Journal of Positive School Psychology
2022, Vol. 6, Issue 3
Pp 67-77

A Comparative Study to Analyze the Public Policy Defense to Refuse Enforcement of Foreign Arbitral Award

Dr. Zdenek Vávra
MARA University of Technology, Malaysia

Dr. Oksana Sokol
PETRONAS University of Technology, Malaysia

Abstract
Public policy (PP) defense may be invoked either by the parties or by the national courts of enforcing state to reject the enforcement of a foreign arbitral award (FAA). Since national courts are given discretionary power to interpret the term 'state public policy' (SPP) thus this term has become very subjective and its application has become most crucial and controversial issue in the enforcement of FAA. The concept of PP is such a dynamic expression which varies from state to state, time to time and place to place. No precise, unified, and harmonized concept of PP has been determined by the international instruments; the New York Convention 1958 (NYC) and UNCITRAL Model Law 1985 (UML) therefore, some countries are applying pro-enforcement approach however, some other countries are emphasizing on the protection of national interest. With the help of qualitative and comparative research methodology, this paper aims to analyze the scope of PP defense to refuse the enforcement of FAA. It also attempts to shed light on the approaches and types of public policy defense and its scope in the different countries of the world. It concludes that the world is moving towards restrictive and narrower approach of PP for refusing the enforcement of FAA.

Keywords:
Foreign Arbitral Award, International Commercial Arbitration, Public Policy, International Public Policy, Domestic Arbitral Award.

Article History:
Received: 15th Jul 2022
Accepted: 21st Aug 2022
Published: 2nd Oct 2022

1. INTRODUCTION

One of the major issues in the enforcement of FAA is defense of PP which may be invoked either by award-debtor or national court. A prominent author Gary Born has stated in his book that for resistance to enforce FAA, the PP has become one of the controversial as well as the significant defenses (Born, G., 2001). The international instruments of arbitration i.e., NYC and UML - which are promoting and regulating enforcement of FAA and International Arbitral Award (IAA) - have envisaged provisions allowing the national courts to refuse the enforcement of FAA if the award is against the PP of the country. The provision of defense of PP is an acknowledgement by these instruments that the states and their domestic courts have ultimate control over the execution process of the FAA and even they can reject enforcement of FAA if that is in divergence to their notion of PP (Bahta, T. H., 2011).

The concept of PP is such a dynamic one that varies from state to state, from time to time and from place to place. Even within a country, it changes from time to time. It responds to ongoing needs at the social, political, economic, and cultural levels thus changes time to time. Therefore, apply a broader interpretation of PP while others apply a narrower/restricted interpretation of the expression. There is no example of any country applying transnational PP because of the term "state public policy" which is used by most prominent international instruments. There are two types of public policy contexts; political context and legal. In former context, it can be termed as PP of the government however in the later context; it can be termed as PP of the state (Maniruzzaman & Chishti, 2019). There have been several cases on this topic in various national courts that have led to some basic principles that can be considered the contents of the PP, which the author discusses in a separate article.

1.1. Relevant Provisions of NYC and UML on PP Exception

The defense of PP has been enumerated in Article V (2) (b) of NYC. According to the provisions of this Article, the enforcement of a FAA may be rejected by the domestic courts if that is against the PP of the country where it is applied for the enforcement (NYC, 1958). The articles 34(2)(b) and 36(2)(b) of the UML also provides this exception and these Articles are identical to the provisions of Article-V(2)(b) of the NYC. According to these Articles, FAA/IAA may be rejected by the national courts because of PP's defense if such award is against the PP of such state (UML Art. 34 & 36). After reading these provisions, one can come to conclusion that the term 'state public policy' (SPP) is leading to a divergence of application of PP's defense particularly in the global legal pluralism. These international instruments of arbitral awards did not attempt to define the PP's defense and did not establish its global and unified standard (Ghodoosi. 2016). The national courts can take justification for non-enforcement of FAA on the ground of violation of its state PP (Den Berg, 2003). These provisions indicate that neither a harmonized PP nor its common standards are established by the drafters of the Convention however, they provided SPP as a ground to refuse the enforcement of FAA. However, intention of drafters was incorporated in a separate Report making it clear that application of PP's defense should be restricted and can only be invoked where the FAA is opposing to the basic principles of legal system of the state where such award is applied for the enforcement (Gibson C.S., 2009). Therefore, the drafters of the Conventions endorsed application of restrictive and narrower concept of PP however, they did not provide its harmonized and universal standards to refuse the enforcement of FAA.

Since national courts are given discretionary power to interpret the term 'state public policy' thus this term becomes very subjective. As a result, national courts can use their discretionary power during the hearing of the petitions for the enforcement of FAA and can reject any such FAA which is repugnant and contrary to their SPP (Veena. A., 2012). The losing party resists mostly the enforcement of FAA on the ground of PP if there is no other ground for its resistance. It is because of lack of standardized and harmonized concept of PP envisioned in the provisions of international instruments dealing with arbitration agreements and arbitral awards (Ghodoosi, (2017).

