it is clear that the grounds for setting aside motion against arbitral awards as given by Article 34 of UNCITRAL Model Law and Article V of the New York Convention are very similar in text and context. When the approaches adopted by Common law courts on the application of public policy is studied, students of private international law can see a set of patterns followed by the courts.

In the case of *Oppenheimer v. Cattermole,* it was held that "[English] court will refuse on grounds of public policy to apply a rule of an otherwise applicable foreign law if the

[50] Convention on the law applicable to contractual obligations, opened for signature in Rome on 19 June 1980, Consolidated at OJ C 027, 26.1.1998

[51] Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, OJ L 12, 16.1.2001

[52] See A. Mills, *The Private History of International Law*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 13 (2006).

[53] See Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden) [1958] ICJ Reports 55, K. Lipstein, *The Hague Conventions on Private International Law, Public Law and Public Policy,* 8 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 506 (1959).

[54] Alex Mills, *The Dimensions of Public Policy in Private International Law*, 4 JOURNAL OF PRIVATE INTERNATIONAL LAW 201 (2008).

content of that rule is unacceptably repugnant."[55] A court will refuse enforcement on grounds of public policy if enforcement would be seriously detrimental to national interests, like in the cases of *Foster v. Driscoll*[56] and *Regazzoni v. Sethia.*[57]

The courts may also refuse the application of a foreign *lex causae*, if enforcement can lead to an unacceptable or unjust result in taking into account the particulars of the case. This approach was developed in *Gray (orse. Formosa) v. Formosa*.[58] P. B. Carter commenting on these various patterns' states that,

> "Many of these rules of private international law are marred by a fatal combination of the rigidity of their mandate and the width of their scope. A rigid rule can be acceptable provided that its scope is narrowly and appropriately defined. A rule of broad scope may be acceptable provided it is couched in sufficiently flexible terms. But it is the rigid rule of broad scope that gives rise to a need to escape in particular cases gives rise to the temptation to mount the unruly horse and head for the nearest palm tree."[59]

Coming to civil law systems, the courts have followed a combination of a liberal and flexible approach. The American jurisprudence leaned towards this flexibility from its interpretation of public policy from a liberal perspective in *Parsons & Whittemore Overseas Co. Inc. v Société generale del' Industrie due papier (RATKA) and Bank of America*.[60]

In *Fotochrome Inc. v. Copal Co. Ltd.*[61] the U.S. Court of Appeals court in 1975 adopted a liberal attitude towards arbitration involving strong foreign elements, however, no express reference to Article V (2) (a) was then made "...public policy limitation is to be applied only where enforcement would violate the former state's most basic notions of morality and justice". A similar liberal attitude was taken by Supreme Court of

[55] [1976] A.C. 249, 278
[56] [1929] 1 K.B. 470
[57] [1958] A.C. 301
[58] 7. [1963] P. 259
[59] P. B. Carter, *The Rôle of Public Policy in English Private International Law*, 42 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 1, 1-10 (1993).
[60] 508 F.2d 969 (1974)
[61] 517 F.2d 512 (2d Cir. 1975)

Netherlands in *Société Européenne d'Etudes et d'Entreprises (S.E.E.E.) v. République Socialiste Fédérale de Yougoslavie et autres.*[62] The court said that,

> "when examining whether the enforcement of the award would run contrary to public policy, the judge must abide by the facts as they have been stated in the award, unless the arbitrator behaved so carelessly that for that reason alone the enforcement of the award would be contrary to the public policy of the country where the enforcement is ordered."[63]

B. Public Policy Exception: Experiences of Indian Supreme Court

In India, Foreign Awards (Recognition & Enforcement) Act 1961 ["FARE"] was the first legislation on the enforcement of foreign awards. Section 7 of the FARE was the foundational provision used for the enforcement of foreign arbitral awards in India. The section reads as:

> "Conditions for enforcement of foreign awards. (1) A foreign award may not be enforced under this Act: (b) if the court dealing with the case is satisfied that-
>
> (ii) the enforcement of the award will be contrary to public policy."

