

CRITICAL EXAMINATION OF THE PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION AND ITS IMPACT ON INTERNATIONAL COMMERCIAL ARBITRATION

Introduction

The New York Convention seeks to provide common legislative standards for the recognition of arbitration agreements and court recognition and enforcement of foreign arbitral awards.¹ It provides uniform standards to enforce arbitral awards.²

Article V(2)(b) of the Convention provides for the public policy exception, allowing a state to refuse enforcement of an international arbitral award if it contravenes the public policy of the enforcing state. Public policy relates to the most basic notions of morality and justice. A set of economic, legal, moral, political, and social values considered fundamental by a national jurisdiction.³

This essay employs doctrinal legal research, examining the public policy exception through case law and scholarly writings. It discusses the legal framework, scope and application of the public policy exception, and its impact on international commercial arbitration.

The Legal Framework of the Public Policy Exception

The public policy provision is intentionally vague, therefore granting states flexibility to protect fundamental national interests. The Convention does not specify whether public policy refers to domestic, international, or transnational principles, leading to varied interpretations.⁴

¹ Githu Muigai, *Arbtration Law and Practice in Kenya* (Nairobi: LawAfrica Publishing (K) Ltd 2011).

² May Lu, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Analysis of the Seven Defences to Oppose Enforcement in the United States and England.' (2006) 23 *Arizona Journal of International & Comparative Law*.

³ *Kampala International University v. Housing Finance Co. Ltd.* Arbitration Causes No. 0038 and 0046 of 2024 (Consolidated) (Arising from an Arbitral Award handed down in Kenya on 17th September, 2019). [25] 28

⁴ Loukas A Mistelis, 'Arbitration and Public Policy' in Stefan Kroll et al. (eds), *International Arbitration and Public Policy* (Juris Publishing 2010) 1-20.

The International Law Association in a 2002 Report on Public Policy recommends a narrow interpretation, limiting the exception to violations of fundamental principles of the enforcing state's legal system, such as due process or prohibitions on corruption.⁵ The narrow interpretation of the exception follows from the general purpose of The New York Convention to promote the enforcement of foreign arbitral awards and the corresponding obligation undertaken by contracting states under Article III.⁶

This balances state sovereignty with the need for international comity. It recognizes the varying national values among countries, and consequently safeguards core national values by allowing states to uphold mandatory domestic legal principles and laws.

The Scope and Application of the Public Policy Exception

The extent to which perceived breaches may constitute violations of public policy, is a question that necessarily differs from jurisdiction to jurisdiction.⁷ To this end, the distinction between domestic and international public policy is critical. International public policy is narrower, encompassing only universally accepted principles, such as prohibitions on bribery or human rights violations.⁸

The purpose of Article V(2)(b) is designed as a 'safety valve' to protect core national values, narrowly construed to preserve the pro-enforcement bias of the convention. In **Parsons & Whittemore Overseas Co. v. Societe Generale**,⁹ the court concluded that; *"the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice."* This approach has been consistently followed in decisions like **Great Lakes Energy v. MSS XSABO Power Ltd**,¹⁰ and recently **Kampala International University v. Housing Finance Co. Ltd**,¹¹ where

⁵ International Law Association, *Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*. (2002).

⁶ *Kampala International University v. Housing Finance Co. Ltd*. (n 3) [30] 30

⁷ *ibid* [25] 60

⁸ Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration* (7th edn, Sweet & Maxwell 2022)

⁹ 508 F.2d 969 (2d Cir. 1974)

¹⁰ Miscellaneous Cause No. 0017 of 2021

¹¹ Arbitration Causes No. 0038 and 0046 of 2024 (Consolidated) (Arising from an Arbitral Award handed down in Kenya on 17th September, 2019)

Mubiru J, held that it should be confined to violations of “the most basic notions of morality and justice”.