The term PP is neither defined by NYC nor by UML. However, an explanatory Note on PP was given in 1994 through the United Nations (UN) publication of Model law wherein some guidance about the meaning and scope of PP for refusal of FAA was provided. According to Para 42 of said explanatory Note, the domestic courts can refuse to enforce FAA on the ground of PP where serious departure from fundamental notions of procedural justice was committed by the arbitrators while making such award (Steinbruck 2015).

1.2. Meaning and Definition of PP Exception

Specific meaning and definition of PP for the refusal of the enforcement of FAA is exceedingly difficult because international instruments did not provide a precise meaning and definition of this expression and same is left to domestic courts where FAA is applied for its enforcement to examine whether such award is contrary to their PP or not. Thus, the competent court of enforcing state has discretionary power to define and interpret its PP and to refuse the enforcement of such award if found it against PP of its state (Ghodoosi, 2017). Defining and interpreting the PP notion is a prerogative of enforcing state (Orient Power Company case, 2019).

The PP standards vary from state to state as it is interpreted by each state and its national courts. Justice Burrough compared PP with an unrestrained horse. Once you ride on it, then your destination is undefined (Richardson case 1824). However, Lord Denning stated that unruly horse can be controlled through a good man (Enderby case, 1971). Sir John Donaldson has the view that PP can never be defined comprehensively but considerations of PP should be applied with care. He restricted the scope of PP in serious cases wherever such an award is clearly harmful to public good and morals (Deutsche case 1987). Judge Joseph Smith also restricted the scope of PP and stated that it may be invoked in case wherever basic notion of justice and morality of enforcing state is violated (Parsons case, 1974). Whereas Dr. Eh-Ahdab a contemporary Muslim jurist has broadened the scope of public policy and stated that FAA should be in conformity with the general spirit of Qur'an and Sunnah. Any award which is against shari'ah, can not be enforced in Islamic Countries (El-Ahdab A., 1995). Whereas Dr. Lew's observation on PP is that a complete inclusive meaning, definition,

and concept of PP can never be given. Obviously, PP of any state is based on its religious, economic, moral, political, social, and legal system (Lew. J., 1978). Therefore, PP of one country or extra-national community diverges from other state and community. Since the structure and nature of a society and a country differs from the other, hence the PP of each nation and state also differs.

2. KINDS OF PP EXCEPTION

Basically, there are two approaches to PP exception; one is wider and other is narrower. Domestic PP provides a wider model of PP defense with the purpose of sheltering nationalized interest whereas IPP establishes a restrictive and narrow model of PP with the purpose of supporting pro-enforcement policy of FAA (Garimella, 2017). Andrew Okekifere, has divided PP into two kinds; International and Domestic. The later contains all principles of justice and morality formulated by the state through its constitution, ordinary statutes, domestic laws and courts judgment and state would not permit anyone to change or alter such principles through contract or agreement whereas the former contains all those principles set by the state through domestic PP and such state insists to apply such principles in relationship with different nationalities or in international relationship (Okekifere, 1999). The PP can be divided into three kinds; domestic, international and transnational.

2.1. Domestic Public Policy (DPP)

The term PP of 'state' or 'country' is referred by most of the countries, the similar phrasing as incorporated in NYC and the UML. It means they have implemented the same terminology as incorporated in these instruments. The Supreme Court of Austria, in 1983, denied recognizing and enforcing a Dutch FAA on the basis that it violated Austrian PP. It was held by the Austrian courts that domestic and international PP is distinguished neither by the NYC nor by the UN Model Law and both instruments referred PP of a state where the FAA is applied for the enforcement (International Council, 1985).

In Malaysia, Justice Abdul Hamid Mohammad, elucidated that PP of one state might be different from another country because of difference in religion, culture, politics, and economics. The vision of one country might be different from another country. Even public policy in the same country varies from time to time according to the circumstances. Therefore, Malaysian Courts should not blindly enforce the foreign judgments under the reciprocal Enforcement of Judgment Act 1958 (Banque, 2000).

The Hong Kong Court of final Appeal in 1999 rejected the notion that the term PP contained in the Articles of the NYC relates to an international or transnational PP hence did not interpret it narrowly. It elaborates that the enforcement of FAA may be denied if the same is opposing the domestic standards of justice and morality. Denying enforcement of FAA on the basis of PP is bound to be contrary to the enforcing state's concept of impartiality, fairness and justice. However, Judge Masob NPJ, held that the PP of one forum may overlap with the PP of another forum in many respects (Hebei Import case, 1999).

2.2. International Public Policy (IPP)

Scope of IPP is restrictive and narrower than the domestic PP. The Courts in many countries are giving weight to IPP and rejecting arbitral awards only in cases contradict to its IPP. Neither the UNCITRAL Model Law nor international Conventions relating to enforce FAA construct any express provision to transnational or IPP. They also do not try to synchronize the PP in respect to enforce FAA. However, the Courts of many countries are applying narrow perception of PP irrespective of specific wording in the national legislation. The OHADA (Organization for Harmonization of Africa du Droit Affairs) Uniform Act is an exceptional in quest of harmonizing IPP among its member states (Interim Report, 2000).