The Supreme Court of India in *Renusagar Power Co. Ltd. v. General Electric Co.*, interpreted the term 'public policy' in Section 7(1)(b)(ii) as "being used in a narrower sense and to rely on this ground used the justification that an award's enforcement must invoke something more than a violation of Indian law." The court held that "in absence of a workable definition of 'international public policy' we find it difficult to construe the expression 'public policy in Article V(2)(b) of the New York Convention to mean international public policy."[64] In this case, the Supreme Court further elaborated that "a foreign award's enforcement will be refused on the ground that it is contrary to public policy if such enforcement would be contrary to the fundamental policy of Indian

[62] France, Cour d'appel de Rouen (Court of Appeal of Rouen), 982/82
[63] Original decision from the registry of the Cour d'appel de Rouen, 982/82
[64] Renusagar Power Co Ltd v. General Electric Co 1994 Supp (1) SCR 644.

law; national interests; or justice or morality." In the landmark judgement of *Shri Lal Mahal Ltd v Progetto Grana SPA*,[65] the Apex Court relied on the ***Renusagar's*** narrow interpretation under the FARE to interpret 'public policy' under section 48(2)(b) of the Arbitration and Conciliation Act, 1996 ["Arbitration Act"].[66]

In 2014 the Supreme Court in *ONGC Ltd v Western Geco International Limited*,[67] to term 'public policy' as provided for in Section 34 of the Arbitration Act, pivoted on the "Wednesbury principles of reasonableness" within the phrase "fundamental policy of Indian Law". The court further noted that:

> "[if] on facts proved before them the arbitrators fail to draw an inference which ought to have been drawn or if they have drawn an inference which is on the face of it, untenable resulting in miscarriage of justice, the adjudication even when made by an Arbitral Tribunal… will be open to challenge and may be cast away."[68]

A similar pattern was adopted by Court in the case of *Associate Builders v Delhi Development Authority*.[69] The court ventured into interpreting the term 'public policy' in Section 34 of the Arbitration Act in a wider sense. The perplexing interpretation of the 'public policy' regarding the enforcement of foreign awards received some clarity after the 2015 Amendment. The amendment introduced two new explanations to Section 48(2) of the act, "which sought to regulate the discretion available to the courts while interpreting the terms 'public policy' and 'fundamental policy of Indian law'".[70]

Recently, the Supreme Court in the cases of *Ssangyong Engineering & Construction Co. v. National Highways Authority of India*[71] and *Vijay Karia v. Prysmian Cavi E*

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[65] Shri Lal Mahal Ltd vs Progetto Grano Spa, (2014) 2 SCC 433.

[66] The Arbitration and Conciliation Act, 1996, § 48(2)(b): "(b) the enforcement of the award would be contrary to the public policy of India: Without prejudice to the generality of clause (b) of this section, it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

[67] ONGC Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263.

[68] *Id.*

[69] Associate Builders v Delhi Development Authority, (2015) 3 SCC 49.

[70] The 2015 amendment added a second explanation by which it clarified that "a contravention of the fundamental policy of Indian law will not entail a review on the merits of the dispute."

[71] Ssangyong Engineering & Construction Co. v. National Highways Authority of India, 2019 SCC Online 677.

Sistemi SRL[72] positively reemphasised the decision of Renusagar. However, a change in this approach was seen in the *National Agricultural Cooperative Marketing Federation of India ("NAFED") v. Alimenta S.A.*[73] A three Judges Bench of the Supreme Court in April 2020 ignored the fundamental practice of Indian arbitration law that a trifling contravention of law is not a breach of public policy, but what is mandated is something more that shocks the conscience of the courts. The Supreme Court ruled that:

> "The fundamental policy of Indian law, as has been held in *Renusagar*, must amount to a breach of some legal principle or legislation which is so basic to Indian law that it is not susceptible of being compromised…. Fundamental Policy refers to the core values of India's public policy as a nation, which may find expression not only in statutes but also time-honoured, hallowed principles which are followed by the Courts".[74]

However, these changing patterns need to be construed as a contextual result to the available facts before the Court. What remains clear is that Indian interpretation has relied heavily on the domestic understanding of public policy. This in no way suggests any disapproval to international principles. It also reflects an alternative approach wherein relativist preferences and sovereign interests finds an upper pedestal while interpreting the public policy.

[72] Vijay Karia v. Prysmian Cavi E Sistemi SRL, 2020 SCC Online SC 177
[73] Civil Appeal No. 667 of 2012, delivered on April 22, 2020.
[74] Renusagar Power Co Ltd v. General Electric Co 1994 Supp (1) SCR 644.

Part V.
CONCLUSION

Judge Burrough in 1824 remarked on the alarming unruliness of the public policy doctrine, when he said, “I protest arguing too strongly upon public policy. It is a very unruly horse and once you get astride it, you never know where it will carry you.”[75] There can be no comprehensive definition of what constitutes public policy and what amounts to a contravention of public policy, as the term encompasses both substantive and procedural aspects.[76]

The elusiveness of the term has also led to each jurisdiction formulating its own definition.[77] However, different jurisdictions defining the term have in some or the other way interlinked the key components of the constituting elements of public policy. This has also led to unintended similarities, for instance, illegality or “patent illegality”,[78] and more generally, when the upholding of the award would “shock the conscience”,[79] or is “clearly injurious to the public good”, or “where it violates the forum’s most basic notion of morality and justice”.

