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To: International Bar Association
Subcommittee on Recognition and Enforcement of Arbitral Awards

From: Mansoor Hassan Khan

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Re: Country reports on Pakistan and India: Public policy exception under the New York Convention.

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1. Position under Pakistani law:

1.1. The term "public policy" appears in various Pakistani enactments. Section 23 of the Contract Act, 1872, declares that the consideration or object of an agreement is unlawful, if the court regards it as opposed to public policy. A uniform definition of this term is, however, not available in Pakistan. Although, courts in Pakistan have generally discussed this term a significant discussion on this term in the context of arbitration is so far not available in Pakistani judicial precedents.[1]

[1] In Pakistan WAPDA and others v. Kot Addu Power Generation Co. Ltd. (PLD 2000 Lahore 461), the Lahore High Court defined "public policy" as under:

"44. … Public policy would mean that no man can lawfully do that which has a tendency to be injurious to the public welfare. Public policy comprehends only the protection and promotion of public welfare. It is that principle under which the freedom to contract or private dealings is restricted by law for the good of the community. Therefore, it can be inferred that the meaning of public policy is the interest of persons other than the parties."

Similarly, the Lahore High Court in Inayat Ali Shah v. Anwar Hussain (1995 CLC 1906) has held that an agreement would be deemed to be against public policy, "[if] found to be unconscionable, unjust or inequitable or for improper object or …. against law or oppressive or leading to vexatious litigations…".

While interpreting section 23 of the Contract Act, in Sardar Muhammad Yasin Khan, Advocate v. Raja Feroze Khan (PLD 1972 AJ&K 46), the Supreme Court of Azad Jammu and Kashmir defined "public policy" as under:

"Public policy, therefore, means any act the allowing of which would be against the general interests of the community. This policy has involved itself with the growth of organised society. Certain standards in the domain of morality, used in its widest sense, have assumed sanctity on account of the acceptance by the general

1.2. Before the coming into force of the regime in Pakistan under the New York Convention of 1958, the Arbitration (Protocol and Convention) Act, 1937 (the "***1937 Act***") dealt with the enforcement of foreign arbitral awards issued pursuant to arbitration agreements covered by the Protocol on Arbitration Clauses, 1923 and to which the Convention on the Execution of Foreign Arbitral Awards, 1927 applied. Section 7 of the 1937 Act had set out the conditions for the enforcement of foreign arbitral awards under that legislation. It was one of the conditions under section 7 that the enforcement of a foreign arbitral award must not be contrary to the public policy or the law of Pakistan.

1.3. In Nan Fung Textiles Ltd. v. Sadiq Traders Ltd. (PLD 1982 Karachi 619) a matter relating to the enforcement of a foreign arbitral award under the 1937 Act, the Sindh High Court rejected an argument that a non-speaking foreign arbitral award (*i.e.*, which did not set out reasons) was unenforceable under the 1937 Act on the basis that such enforcement was against public policy. In order to ascertain the meaning of the expression "public policy" the court relied upon below definition from Chitty on Contract (24th Ed.):

> "Scope of Public Policy: Objects which on grounds of public policy invalidate contracts may, for convenience, be generally classified into five groups first, objects which are illegal by common law or by legislation; secondly, objects injurious to good Government either in the field of domestic or foreign affairs; thirdly, objects which interfere with the proper working of the machinery of justice; fourthly, objects injurious to family life; and fifthly, objects economically against the public interest."

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community. Therefore, any agreement which would destroy these standards or adversely effect the development of society or its organization have to be viewed from this angle and it is here that the principle of public policy is born."

1.4. The court added that this definition was "… not exhaustive as certain cases may not fit clearly into any of these five categories". While taking this position, the court relied upon Danckwert L. J. who had observed in Nagle v. Feilden (1966) 2 Q B 633 that "the law relating to public policy cannot remain immutable. It must change with the passage of time. The wind of change blows upon it ...".

1.5. Pakistan is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (the "***New York Convention***"). Pakistan had signed the New York Convention in 1958, however, ratified it much later in 2005. On July 15, 2011, a permanent legislation was enacted by the Parliament of Pakistan to implement the New York Convention in Pakistan *i.e.*, the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Act, 2011 (the "***NYC Act***").