The Final Report on PP as a defense to refuse the enforcement of FAA suggested and recommended IPP only as a bar for enforcing FAA. It defined IPP in three heads. The IPP of any state may comprise upon (i)

fundamental principles of justice and morality of state even if it is not directly concerned but state wishes to protect them at any cost; (ii) the rules of 'lois de police' or PP's rules designed to serve essential economic, social, or political interests of the state; and (iii) international obligation of state towards other state where it is duty bound to respect these obligations (Final Report, 2002). In authority of many states, PP exception is interpreted restrictively and narrowly for resolving tension between SPP and finality of FAA requiring infringement of IPP for justification to reject the enforcement of FAA as discussed in coming pages.

Several national arbitration statutes expressly stipulate the 'IPP' for refusing enforcement of FAA as this approach is adapted by New Code of French Procedure (1981) through Article 1502 by stating that a FAA can be rejected on the ground of violation of IPP. The same approach is also adopted by some other states such as Portugal (Code of Civil Procedure, 1986), Algeria (Decree No. 83.09 of Algeria, 1993) and Lebanon (Decree law No.90 of Lebanon, 1983); they also incorporated IPP only for resistance of FAA. The basic purpose of these provisions is to limit and restrict the scope of PP exceptions in enforcement of FAA.

2.3. Transnational PP (TPP)

The scope of TPP is more restricted and narrower even than IPP. The PP universally applied can be termed as TPP. It is also called true IPP. The TPP comprises general principles of morality accepted by civilized nations, general principles of universal justice known as 'jus cogens' in Public International Law (PIL) and fundamental principles of natural law (Interim Report, 2000). With the exception of Switzerland, there is no court precedent for the application of the TPP concept. The federal tribunal of Switzerland first held in case L v. W that FAA may be rejected if such award is against the fundamental legal and moral principles recognized by civilized nations (Les Emirates case, 1994). However, later, after the long discussion on this concept it also refused to apply the concept of TPP for resistance of enforcement of FAA. Several activities may fall under the concept of TPP such as terrorism, smuggling, bribery, and drug trafficking etc.

There are two categories of states in respect of application of the PP notion for rejection of FAA/IAA. Some countries applying IPP/narrower notion for rejection of the enforcement of FAA/IAA and they have implemented it in their domestic laws. However, some countries are applying Domestic PP and there is no one who is applying concept of translational PP except Switzerland (Jagusch, 2014).

3. SCOPE OF PUBLIC POLICY EXCEPTION

International instruments have not yet provided a precise, unified and coherent definition of the PP exception, so the way in which PP exception is interpreted and expressed, has become more controversial and determination of its scope has become extremely difficult. Different countries and their national courts have assigned different meanings and interpretation to the PP exception. Each state has its own considerations for this expression as one state may reject a FAA on the basis of its own PP, however, another state may enforce the same by taking a pro-enforcement approach of arbitration. Parties opposing enforcement of FAA mostly try to convince the domestic court to apply wider approach of PP for seeking annulment or refusal of FAA. The national courts apply one of the three types of PP; DPP, IPP or TPP (Jagusch, 2014).

The scope of PP is most controversial and its determination even within one state has become difficult. Some awards were refused by national courts on the PP exception but later some awards having same circumstances as previous one, were recognized and enforced by same courts or courts of same state on the reason that those considerations are no longer part of their PP. For instance, the national courts in England and India adopted controversial approaches at different times in number of cases where on same circumstances; the same court gave different judgments in the enforcement of different FAA. No specific type of PP is provided by the NYC and UML. They specifically provided term State Public Policy as a ground for rejection of FAA. However, it is widely recognized by the national courts of different states that the intent of the drafters of NYC was to apply only IPP for rejection of enforcement of FAA. Currently, the prevailing opinion regarding the applicability of the PP exception for the rejection of arbitral award is that the IPP applies to the FAA however domestic public policy applies exclusively to the enforcement of domestic arbitral awards. At international level, all major jurisdictions supported exclusive application of IPP for rejection of FAA (Ryabinin, 2009). In the common law system, the term PP is famous, although its meaning

varies from state to state of common law, whereas in civil law system, the term public order is used instead of PP. However, both terms are considered to have same meaning.

4. COMPARATIVE STUDY OF PUBLIC POLICY DEFENSE

Here the case laws of different countries regarding PP exception are discussed for rejection of FAA. Four jurisdictions are taken under consideration two from advanced countries i.e., U.S.A and U.K and two from developing countries i.e., India, and Pakistan for analyzing PP exception as a ground to refuse execution of FAA or IAA.

4.1. PP Exception in United State of America (U.S.A)

The courts in USA have taken a narrow construction and restricted interpretation of the PP defense. They are following pro-enforcement policy in enforcing the arbitral award arising from transactions between parties of different nations. Despite the PP argument, they have executed many FAA under the NYC. They have stated that PP ground can only be accepted where the enforcement of FAA would be against the basic notions of justice and morality of enforcing state (McLaughlin. J. & Genevro. L, 1986). They mostly rejected the PP defense to decline the enforcement of FAA because of narrow interpretation of Article V (2) (b) of the NYC and the pro-enforcement bias of the courts. Anti-trust law was not arbitrable in U.S but later in case of Mitsubishi, the Court placed greater focus on the international comity and stated that if in anti-trust cases, the matter is purely domestic that would not be arbitrable however, if it has international character of controversy, that would be arbitrable (Mitsubishi case, 1985).

