International Journal of Law
ISSN: 2455-2194; Impact Factor: RJIF 5.12
Received: 01-11-2020; Accepted: 15-11-2020; Published: 01-12-2020
www.lawjournals.org
Volume 6; Issue 6; 2020; Page No. 238-240

Public policy versus arbitration: Proposing the see-saw theory to achieve harmonization

Parvathi Pradeep
Advocate, High Court of Kerala, Kerala, India
Assistant Professor, Department of Law, Nehru Academy of Law, Kerala, India

Abstract
Public policy is an unavoidable factor in any jurisdiction, as it forms the cornerstone of a legal system. At the same time, giving enormous importance to public policy can erode the legal system itself, especially alternative dispute resolution. Hence it can be defined as a "necessary evil" or a "double-ended sword." The idea of this paper is to introduce a theory which aims at striking a balance or harmonization Between Public policy and the enforcement of foreign arbitration award. The theory is supported by a comparative study, which concludes that advanced countries like USA have been successful in taming this unruly horse.

Keywords: public policy, foreign arbitration award, see-saw

Introduction

Let's assume a situation where public policy is no more a defense to enforce a foreign arbitration award. The result has both positive as well as a negative effect. The positive effect is that such jurisdiction will flourish as an arbitration hub on the other hand it is worrisome because any foreign award will get enforced without being affected by public policy. Public policy is nothing but the total representation of certain ideals and aspirations of a community and it varies from jurisdiction to jurisdiction. So, enforcing a foreign award blindly without taking into account the public policy of that Nation would ultimately lead to protests by citizens.

Now let's take another situation where public policy is given high priority and wide interpretation. The result is every foreign arbitration award will be subjected to judicial intervention and it will have to cross a big barrier to get enforced; consequently, it will retard the growth of arbitration.

Public policy is a shield cum sword. It is a shield because it's a good defense against arbitration awards that tend to shake certain unwritten yet core principles that form the foundation of a Nation's legal system. It is a sword because; it can hamper the growth of alternative dispute resolution systems in the country. In other words, the public policy when given a wide interpretation is no different from an unruly horse [1].

As I discussed earlier, USA & France are leading hubs of international arbitration, because of public policy that is oriented towards arbitration and enforcement. On the other hand in India up till 2015, the approach favoring public policy has retarded the growth of arbitration. The result of the comparative study is that the extreme application of public policy is injurious to the growth of arbitration. At the same time, we must acknowledge the fact that no jurisdiction can completely ignore public policy while enforcing the arbitration award.

The need of the hour is to establish a harmonious relationship between "public policy" and "arbitration"; a balance between two must be established to create a sustainable environment for arbitration to flourish. This need for balance and how it can be achieved can be better explained in the form of a theory called "seesaw" theory.

Proposing "The Seesaw Theory"

The working principle of the seesaw is the center of balance. If equal weights are placed at either side of the seesaw, balance is attained.

But if one side of the seesaw is heavy than the other side, balance is lost and side which is heavy get grounded while the other side gets lifted high. The same principle can be applied in the tug of war between public policy & arbitration.

Hypothetically let's place arbitration on one side and public policy on the other side of the seesaw and assume three situations.

Situation 1: When Public Policy Weighs More

If public policy is given a wide interpretation and undue importance then the seesaw gets unbalanced, consequently harmony is lost.

Theoretically, the arbitration award will be subjected to judicial intervention and it will have to cross a big barrier set by public policy to get enforced. The public policy would then at as a web fending the enforcement of the new policies in the award.

The party against whom an award is passed would prevent or delay enforcement by invoking public policy as a defense in Court.

Eventually, people will lose their faith in the arbitration mechanism which ultimately would retard the country's endeavors to become an arbitration hub. (Fig 1)

[1] P. Rathinam v. Union of India, (1994) 3 SCC394; Union of India v. Shri Gopal Chandra Mishra, AIR 1978 SC 694;Gherulal Parakh v. Mahadeo Das, (1959)Supp (2) SCR 206

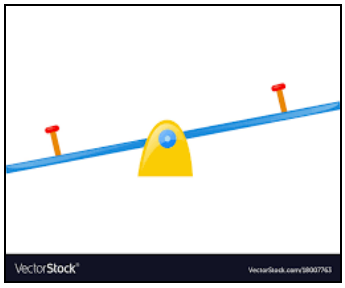

Fig 1: Public policy Arbitration

Situation 2: When public policy is weak

Now let's consider the situation was the arbitration side is given more weightage and the public policy side is weak. The consequence will be again a loss of balance and every award will get enforced on national soil which will eventually weaken its legal system because public policy is the notion that cements the foundation of a nation's legal system and if the public policy gets weakened it will eventually weaken the legal system. Also, when arbitration is given more importance than the public policy it simply makes the judicial system as a mere spectator. Hence public policy is a necessary evil. It is a tool vested with courts to oversee the arbitration process. The court is vested with the solemn duty to '*preserve the integrity of the process, and to see that it is not abused*" [2]. Though the arbitration process allows party autonomy to a great extent; it cannot be used in an abusive way to enforce something illegal or immoral. Court has the inherent power to check and prevent a private agreement from evading judicial scrutiny and compromising the integrity of the legal system. (Fig 2)