1.6. Section 7 of the NYC Act states that the recognition and enforcement of a foreign arbitral award will not be refused except in accordance with Article V of the New York Convention. So far we have not seen a reported judgment of a Pakistani court where the court may have discussed the meaning and the scope of the expression "public policy" under section 7 of the NYC Act and Article V(2)(b) of the New York Convention. It is yet to be seen if the Pakistani courts would give this term a wider or a restricted meaning.

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2. Position under Indian law:

2.1. Like Pakistan, the expression "public policy" has been used in various Indian enactments including section 23 of the Indian Contract Act, 1872 and the Indian Arbitration (Protocol and Convention) Act, 1937.[2]

2.2. Prior to 1996, the Foreign Awards Act, 1961, dealt with the enforcement in India of foreign arbitral awards made pursuant to the New York Convention. Under section 7(1)(b)(ii) of the Foreign Awards Act, a foreign award may not be enforced if the court was satisfied that the enforcement of such award would be contrary to public policy. In Renusagar Power Co. Ltd. v. General Electric Co. (AIR 1994 SC 860), the Indian Supreme Court had defined the scope and meaning of the expression "public policy" used in section 7(1)(b)(ii) of the Foreign Awards Act as under:

> "Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression 'public policy' in S.

[2] The Indian Supreme Court, in Central Inland Water Transport Corporation Limited and others v. Brojo Nath Ganguly and others (AIR 1986 SC 1571), had defined the expression "public policy" for the purposes of section 23 of the Contract Act as under:

"...the Contract Act does not define the expression 'public policy' or 'opposed to public policy'. From the very nature of things, the expressions 'public policy', 'opposed to public policy', or 'contrary to public policy' are incapable of precise definition. Public policy, however, is not the policy of a particular Government. It connotes some matter which concerns the public good and the public interest. The concept of what is for the public good or in the public interest or what would be injurious or harmful to the public good or the public interest has varied from time to time. As new concepts take place of old transactions which were once considered against public policy are now being upheld by the Courts and similarly where there has been a well-recognized head of public policy, the Courts have shirked from extending it to new transactions and changed circumstances and have at times not even flinched from inventing a new head of policy. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the Court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy. Above all, in deciding any case which may not be covered by authority Courts have before them the beacon light of the Preamble to the Constitution. Lacking precedent, the Court can always be guided by that light and the principles underlying the Fundamental Rights and the Directive Principles enshrined in the Constitution ....".

> 7(1)(b)(ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

2.3. Presently, the Arbitration and Conciliation Act, 1996 (the "***1996 Act***"), governs matters relating to arbitration and enforcement of arbitral awards in India, both domestic and foreign. Part I of the 1996 Act deals with domestic arbitration. Part II Chapter I deals with foreign arbitral awards issued pursuant to the New York Convention. Section 48(2)(b) of the 1996 Act sets out the grounds of refusal for the enforcement of a foreign arbitral award under public policy ground and reads as under:

> "(2) Enforcement of an Arbitral Award may also be refused if the Court finds that … the enforcement of the award would be contrary to the public policy of India.
>
> Explanation:
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> Without prejudice to the generality of clause (b), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption."

2.4. Section 34(2) of the 1996 Act (which applies to domestic arbitral awards) contains following in relation to public policy:

> "An arbitral award may be set aside by the court only if … the court finds that … the arbitral award is in conflict with the public policy of India.
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> Explanation:
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> Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption or was in violation of Section 75 or Section 81."

2.5. In Oil & Natural Gas Corporation Ltd. v. SAW Pipes Ltd. (AIR 2003 SC 2629), a matter relating to the setting aside of a domestic arbitral award under section 34 of the 1996 Act, the Indian Supreme Court expanded the definition of "public policy" as expounded in the Renusagar Case and observed as under:

> "34. Therefore, in our view, the phrase 'Public Policy of India' used in S. 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term 'public policy' in Renusagar's case 1993 Indlaw SC 1441 (supra), it is required to be held that the award could

be set aside if it is patently illegal. Result would be award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or
(b) the interest of India; or
(c) justice or morality, or
(d) in addition, if it is patently illegal.

35. Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the Court. Such award is opposed to public policy and is required to be adjudged void."

2.6. As stated above, the SAW Pipes case related to a domestic arbitral award and the Indian Supreme Court had defined the expression "public policy" under section 34 of the 1996 which dealt with domestic arbitration. Consequently, the dicta in SAW case may not apply to foreign arbitral awards which are covered by section 48 of the 1996 Act where the matter is to be viewed by the court considering the scope and purpose of the New York Convention.