4.1.1. Parsons & Whittemore Overseas v Societe General de L'Industie du Papier (RAKTA)

A dispute arisen between RAKTA an Egyptian Government corporation and Parsons & Whittemore, an American Corporation. Persons went to Arbitration in International Chamber of Commerce (ICC). The final award came against the Persons and held him liable. Ultimately, the matter went to the court which declined the Person's prayer and confirmed the enforcement of FAA in favor of RAKTA. An appeal was filed by the Persons and Appellate court affirmed judgment of the lower court. During arguments, among the other grounds, the PP defense has also taken by the Persons. He argued that as a loyal American citizen, he abandoned the project in accordance with various actions taken by U.S officials which broken the relations between America and Egypt. Judge Smith interpreted the notion of PP in this judgment and declared that the term PP should be construed narrowly, that is violation of most basic notions of justice and morality of the enforcing state. He further noted that an expensive construction of the notion of PP would be against the basic objective of the NYC and would vitiate its effort to remove obstacles to enforce FAA. He also stated that the utility of NYC would be seriously undermined if the PP's defense became a parochial device for protection of political interests of the country where award is applied for enforcement. (Kazutake. O. 2005).

The court in U.S.A, are applying narrow and restrictive notion of PP and in many cases, they enforced even annulled award and they stated that non-enforcement of FAA would violate the American PP. So, the U.S courts have pro-arbitration attitude (Sattar. S. 2011). In USA, the courts rarely rejected the enforcement of FAA on the ground of PP (American Construction Machinery case, 1987).

4.2. PP Exception in U.K

In 1975, England signed the NYC and adopted the provisions of the Convention by promulgating the Arbitration Act 1975. In 1996, England enacted the Arbitration Act in accordance with UML of Arbitration which is the most updated arbitration act of England. The Arbitration Act 1996 considered the arbitral award as a court judgment. Any party can challenge the arbitral award under section 68 of the Act if such award is contrary to the PP or obtained by fraud or there is serious irregularity in the proceeding of the arbitration. According to Article 68(3), if the matter is incapable of settlement by arbitration award or in contradiction

with the public policy, the English Courts may reject to enforce the IAA (English Arbitration Act, 1996,). A narrow and restrictive construction of PP defense is adopted by the English courts and they rarely refused to enforce FAA or IAA.

4.2.1. Deutche Schahtbau Undtiefbohr Gesellschafi M.B.H. (D.S.T) v Ras Al Khaimah Nat'l Oil Co. (RAKOIL)

A contract was made between Rakoil and D.S.T for oil exploration and a Dispute was arisen between them. The agreement had an arbitration clause. A claim was submitted to ICC by the D.S.T for arbitration, however, Rakoil filed a suit for rescind in the court of Ras Al Khaimah and argued that D.S.T obtained the contract by misrepresentation. Both parties succeeded in their claims. Rakoil argued in the English Court that the arbitral tribunal used some ill and unspecified principles of law and not followed the country's law which is violation of PP of England. The English court disagreed with the argument of the Rakoil. The court held that for vacating the FAA on the grounds of PP's defense, the party must show that the award is injurious to the public good or wholly offensive or there are some elements of illegality (Rakolicase, 1987).

The D.S.T is important and vital English's landmark case of PP like the case Parson & Whittemore of America. We can say that the definition of PP for refusing FAA is clearly provided. The English standards of PP is less ambiguous than the standard of America. However, it does not clarify what circumstances would fall in the meaning of "clearly injurious" or "wholly offensive." This case also shows that the English Courts are distinguishing between English DPP and IPP in respect of enforcement of awards.

4.2.2. Soleimany v. Soleimany

The enforcement of FAA was refused by English court on the argument of illegality of the contract because the contract was made in the breach of the Iranian law. This case related to a dispute raised between the son Aber Soleimany and the father Sion Soleimany on the business partnership contract. A claim was submitted to an arbitrator for award based on Jewish governing laws and an award was given in favor of Son Aber for sharing profit on the ground that in Jewish law, illegality is irrelevant to determine the rights of the parties. Son Aber filed a suit in English courts for enforcement of FAA but the same was resisted by the father Sion on the argument that the said award is against the PP of England as the contract was based on illegality. The English court rejected the enforcement of FAA on the ground that contract was illegal when made therefore; its enforcement is contrary to the English PP (Soleimany case, 1999).

A narrow and restrictive approach of PP is adopted by the English courts. They mostly supported the pro-arbitration basis like the U.S courts.

