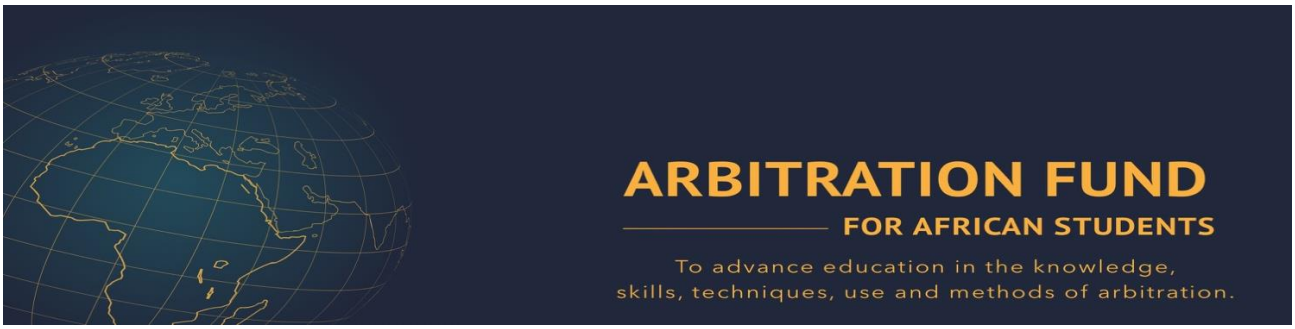

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Introduction

The efficacy of international commercial arbitration as a preferred dispute resolution mechanism hinges significantly on the predictable recognition and enforcement of arbitral awards across national borders. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention (NYC), stands as a cornerstone in facilitating this predictability. However, Article V(2)(b) of the NYC introduces a critical safeguard: the public policy exception, allowing national courts to refuse enforcement if doing so would violate their fundamental public policy. This essay critically examines the scope and impact of this exception on international commercial arbitration, with a particular focus on its application and interpretation within Tanzania's unique legal landscape.

The Public Policy Exception under the New York Convention

Article V(2)(b) of the New York Convention stipulates that recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and

enforcement is sought finds that "the recognition or enforcement of the award would be contrary to the public policy of that country"[1]. This provision, alongside Article V(2)(a) concerning non-arbitrability, grants domestic courts a limited discretion to decline enforcement, even when all other conditions for recognition are met.

The concept of "public policy" within this context is notoriously difficult to define precisely, often being described as an "unruly horse"[2]. It is generally understood to encompass the fundamental principles of justice, morality, and economic order that are essential to the forum state's legal system. Crucially, courts globally have largely adopted a restrictive interpretation of this exception[3]. This narrow approach is essential to uphold the pro-enforcement bias of the New York Convention, preventing domestic courts from reopening the merits of an arbitral award under the guise of public policy concerns. A broad interpretation would undermine the finality of arbitral awards and reintroduce the very uncertainties and parochialism that the Convention sought to eliminate[4].

The rationale behind the restrictive interpretation is twofold: firstly, to respect party autonomy, as parties freely choose arbitration as their dispute resolution mechanism; and secondly, to promote efficiency and predictability in international trade, by ensuring that arbitral awards are not easily overturned[5]. While the contours of public policy remain inherently national, international arbitration jurisprudence has evolved to suggest that only a violation of the forum's "most basic notions of morality and justice" or "international public policy" should trigger the exception, rather

[1] United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article V(2)(b), New York, 10 June 1958.
[2] Burroughs J, *Richardson v Mellish* (1824) 2 Bing 229, 252 (often quoted in public policy discussions).
[3] Gary Born, *International Commercial Arbitration* (3rd ed, Kluwer Law International 2021) 3907.
[4] Ibid.
[5] *The Public Policy Exception to the New York Convention on the Recognition and Enforcement of Arbitral Awards*, (The Ohio State University Law Journal, Vol. 64, Issue 4, 2003).

than mere breaches of ordinary domestic law or procedural irregularities that do not offend fundamental principles[6].

Impact on International Commercial Arbitration

The public policy exception, despite its narrow interpretation, represents the ultimate safety valve for national legal systems. Its potential impact on international commercial arbitration is significant. If applied expansively, it can negate the advantages of arbitration, such as finality, neutrality, and efficiency, by allowing extensive judicial review of awards. This would lead to "arbitration-unfriendly" jurisdictions, deterring foreign investment and commercial activity. Conversely, a consistently narrow application fosters confidence in the international arbitration system, encouraging parties to opt for arbitration knowing their awards will be enforced.

The challenge lies in balancing the legitimate need for states to protect their fundamental legal and moral order with the imperative of promoting cross-border trade and dispute resolution. In practice, the impact manifests through judicial decisions that define the scope of public policy in their respective jurisdictions. This creates a spectrum, with some states adopting a highly restrictive view (e.g., often seen in civil law jurisdictions that distinguish between internal and international public policy) and others, though fewer, occasionally exercising a broader discretion. The goal for the international arbitration community is to encourage uniformity in applying a truly restrictive approach to avoid "public policy tourism" – where parties seek to enforce awards in jurisdictions known for their lax public policy defences[7].