2.7. However, in Bhatia International v. Bulk Trading S.A. and another (2004 (2) SCC 105), the Indian Supreme Court held that the provisions of Part I of the 1996 Act would apply to international commercial arbitrations held out of India except where the parties by agreement have excluded the application of all or any of those provisions.

2.8. Following the principle laid down in the Bhatia case, the Indian Supreme Court held in Venture Global Engineering v. Satyam Computer Services Ltd. (2008 (4) SCC 190) that foreign arbitral awards made pursuant to the New York Convention can also be challenged in India under section 34 of the 1996 Act on the basis of expanded definition of the term "public policy" given in the SAW Pipes case, except where the parties had

agreed otherwise. This judgment opened the door for setting aside foreign arbitral awards on the ground of "patent illegality" as per the expanded definition of the expression "public policy" given in the SAW Pipes case such as where the foreign arbitral award is in conflict with any Indian law.

2.9. Similarly, in Phulchand Exports Ltd. v. OOO Patriot (2011 (10) SCC 300), the Indian Supreme Court held that "[I]n view of the decision of this Court in Saw Pipes Ltd., the expression 'public policy of India' used in Section 48(2)(b) has to be given wider meaning and the award could be set aside, 'if it is patently illegal'." However, having found no illegality, the Supreme Court did not refuse to recognize the foreign arbitral award.

2.10. However, in a 2012 judgment of Bharat Aluminium Co. v. Kaiser Aluminium Technical Service, Inc. (2012 (9) SCC 552) the Indian Supreme Court overruled[3] its earlier judgments in the Bhatia case and the Venture Capital case. The Supreme Court held:

> "We are of the considered opinion that Part I of the Arbitration Act, 1996 would have no application to International Commercial Arbitration held outside India. Therefore, such awards would only be subject to the jurisdiction of the Indian courts when the same are sought to be enforced in India in accordance with the provisions contained in Part II of the Arbitration Act, 1996…".

2.11. The Supreme Court held that its judgment in Bharat Aluminum case would apply prospectively to all the arbitration agreements executed after the date of said judgment.

2.12. The judgment in the Phulchand case was overruled by the Indian Supreme Court in its later judgment in the case of Shri Lal Mahal Ltd. v. Progetto Grano Spa. ((2014) 2 SCC

[3] However, the Indian Supreme Court did not specifically overrule its earlier judgment in the Phulchand Exports case. It appears that the judgment in the Phulchand Exports case was not brought to the notice of judges in the Bharat Aluminum case.

433). In the Shri Lal judgment, the Indian Supreme Court unequivocally held that the expanded definition of the expression "public policy of India" given in the SAW Pipes case cannot be applied for refusing the enforcement of foreign arbitral awards and that the expression "public policy of India" used in section 48(2)(b) of the 1996 Act should be given narrow meaning as expounded in the Renusagar Case.

2.13. Thus, at present, the enforcement of a foreign arbitral award may be refused by an Indian court on the ground of public policy under section 48(2)(b) of the 1996 Act if such enforcement would be contrary to: (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.

Table of Decisions: India

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Supreme Court of India Renusagar Power Co. Ltd. v. General Electric Co. (AIR 1994 SC 860)	The expression "public policy" used in the Foreign Awards Act, 1961, has to be construed in a liberal sense. Such construction would entail any disregard of the provisions of the Foreign Exchange Regulation Act, 1973, as well as, the concept of unjust enrichment. It was further argued that award of "interest on interest and compounding it further" and award of "damages on damages" was against the public policy of India.	X			X
Supreme Court of India Phulchand Exports Ltd. v. OOO Patriot (2011 (10) SCC 300)	It was argued that a stipulation in the contract to the effect that in case the goods did not arrive at the customs area of the importer's country within 180 days of the making of the advance payment the advance would be refunded to the buyer amounted to a penalty as well as an "unconscionable bargain" hence void under the Indian Contract Act.	X			X
Supreme Court of India	It was argued that the award was made contrary to express	X			X

Table of Decisions: India

Shri Lal Mahal Ltd. v. Progetto Grano Spa. ((2014) 2 SCC 433)	provisions of the contract entered into between the parties hence the enforcement of such an award would be against the public policy of India.				