4.3. PP Exception in India

The India made efforts to attract foreign investment, inspire the confidence of foreign investors in the dispute settlement system and reassure the foreign investors for expeditious dispute resolution and reliability of Indian legal system to provide alternatives for dispute resolution (Krishna S. 2009). Reducing the supervisory role of the courts was one of the main objectives of new law of the arbitration but the Indian courts interpreted the provisions of the new law of the arbitration on the same pattern of the Arbitration Act, 1940. In 1996, the India made new law of Arbitration with the hope that it would minimize the involvement of the courts in the process of the arbitration, but the courts did not apply it in letter and spirit and shown a great desire to interfere in the FAA or IAA especially on the ground of the PP (Indian Arbitration Act, 1996).

Indian Judiciary has two views on the PP for refusing the foreign arbitral award; namely narrow view and wider view. On various occasions the supreme court of India has taken deferent views and these views are discussed below.

4.3.1. Narrower Interpretation of PP

There are two rulings of the ISC about the PP defense for refusing the Arbitral award. One of them is in the Renusagar case in which ISC provided three heads of PP for refusing FAA; the award is contrary to (i) the justice and morality; (ii) fundamental policy of Indian laws; or (iii) the interest of India (Renusagar case, 1994). It was held even before passing the new laws of arbitration. This decision was based on PIL and was consistent international practices generally acknowledged in advanced countries. This decision applied the IPP/narrower construction and confirmed that the national courts may interfere in exceptional circumstances. In this case, the ISC plainly held that the domestic courts should not exercise the PP's defense to evaluate the merits of FAA. In Smita case, the Indian Apex Court also emphasized on the pro-enforcement bias of the NYC where it held that FAA could not be impeached on the merits in the proceeding of enforcement of FAA; and the term PP must necessarily be interpreted narrowly and restrictively to achieve the objectives of the NYC and UML (Smita case, 2001). This view again reiterated by ISC in 2014 and wider meaning of PP defense to refuse FAA was overruled (Shri Lal Hahal case, 2014).

4.3.2. Broader Interpretation of PP

Broader approach of the PP defense was taken by the ISC in Oil & Natural case in contrast its earlier decision in Renusagar. In this case, the ISC added a fourth head 'patently illegal' to refuse FAA if it is opposing the provisions of any substantive law, to any provision of the contract of the parties or to any provision of the new laws of arbitration. The patently illegal is fourth head of the PP of India (Saw pipes case, 2003). This decision has faced much criticism. Fali Sam Nariman, Indian famous jurist, while commenting on the decision of this case, stated that this decision put the clock back to where we started under the Arbitration Act, 1940 and virtually set at naught the entire process of new laws of arbitration and conciliation made in 1996 (Kachwala S. 2007). International lawyers also criticized this decision and said that under this case, broadest approach of term PP is taken as possible, and it paved the way for losing party to take its advantages from the Indian courts. One of the main objectives of the new laws of arbitration of 1996 of India was to eliminate the near-limitless judicial review but the Indian courts resurrected it again through judicial interpretations (Aloke R. & Dipen S. 2007). The lawyers in India also criticized on this decision and said that through this decision a significant dent has been made in the jurisprudence of arbitration in India (Kachwala S. 2007). The broader view of PP also upheld in Associate builder case of 2014 (Associate builder case, 2014).

It is also significant to note that an additional ground 'patently illegal' was recommended by Law Ministry in 2010 to be inserted in law for challenging award especially the domestic arbitral award (Kachwala S. 2007) and same was inserted in 2015 (Arbitration Amendment Act, 2015). Now 'patently illegal' is one of the grounds for rejection of DAA however same is not inserted in S. 48 for rejection of FAA/IAA. The latest important case of PP of India is the Cruz City 1 case wherein after long discussion; the matter was referred to the larger Bench of the SC which is still pending (Cruz City 1 case, 2017).

4.3.3. Extension of the Saw Pipe Decision to ICA

Although the decision of SAW Pipes case was relevant to the domestic arbitral award, but the ISC upheld it for refusal of FAA while considering the Bhatia case, therefore; it has become much more significant for cases of ICA and subsequently the Indian courts made dramatic extension of fourth ground; patently illegal. In Bhatia case, the ISC held that the provisions of part 1 of the Arbitration Act 1996 are also entirely applicable to ICA regardless of the applicable laws under the contract. It made no difference between domestic and ICA (Bhatia case, 2004). In 2008, the ISC extended the ruling in Bhatia case to Venture Global case in which, the FAA was challenged under section 34 of the 1996 Act. The ISC held that the rules laid down in Bhatia case are applicable to the ICA for the proceeding's u/s 34 of the Act (Venture Global case, 2008).Therefore, a new procedure and new ground was created to challenge the FAA. So, the award debtor can request the court to refuse the enforcement of FAA even to set aside it.

Presently it seems that Indian courts are applying broader approach of PP to refuse the enforcement of DAA and narrower approach for rejection of FAA. However, the matter is still sub-judice before the larger Bench of ISC.

4.4. PP Exception in Pakistan

The NYC was signed by the Pakistan and was made a part of legislation through enactment in 2011. In Pakistan, the competent authority to enforce the FAA is High Court (HC) (Recognition Act, 2011). The expression 'public policy' is listed in S. 23 of the Contract Act 1872 as well as in Schedule of the Recognition Act 2011. The courts in Pakistan have refused some contracts as well as some arbitral awards on the argument of PP under section 23 of the Contract Act 1872 however, also rejected this defense in many case.