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[6] *Parsons & Whittemore Overseas Co. v. Société Générale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974) (seminal US case adopting a narrow interpretation).

[7] Fifi Junita, *Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms*, MIMBAR HUKUM Volume 25, Nomor 1, Februari 2013, Halaman 138-150.

Tanzania's approach to the New York Convention and the public policy exception presents a unique case study. Tanzania ratified the New York Convention on January 12, 1965[8]. However, a critical aspect of Tanzanian legal practice, rooted in its dualist legal system, is that international treaties, even if ratified, do not automatically become part of municipal law unless explicitly incorporated through an Act of Parliament[9]. Historically, the New York Convention was not domesticated into Tanzanian law, meaning its provisions were not directly binding on Tanzanian courts as domestic law. Instead, the Arbitration Act, Cap 15, Revised Edition 2002, (now repealed and replaced) incorporated the **Geneva Protocol of 1923 and the Geneva Convention of 1927[10]**, making these the primary instruments for the enforcement of foreign arbitral awards.

This situation shifted significantly with the enactment of the **Arbitration Act No. 2 of 2020** (the "Arbitration Act 2020"). This modern legislation, which replaced the outdated 1931 Act, explicitly provides for the recognition and enforcement of both domestic and foreign arbitral awards[11]. Crucially, Section 78(1)(d) of the Arbitration Act 2020 lists as a ground for refusing recognition and enforcement that "the recognition or enforcement of the award would be contrary to the public policy of Mainland Tanzania"[12]. This new provision directly mirrors Article V(2)(b) of the New York Convention, signaling a legislative intent to align with international best practices, despite the non-domestication of the Convention itself.

While specific Tanzanian court decisions explicitly detailing the application of the public policy exception under the 2020 Act are still emerging, the general trend in Tanzanian courts concerning

[8] *Ratification - United Republic of Tanzania*, The New York Arbitration Convention, available at https://old.newyorkconvention.org/implementing+act+-+united+republic+of+tanzania.
[9] Wilbert Kapinga, *Arbitral Dispute Resolution Legal Framework in Tanzania*, Simmons & Simmons Publication (2012).
[10] Section 30 of the Arbitration Act, Cap 15, Revised Edition 2002 (Repealed by Arbitration Act 2020).
[11] Arbitration Act No. 2 of 2020, Part XI, ss. 73-81.
[12] Arbitration Act No. 2 of 2020, s. 78(1)(d).

enforcement of foreign awards suggests a cautious but ultimately pro-enforcement stance, particularly where the award meets procedural fairness standards. The case of *TANESCO v. Independent Power Tanzania Limited (IPTL)*, though largely dealing with issues of jurisdiction and the seat of arbitration, saw the Court of Appeal of Tanzania uphold the High Court's decision to enforce an ICC award, indicating a practical inclination towards upholding arbitral awards[13]. The Arbitration Act 2020 further solidifies this by limiting judicial intervention and emphasizing party autonomy, subject to public interest safeguards[14].

However, the Act also introduces provisions that could influence public policy considerations, particularly concerning disputes related to natural wealth and resources. Section 60 of the Arbitration Act 2020 mandates that for such disputes, the seat of arbitration must be in Mainland Tanzania, and the governing law must be Tanzanian law[15]. While this does not directly invoke the public policy exception for enforcement, it reflects a strong national policy interest in a specific sector, which could indirectly inform judicial interpretations of public policy if an award arising from such a dispute (arbitrated abroad or under foreign law) were to be presented for enforcement in Tanzania. Any award contravening these specific domestic mandates, especially those touching upon sovereignty or national economic interests, might face a public policy challenge.

Conclusion

The public policy exception under the New York Convention serves as a vital yet controversial safeguard in international commercial arbitration. Its careful and restrictive application is

[13] *Tanzania Electric Supply Company Limited (TANESCO) v. Independent Power Tanzania Limited (IPTL)*, High Court of Tanzania, Commercial Case No. 8 of 2011 (affirmed by Court of Appeal).
[14] Arbitration Act No. 2 of 2020, s. 5.
[15] Arbitration Act No. 2 of 2020, s. 60.

paramount to upholding the Convention's pro-enforcement policy and the broader predictability of international dispute resolution. Tanzania, while historically unique in not domesticating the New York Convention, has taken a significant step forward with the Arbitration Act 2020. By explicitly incorporating the public policy exception into its domestic law in terms mirroring the NYC, Tanzania signals its commitment to modern arbitration practices. The challenge for Tanzanian courts will be to interpret this exception restrictively, in line with international best practices, to ensure that it acts as a genuine safeguard against fundamental injustice, rather than a broad tool for re-litigating the merits of arbitral awards, thereby reinforcing Tanzania's position as a reliable jurisdiction for international commercial engagement.