Modern commentators on the basis of these underlying similarities have advocated a more nuanced approach to frame a broad definition of international public policy. The term international or transnational public policy consists of “principles that represent an international consensus as to universal standards and accepted norms of conduct that must always apply. This concept is said to comprise fundamental rules of universal justice, jus cogens in public international law, and the general principles of morality accepted by what are referred to as civilized nations.”[80]

The influence of international law on domestic conceptions of public policy has received special attention from private international law scholars. The international attitude of private international law proclaims an international focus on public policy,

[75] Chardson v. Mellish (1824) Bing 229, per Burrough, J.

[76] Report of the U.N. Commission on International Trade Law on the Work of its 18th Session, United Nations Commission on International Trade Law OR, UN Doc. A/40/17, (1985) at para. 270. See also Amaltal Corporation Ltd v. Maruha (NZ) Corporation Ltd [2003] 2 N.Z.L.R. 92 (C.A.) at para. 43.

[77] Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Company [1987] 2 Lloyd's Rep. 246 (C.A.) at 254 [Deutsche], See also INTERNATIONAL LAW ASSOCIATION COMMITTEE ON INTERNATIONAL COMMERCIAL ARBITRATION, INTERIM REPORT ON PUBLIC POLICY AS A BAR TO ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS (London Conference, 2000).

[78] Oil & Natural Gas Corporation Ltd v. SAW Pipes Ltd (2003) 5 S.C.C

[79] Downer-Hill Joint Venture v. Government of Fiji [2005] 1 N.Z.L.R. 554 (H.C.) at para. 80

[80] Herold Goldman, *Public Policy and International Commercial Arbitration*, 26 AMERICAN BUSINESS LAW JOURNAL 5 (1988).

i.e., a court should take into account foreign elements and universally accepted principles when determining if a public policy has been contravened. The domestic understanding of public policy incorporates the element of territoriality of State public policy, because of which an award that offends the public policy of Singapore for being "patently unreasonable" or "clearly irrational"[81] may not found a public policy objection in India.[82] Having a transnational definition would make a uniform platform of deciding factors that would be applied by States while interpreting public policy exceptions. This idea of framing a transnational identity of public policy for smoothness and convenience would certainly be counterproductive. Having a universal definition would subjugate and compromise national understandings.

Creating uniformity in a diverse legal ecosystem would require a number of legal systems to amend and adapt to foreign understandings. Another major impediment for fetching transnationality in the public policy regime is the theoretical limitations to define what would the definition encompass. It would not just derail domestic understanding, but due to its theoretical ineffectiveness make the functioning and interpretation procedurally inane. Therefore, only the domestic courts can be the sole decider to determine whether an act, conduct or event contravenes public policy. Principles of constitutional sovereignty mandate that the State's public policy to be protected in priority as compared to an abstract notion of international public policy.

The differences between national and international conceptions of "public policy" do not appear to be as stark as sometimes supposed. However, the practical experience has shown that these differences are a necessity to maintain the individuality of domestic legal systems. It is also important to recognise that courts can apply public policy, but they cannot create or obviate their domestic public policy norms to satisfy international norms.

The power to determine the constituents of public policy should be the sole prerogative of domestic courts. This construction and deconstruction of public policy should be construed only by taking into account the localized interests of the State parties. Infusion of any transnational identity to replace domestic understanding would

[81] AG for Canada v. SD Myers Inc [2004] 3 F.C.R. 368 (F.C.) at para. 56
[82] Sui Southern Gas Co Ltd v. Habibullah Coastal Power Co (Pte) Ltd [2010] 3 S.L.R. 1 (H.C.) at para. 48

certainly lead to further pliability of its structure. It may not be easy to regulate an unruly horse such as public policy.[83] However, as Lord Denning once remarked "with a good man in the saddle, the unruly horse can be kept in control".[84]

[83] John Shand, *Unblinkering the Unruly Horse: Public Policy in the Law of Contract*, 30 CAMBRIDGE LAW JOURNAL 1, 144 (1972).
[84] Enderby Town Football Club Ltd v. The Football Association Ltd [1971] Ch. 591 (C.A.) at 606, 607.

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION

ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. 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.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforce-

ment shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. 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.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (*e*), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive

any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting

State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

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