4.4.1. Section 23 of the Contract Act 1872

The violation of PP is provided as one of the grounds which make the consideration of the contract illegal and unlawful consequently void. Therefore; every agreement or contract which is contrary to the PP of the Pakistan would be unlawful, illegal, and void (Contract Act, 1872). The courts in Pakistan interpreted the expression of PP while deciding the cases u/s 23 of the Contract Act. Through judicial interpretation, it is well-settled that the provisions of this section should be interpreted strictly, and no new head or category of the PP should be invented (Manzoor Hussain case, 1965). The courts in Pakistan are referring the English courts' judgments while interpreting the notion of PP. Here some famous Pakistani cases are discussed in which the expression of PP is discussed.

4.4.2. Landmark cases of PP in Pakistan

In Manzoor Hussain case, the main query was whether arbitration clause in contract is enforceable at law if contract itself was found to be void on account of its being conflicting to PP of the country. The HC of West Pakistan, Karachi Bench, held that the agreement was not hit by the provisions u/s 23 of the Contract Act and the objection was rejected. The SCP held that section 23 of the Contract Act should be interpreted narrowly, and court should apply consideration of PP with care and caution and should not craft new heads and considerations of PP for refusing a contract (Manzoor Hussain case, 1965). The SCP reiterated this principle in Official Assignee case and declared that the court should not expand the PP and it may be invoked only in clear cases where substantial incontestable harm occurred to the public (Official Assignee Case, 1969). In Sultan Textile Mills case, the question of illegality was raised on the grounds that the agent used his influence on the Government's officers for monetary gain. The Court stated in this case that the mere fact that the agent is influential is not enough for illegality unless some other facts prove that his conduct was illegal. The court held that the mere influence of an agent and disregard of the law of pleadings do not fall under the ambit of PP. The party seeking refusal of contract on the ground of public policy should prove the illegality of conduct of an agent which is injurious to the community. The principle that the judge may expound the PP and shall not expand it was reiterated (Sultan Textile Mills case, 1972). In Sardar Muhammad case, the court held that violation of PP occurred where any act is contrary to general interest of the community. (Sardar Muhammad case, 1972). In Nan Fung case, The HC of Sindh laid down certain heads of the PP including trade with enemy during war; illegal objects declared by legislation or common law; injurious objects for affairs of good governance either domestic or foreign; injurious acts interfering in proper working of justice's machinery; injurious objects for family life; and objects against the economic interest of the public (Nan Fung case, 1982). In Raja case, gambling including betting on horses was declared contrary to the Injunction of Islam and PP (Raja case, 1986). In Mushtaq case, lottery was also declared against the Injunctions of Islam and PP (Mushtaq Ali case, 1989) and same was upheld by Shariat Appellate Bench of SC (Federation case, 1992). In Inayat Ali case, the court declared the agreement against the PP on the ground that it clearly violated the provisions of Pre-emption Act 1913 rather set at naught the underlying purpose of the Act. (Inayat Ali case, 1995) In Ali Muhammad case, the HC held that making an agreement to settle the matter through arbitration after dropping proceedings of non-compounding offences is contrary to the PP. The Award stood on that account vitiated. The award consequently set aside. The SCP upheld it while stating that it is now a well-settled proposition that a pending criminal matter cannot be referred to Arbitration, nor can it be withdrawn if it directed by the Arbitrator (Ali Muhammad Case, 1991). In Grosvenor case, Judge Rana Bhagwan Das rejected to enforce the degree of Queen's Bench of U.K on the ground that the judgment/decree decided a matter which was not completely violation of PP but also repugnant to injunctions of Islam and laws of Pakistan. The Judge Rana Bhagwan Das included the violation of law and breach of injunction of Islam in the contents of PP of Pakistan (Grosvenor case, 1998). In HUBCO case, The SCP held that the matter between the parties is not a commercial dispute, but it relates to criminal matters as alleged by WAPDA and criminal matters cannot be referred to arbitration. The SCP decided that the agreement which is obtained by corruption and bribery is void and if it contains arbitration clause, it shall not be referred to arbitration because it violates the PP (Hubco case, 2000). What about interest (Riba) whether is it against the PP or not? It is debatable. Prevalent view is that till the finality of judgment of FSC regarding Riba and repealing of Interest Act 1839, it is not unlawful. Currently Interest Act is valid law of Pakistan

((Maniruzzaman & Chishti, 2019). Recently, in 2019, the Lahore High Court (LHC) discussed PP exception in detail and held that it can only be invoked in exceptional cases where FAA is against the fundamental values of the state, against the notion of morality and justice of the country or there is patent illegality in making the award. It should not be used as back door for reviewing the merits of the FAA and no any new ground should be created on the name of it which is not available under NYC (Orient Power Company case, 2019).