Some jurisdictions, however, have adopted broader interpretations. For example, in **Hilmarton Ltd v. OTV**,¹² the French court upheld enforcement despite allegations that the contract involved illicit payments.

The New York Convention’s failure to include what constitutes a violation of public policy results in some national courts’ resistance in enforcing a foreign arbitral award based on the award’s violation of that nation’s domestic public policy.¹³ This varied interpretation and application create a major obstacle to the enforcement of arbitral awards internationally.¹⁴

The Impact of the Public Policy Exception.

1. Uncertainty and inconsistency.

The ambiguity of the public policy exception undermines the certainty and predictability in arbitration outcomes. These are acceptable principles that govern international trade relations under the WTO multi-lateral trade system, too, for example.

Parties to transactional documents prefer arbitration for its neutrality and finality, but divergent judicial interpretations create an antithesis to this. This divergence can be seen, for instance, in the **Parsons and Whittemore**, and the **OTV** cases (supra) due to differing public policy thresholds. This inconsistency can erode confidence in arbitration as a reliable dispute resolution mechanism.¹⁵

The use of the exception, more recently, has also morphed into a tool for delay. This is because its vague nature allows award debtors to oppose enforcement on public policy grounds. In **KIU v. Housing Finance Co. Ltd**,¹⁶ for example, the respondents pleaded

¹² Cour de Cassation, France, 23 March 1994

¹³ Kurkela MS and Snellman H, *Due Process in International Commercial Arbitration* (Oceana Publications 2005) 1, 11.

¹⁴ Paulsson J, ‘The New York Convention in International Practice: Problems of Assimilation’ in Marc Blessing (ed), *The New York Convention of 1958* (ASA Special Series No 9, 1996).

¹⁵ Born GB, *International Commercial Arbitration* (3rd edn, Kluwer Law International 2021), p.3744

¹⁶ *Kampala International University v. Housing Finance Co. Ltd.* (n 3) [25] 26

that it had, till the point of case determination, been unable to enforce the award in Kenya, nearly six years since the award was handed down; the enforcement was being opposed on public policy grounds.

2. Balancing sovereign and global commercial obligations.

The exception allows states to protect national interests such as anti-corruption laws or human rights standards. However, overuse risks a limited or narrow outlook, as seen in cases where domestic policy overrides international norms.

This not only risks neglecting the narrow approach of the exception to fundamental principles of justice and not minor regulatory violations, as espoused in cases like **Renusagar Power Co. Ltd v. General Electric Co.**,¹⁷ but also sacrifices global commerce and international trade obligations at the altar of national commerce and sovereignty. This fails at striking a balanced approach.

3. Chilling effect on arbitration.

The overuse of the Public Policy exception strips international commercial arbitration of its preferred attributes. This is due to the fear of non-enforcement. Despite International laws like the UNCITRAL Model Law,¹⁸ aligning with the narrow approach, national courts continue to exercise a discretion bordering a protectionist tendency. This, Mistelis argues, is particular in jurisdictions with less-developed arbitration frameworks.¹⁹

Conclusion

The public policy exception under the New York Convention is wide; its ultimate definition has eluded both the international legal regime and domestic legislations. Redfern and Hunter write that: “Public Policy is a very unruly horse, and once you get astride it, you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.”²⁰ Looking at the broader interest of honesty and fair dealing

¹⁷ 1994 AIR SC 860.

¹⁸ *UNCITRAL Model Law on International Arbitration* (United Nations Commission on International Trade Law, 1985, with Amendments as adopted in 2006)

¹⁹ Loukas A Mistelis, ‘Arbitration and Public Policy’ in Stefan Kroll et al. (eds), *International Arbitration and Public Policy* (Juris Publishing 2010) 1-20.

²⁰ Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration* (7th edn, Sweet & Maxwell 2022) pp 463; also see *Richardson v. Mellish* (1824) 2 Bing 229, at 252

in trade, establishing a uniform definition would create a high level of certainty in International commercial transactions.

References

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