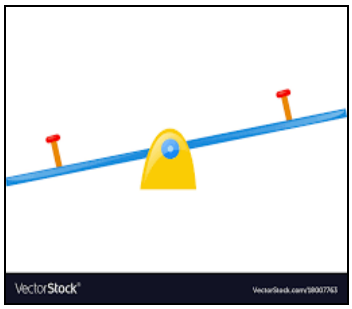

Fig 2: Arbitration Public policy

Situation 3: When public policy & arbitration are given the same weightage:

When both are given the same weightage then the 'seesaw' will attain a balance. The benefit of this harmonious relationship is that a country can flourish as an arbitration hub without compromising on its public policy. (Fig3)

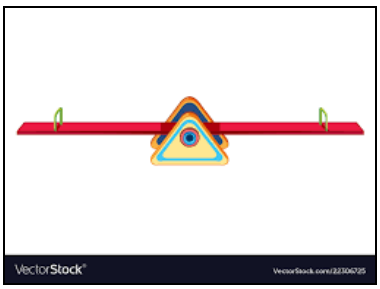

Fig 3: Arbitration Public policy

In the form of a see-saw, we assumed a hypothetical scenario wherein, we consider that when either of them is given extreme importance, a substantial crisis has occurred which leads to an imbalance in the expected outcomes. On the other hand, when both are given the same weightage a harmonious balance is attained.

An approach is a way through which a person can understand and explain a particular phenomenon. Harmonious relationship as mentioned above can be attained by reframing the existing legal framework on arbitration law or by creating a new law which is built upon this principle. How to attain the balance can be explained through 'legislative-approach' and 'judicial-approach'.

Legislative Approach

The legislators while drafting or amending arbitration law must weigh and see whether the law is drafted in such a way that 'see-saw' is balanced. It's upon the lawmakers to define what public policy is and to provide specifically what all it includes. A vague definition of public policy or giving a wide interpretation of it would defeat the purpose for which alternative dispute resolution mechanisms are established; also it will lead to multiple judicial interpretations causing cloud cast. The best example to illustrate this point is the definition of public policy contained in section 34 of Act, 1996 which states that the court may set aside arbitration award if it conflicts with the "public policy of India". Now, what constitutes the public policy of India was not defined and as a result, multiple judicial interpretations came to existence. On the other hand, a well-defined public policy removes the cloud cast and aids the judiciary to apply the law without any confusion. This clarity is visible post-Amendment Act of 2015, which has narrowed down the wide import of the term public policy, and how matters were virtually being heard *de novo* on the merits to examine whether they violated the fundamental policy of Indian law. Further, Explanation No. 1 to Section 34 explains about fraud and corruption. The arbitral award should be in line with the provisions of section 75 or 81; if the award obtained without caring for these sections. It will contravene the FP, or it conflicts with the most basic notions and morality of justice. Furthermore, legislature by introducing Explanation No. 2 to Section 34 has made it clear that the test as to whether there is a violation of the FP of law shall not allow reviewing the merits of a dispute. The short amendment Act of 2015 narrowed the expanse of public policy and hence reduced the scope of judicial intervention which is precisely the objective of Article 5 of the Model Law according to which "*no Court shall intervene in arbitration proceedings except where provided by law.* "Altogether there is no doubt that the Amendment Act of 2015 has given a second chance for India to flourish as an arbitration hub.

Judicial Approach

Public policy is a notion which existed even before modern law was established. It can be called as the general will of the people of a country. Therefore, the court has the inherent power to apply public policy beyond the definition given in law. But such an approach by Court will defeat the objective of the law. This is evident in the *ONGC* v. *Saw pipes* [3] case where the Supreme Court interpreted public policy of India

[2] Soleimany v. Soliemany, (1999 QB 785)