5. CONCLUSION

The NYC and UML have acknowledged the defense of SPP and permitted the national courts to refuse the FAA where such award is against PP of the enforcing state. These international instruments did not define the PP. They used the word state's PP which indicates that the drafters of these instruments intentionally not established global and unified standards of PP. Defining the PP notion is the prerogative of the courts of enforcing states. After analyzing definitions of PP given by the domestic courts and jurists, it has become clear that the PP of one state and extra-national community differs from the PP of other state and other extra-national community therefore; a precise, global, and comprehensive definition of PP can never be given. Even within the territory of one state, the scope of PP could not be determined. However, International Law Association has drafted IPP in 2002 for refusing FAA/IAA and requested the states to apply this concept of PP.

It can be observed that some countries have pro-enforcement bias in international commercial arbitration. They favor the enforcement of FAA and discourage its refusal. The Courts in U.S.A and England follow pro-enforcement policy therefore, they are interpreting notion of PP very narrowly and restrictively. They are emphasizing on enforcement of FAA and in rare cases they are refusing FAA. The Courts in India have two views as discussed above however Arbitration Amendment of 2015 has inserted wider approach in DPP and narrower approach in respect to FAA but the matter again is sub-judice before larger Bench of ISC. The issue of PP has been discussed in Pakistani Courts under section 23 of Contract Act and under Enforcement of FAA Act of 2011. In Pakistan, the courts discussed PP exception in many cases and recently LHC in 2019 discussed it in detail and emphasized on pro-enforcement approach in the enforcement of FAA. Both India and Pakistan are moving towards restrictive and narrower approach of PP in the enforcement of FAA but still its interpretation varies time to time in both the countries. This study clearly indicates that the world is moving toward restrictive and narrower interpretation of PP notion in the context of enforcement of FAA or IAA.

References

1. Ali Muhammad v. Bashir Ahmad, (1991) SCMR 1928.
2. American Construction Machinery & Equipment Corporation Ltd v. Mechanised Construction of Pakistan Ltd, (1987) 659 F. Supp 426 (SDNY).
3. Associate Builder v. DDA (2015) SCC 49; (2015), SCC (Civ) 204.
4. Bhatia International v. Bulk Trading S.A, (2004) 2, SCC 105.
5. Bahta T. H., (2011) "Recognition and Enforcement of Foreign Arbitral Awards in Civil and Commercial Matters in Ethiopia". Mizan Law Review, Vol. 5:1 pp. 106-140.
6. Banque Nasionale de paris v. Wuan Swee May, (2000) 3 MLJ 587.
7. Born G. (2001) International Commercial Arbitration: Commentary and Materials, the Hague: Kluwer Law International and Transnational Publishers.
8. Cruz City 1 Mauritius Holding v. Unitech Limited, (2017) 239 DLT 649.
9. Contract Act, 1872.
10. Den Berg A. J. V. (2003) "The New York Convention of 1958: An Overview", Yearbook: Commercial Arbitration, Vol. XXVIII (2003), 22. pp. 1-22,
11. Deutsche Schachtbau-und Tiefbohrgesellscaft mbh v Ras al Khaimah National Oil Company (1987) 2 Lloyd's Rep. 246-254 (C.A) (Eng).
12. El-Ahdab Abdul Hamid, (1995) "Enforcement of Arbitral Awards in the Arab Countries", Arbitration International, Vol. 11 No, 2 (1995), 169. pp. 169-182.
13. Enderby Town Football Club v. Football Association Ltd, (1971) Ch, n 5 at 606 and 607.

