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Critically Examining the Public Policy Exception under the New York Convention and Its Impact on International Commercial Arbitration.

1.1 Introduction and Methodology

This paper employs a doctrinal legal methodology, examining legal texts, international conventions, and judicial precedents to analyze the scope and application of the public policy exception under Article V(2)(b) of the 1958 New York Convention.[1] The study pays special attention to how courts in different jurisdictions interpret this provision and explores its implications on international commercial arbitration. Focus is placed on comparative perspectives, with reflections on the Ghanaian legal system's position within this global framework. The core concern is how the interpretation of "public policy" affects the enforcement of arbitral awards, whether it serves as a legitimate safeguard for national values or an avenue for judicial overreach.

1.2 Judicial Interpretations and International Perspectives

In general, arbitration-friendly jurisdictions, such as France, Switzerland, the UK, and the US, have adopted a narrow construction of the public policy exception. In *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA)*, the U.S. Court of Appeals emphasized that mere incompatibility with domestic interests is insufficient to invoke public policy.[2] Similarly, in *Hebei Import & Export Corp v. Polytek Engineering Co Ltd*, the Hong Kong Court of Final Appeal reaffirmed a narrow approach to public policy to uphold predictability in international arbitration. [3]

In contrast, courts in India and under EU law have adopted broader interpretations. The Renusagar case held that public policy includes national economic interests and international comity. In *Eco Swiss v. Benetton*, the European Court of Justice considered a violation of EU competition law as

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[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) https://www.newyorkconvention.org/english Article V(2)(b); *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.

[2] 508 F.2d 969 (2d Cir. 1974)

[3] [1999] HKCFA 40

grounds to refuse enforcement, treating such laws as part of European public policy.[4]

1.3 Ghana's Perspective

Ghana became a signatory to the New York Convention on 30 May 1968 and ratified it on 9 April 1968.[5] The Convention entered into force in Ghana on 8 July 1968, and its enforcement mechanisms are embedded in the Alternative Dispute Resolution Act, 2010 (Act 798). Section 59(3)(b) of the Act echoes the public policy exception. Ghanaian courts have traditionally upheld international arbitration awards unless there is a clear breach of fundamental legal norms or public morality. However, a defined judicial approach to the scope of "public policy" remains underdeveloped, leaving room for future jurisprudential refinement.

Drawing on international best practices, Ghana can enhance its arbitration-friendly status by adopting a restrictive and clearly defined interpretation of public policy, preventing abuse and promoting certainty in cross-border transactions.

1.4 Analysis and Implications

The inconsistent global application of the public policy exception in arbitration presents significant challenges to the predictability and reliability of arbitral outcomes. This inconsistency encourages forum shopping, as parties may seek jurisdictions with more favorable interpretations of public policy. Narrow interpretations of the exception serve to uphold the finality and sanctity of arbitration awards, minimizing judicial intervention and fostering confidence in the arbitral process. Conversely, overly expansive or vague constructions of public policy risk being exploited for political, ideological, or economic objectives, thereby undermining the neutrality of arbitration.

For Ghana, the judiciary faces the delicate task of safeguarding national interests while maintaining fidelity to its international commitments under treaties such as the New York Convention. Striking this balance requires a principled yet pragmatic approach. Adopting a harmonized standard, ideally influenced by interpretations under the UNCITRAL Model Law, would not only enhance consistency in judicial review of arbitral awards but also reinforce Ghana's

[4] (C-126/97) [1999] ECR I-3055

[5] https://www.addleshawgoddard.com/en/insights/insights-briefings/2022/africa/corporate-crime-africa-update/enforcement-of-foreign-arbitral-awards-ghana/

reputation as an arbitration-friendly jurisdiction.[6] Such alignment is crucial for boosting investor confidence and promoting Ghana as a viable destination for foreign direct investment and cross-border commercial arbitration.

1.5 Conclusion

The public policy exception under Article V(2)(b) remains a double-edged sword. It safeguards fundamental national values but also threatens the uniform enforcement of arbitral awards when applied too broadly. Ghana, like many jurisdictions, should work toward judicial clarity and minimal intervention, aligning with transnational public policy norms while safeguarding its sovereign interests. Doing so will reinforce Ghana's reputation as a reliable seat for international arbitration.

1.6 Bibliography

1.6.1 Statutes

1. New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, 330 UNTS 38.
2. UNCITRAL Model Law on International Commercial Arbitration, UNGA Res 40/72 (11 December 1985), as amended by UNGA Res 61/33 (4 December 2006).
3. Ghana's Alternative Dispute Resolution Act, 2010 (Act 798)

1.6.2 Cases

1. Parsons & Whittemore Overseas Co. Inc. v Société Générale de l'Industrie du Papier (RAKTA) 508 F.2d 969 (2d Cir. 1974)
2. Hebei Import & Export Corp v Polytek Engineering Co Ltd [1999] HKCFA 40
3. Eco Swiss China Time Ltd v Benetton International NV (C-126/97) [1999] ECR I-3055
4. Renusagar Power Co. Ltd v General Electric Co. (1994) AIR 860 (SC)

[6] UNCITRAL Model Law on International Commercial Arbitration, UNGA Res 40/72 (11 December 1985) as amended by UNGA Res 61/33 (4 December 2006), is a subsidiary body of the UN General Assembly that aims to facilitate international trade and investment by promoting the progressive harmonization and modernization of international trade law. https://uncitral.un.org/

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