[3] Oss NGC v. Saw pipes, (2003) 5 SCC 705

widely which ultimately led to reviewing the merits of the award. The Court ruled that an award is patently illegal if it is in contravention to the substantive laws of India. Court then went on expanding the meaning of the phrase public policy of India, citing the need for giving a wider meaning, as the notion of public policy is a matter that affects the public good and the public interest. Violations of statutory provisions occur in the arbitral awards. But, it can't be regarded as a violation of public interest. Further, the Court held that enforcement of an award can be refused if it is against the 4 elements mentioned in the Act (FP of Indian law, the Int of Ind & jus, and morality). This decision was severely criticized as it has opened the floodgates, giving party against whom an award was passed, a wider scope of challenging arbitral awards. Post 246th law commission report, which emphasized the importance of arbitration as a mechanism to resolve disputes without being affected by complex technicalities, and after the Amendment Act of 2015, the Court took a U-turn and narrowed public policy and reiterated enforcement policy as established in *BALCO* v. *Kaiser Aluminum* [4]. But it has been noted that again the approach of the Supreme Court of public policy is wavering, the recent judgment in the matter of *NAFED* v. *Alimenta S.A* [5] pronounced on April 2020 of Apex Court has reversed the trend in public policy. In this matter, the Court barred enforcement of a foreign award on the ground that the violation of Indian law and export restrictions constitutes a violation of the public policy of India.

When it comes to legislative approach the challenge is to define and describe the components of public policy. It is nearly impossible to define public policy, but the legislature can narrow the scope of public policy by identifying and including only essential components of public policy such as those affecting "sovereignty, integrity, security of the country and fundamental interests of society."

For the judicial approach, the major challenge is to impart training & proper education to judges and arbitrators so that their decisions are in sync with the objective of the law. When public policy is raised as a defense the Court must keep in mind the interest and need for protection of interest of foreign investors.

If both these challenges are addressed, a balance can be attained. Thus the see-saw theory proposes to achieve a balance between arbitration & public policy through judicial and legislative approaches.

Conclusion

There is no doubt that public policy is similar to an unruly horse [6]. A comparative study on countries like U.S.A and France has shown that these jurisdictions were successful in taming this unruly horse. In India, before 2015, the situation was that public policy was used as a weapon by the party against whom the award was passed to approach Court to prevent enforcement. This is because there were no fixed criteria for defining the phrase public policy. Therefore, its interpretation has been wavering and conflicting judicial decisions and frequent judicial interventions have retarded India's growth as an international arbitration hub. In other words, both legislative and judicial approach before the Amendment Act of 2015 was not favoring the growth of arbitration and was not in sync with Model law. But, post-2015, both judicial and legislative approach has been aligned towards enforcement policy, and a balance is attained. If India follows this trend it will soon flourish as a favorable arbitration seat in South East Asia. But if we deviate from the existing trend and revert to the situation before 2015, the investors will lose their faith in India's arbitration seat.

The possibility of deviation isn't a myth because an ambiguity exists as to what constitutes "fundamental policy of India", "justice & morality". These components of public policy are highly subjective and are subject to judicial interpretation which can give rise to cloud cast again. Also, the recent judgment of apex court in *NAFED* v. *Alimenta S.A* [7]. Supports the argument that stability hasn't been attained and the judicial approach on public policy is wavering. *The stand of Apex court has brought back the cloud cast on an interpretation of the public policy. This* unprecedented approach transgresses the permissible degree of interference in construing a foreign award and expanding the scope of public policy. The Court has not only overlooked the element of discretion but certainly failed to honor the legislative intent behind the Amendment Act of 2015 and ultimately the objective of the New York Convention. Without any confusion, it can be concluded that the decision has opened floodgates once again as in the *ONGC* v. *Saw pipeline* [8], and balance hasn't been attained yet. The unpredictable judicial approach and lack of uniform position in the matter of public policy is the biggest threat to India's growth as arbitration hub; the author emphasizes on reinforcing the need for a uniform position in the subject.

References

1. Nafed V. Alimenta SA. Civil appeal no, 2012, 667.
2. ONGC V. Saw Pipeline. 2003; 5:705.
3. Rathinam PV. Union of India. 1994; 3:394.
4. Union of India v. Shri Gopal Chandra Mishra, AIR, 1978, 694.
5. BALCO v. Kaiser Aluminum. 2012; 9:552.

[4] BALCO v. Kaiser Aluminum, (2012) 9 SCC 552
[5] NAFED v. Alimenta S.A, Civil appeal no: 667 of 2012
[6] P.Rathinam v. Union of India, (1994) 3 SCC394; Union of India v. Shri Gopal Chandra Mishra, AIR 1978 SC 694;Gherulal Parakh v. Mahadeo Das, (1959)Supp (2) SCR 206
[7] NAFED v. Alimenta S.A, Civil appeal no: 667 of 2012
[8] ONGC v. Saw pipeline, (2003) 5 SCC 705