14. English Arbitration Act, 1996.
15. Explanatory note' (1985) by the UNCITRAL secretariat on the Modal Law on International Commercial Arbitration.
16. 'Final Report', (2002) "Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards" by The Committee on International Commercial Arbitration, on the 70th Conference of the International Law Association held in New Delhi, India, 2-6 April (2002), 3.
17. Federation of Pakistan v. Mushtaq Ali, (1992) PLD SC 153.
18. Gibson, C. S. (2009) "Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law", Penn State Law Review, 113:4, pp. 102-130.
19. Garimella S.R, (2017), Issues of Jurisdiction, Choice of Law and Enforcement in International Commercial Arbitration: An Indain Perspective', in Sai Ramani Garimella and Stellina Jolly (eds.), Private International Law: South Asian States' Practice, Springer
20. Ghodoosi Farhad, (2017) International Dispute Resolution and the Public Policy Exception, London & New York: Riutledge.
21. Ghodoosi Farhad, (2016) "Arbitrating Public Policy: Why the Buck Should not Stop at National Courts", Lewis & Clark Law Review. pp 238-279.
22. Grosvenor Casino Limited v. Abdul Malik Badruddin, (1998), PLD Karachi 104.
23. Hub Power Company Limited (HUBCO) v. Water and Power Development Authority (WAPDA), (2000) PLD Supreme Court 841.
24. Hebei Import and Export Corporation v. Polytek Engineering Co.Ltd [1999] 2 HKC 205, also reported in (1999) XXIV Yearbook 652.
25. Indian Arbitration Act, 1940.
26. International Council for Commercial Arbitration, (1985) Court Decisions on the New York Convention, Yearbook Commercial Arbitration, Vol X, Kluwer Law International.
27. Interim Report (2000) Public Policy as A Bar to Enforcement of International Arbitral Awards, International Law Association London Conference.
28. Inayat Ali Shah v. Anwar Hussain, (1995) CLC 1906
29. Jagusch Stephen (2014) Issues of Substantive Transnational Public Policy, Chapter-3 of International Arbitration and Public Policy by Devin Bray
30. Kazutake, Okuma. "Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards",The Seinan Law Review, 37:4 (2005), 3. pp. 1-41.
31. Kachwala S., (2007) "The Indian Arbitration Law: Towards a New Jurisprudence", INT'L ARB. L REV. 15, pp. 13-17 (quoting F. S. Nariman's Speech at the Inaugural Session of "Legal Reforms in Infrastructure" (May 2, 2003)).
32. Lew J. D.M. (1978) "Applicable Law in International Commercial Arbitration" Oceana Law Journal, Vol. 73, No. 3 pp. 531-542.
33. Les Emirates Arabes Unis v. Westland Helicopters, (1994) 19 Apri, Bull. ASA 404.
34. Laminoirs-Trefileries de Lens, S.A. v. Southwire Co., (1980) 484 F. Supp. 1063, 1069 (N.D.Ga. 1980).
35. McLaughlin J. T. and Genevro L., (1986), "Enforcement of Arbitral Awards under the New York Convention – Practice in U.S. Courts" Barkeley Journal of International Law, Vol. 2, Issue. 1 pp. 250-272.
36. Maniruzzaman AFM & Chishti I.A, (2019), "International Arbitration and Public Policy Issues in the Indian Subcontinent: A Look through the English Common Law and International Lenses", Manchester Journal of International Economic Law, Vol. 16, Issue 2: 183-212.
37. Manzoor Hussain v. Wali Muhammad, (1965) PLD SC 425.
38. Mitsubishi Motors Corp v. Soler Chysler Plymouth Inc, (1985), 473 US 614, 105 SC 3346.
39. Mushtaq Ali v. Government of Pakistan, (1989) PLD FSC 60.
40. Nan Fung Textile Ltd. v. Sadiq Traders Ltd., (1982) PLD Karachi 619.
41. Okekifere A. (1999) "Public Policy and Arbitration under the UNCITRAL Modal Law", International Arbitration Law Review, 2(2), 70. pp. 65-75.
42. Oil & Natural Gas Corp v. Saw Pipes (2003) 5 SCC 705.
43. Orient Power Company (Private) Limited v. Sui Northern Gas Pipelines Limited through Managing Director, Lahore, (2019) PLD Lah 607.
44. Official Assignee of the High Court of west Pakistan v The Lloyds Bank Ltd. Karachi, (1969) PLD SC, 301.
45. Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de I Industrie du Papier RAKTA and Bank

of America (1974) 508 F.2d 969, 974 (2nd Cir.,).
46. Ryabinin A. (2009) Procedural Public Policy in Regarding to the Enforcement and Recognition of Foreign Arbitral Awards, Unpublished LL.M Diss (Central European University).
47. Renusagar Power Co. Ltd v. General Electric Co., (1994) AIR SC 860.
48. Raja Khushbakht ur Rehman v. The Province of Punjab, (1986) PLD FSC 49.
49. Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Award) Act, 2011, Art. 3.
50. Richardson v. Mellish (1824) 2 Bing p. 229.
51. Steinbruck Ben, (2015), international Commercial Arbitration – A Handbook, Munich: Beck, Hart, Nomos.
52. Sattar Sameer, (2011) "Enforcement of Arbitral Awards and Public Policy:Same Concept and Different Approach?" Available at http://www.employmentlawalliance.com/Templates/media/files/Misc%20Documents/Enforcement-of-Arbitral-Awards-Public-Policy.pdf. (Last Accessed 12-11-2021)
53. Soleimany v. Soleimany (1999) Q.B 785, 804 (K.B.).
54. Smita Conductors v. Euro Alloys Ltd (2001) 7 SCC 328.
55. Sultan Textile Mills v. Muhammad Yousaf Shami, (1972) PLD Karachi.
56. Shri Lal Mahal Ltd. v.. Progetto Granto Spa, (2014) SCC 433.
57. The Code of Civil Procedure of Portugal, (1986).
58. The Arbitration and Conciliation (Amendment) Act (2015) (No. 3 2016) 31st December.
59. The New York Convention (1958).
60. UNCITRAL Model Law on International Commercial Arbitration, (1985), designed by the United Nations for the purpose of modernization and harmonization of rules and laws of international business and international commercial arbitration.
61. Venture Global Engineering v. Satyam Computer Service, (2008) 1 S.C.R. 501, 521 (India).
62. Veena A., (2012) "Arbitrability and Public Policy in Regard to the Recognition and Enforcement of Arbitral Award in International Arbitration: The United States, Europe, Africa, Middle East and Asia", Unpublished PhD Diss (Golden Gate University School of Law, San Francisco, California 2012), 19. pp. 1-227.