II. WHETHER TO INVEST OR NOT: COMPARATIVE ANALYSIS OF THE PUBLIC POLICY DOCTRINE IN INDIA AND ENGLAND

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ABSTRACT

Public Policy doctrine is a barrier in the way of enforcement of international arbitral awards. There has always existed an air of inconsistency when it comes to deliberating upon the pros and cons of the use of this exception. Public policy as an exception has been considered as a roadblock in the way of India being an arbitration-friendly jurisdiction and acts as an obstacle in the way of India's ultimate goal of receiving greater Foreign Direct Investment and becoming an international arbitration hub. This can be accomplished if India provides a more friendly business environment to foreign investors and a robust dispute settlement mechanism with minimum judicial interference. Countries like the UK adopt a strict pro-enforcement bias with respect to the actual use of the public policy barrier. The article discusses the public policy exception, its origin, and its interpretation through numerous judicial pronouncements in both India and the UK. The ultimate objective is to strengthen India's pro-enforcement bias to eventually attract higher foreign investment which will finally lead to overall economic development and a greater role for India in the international commercial sector.

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I. INTRODUCTION TO PUBLIC POLICY

Justice Burroughs called 'public policy', "an unruly horse when once you get astride it you never really know where it will take you."[1]

Public policy can be a very appropriate label for the unwillingness, for whatsoever reason, to deny the enforcement of any arbitral award granted under the New York Convention.[2] One cannot practically assume what opinion any judge or a common man might hold about what public policy is.[3] In a perfect world, when parties enter into an agreement, they ensure that an arbitration clause exists in that agreement, provided that in its origin, the nature and concept of arbitration is a simple one.[4] The narrow ambit of the defence of public policy guarantees that the enforcing court cannot raise its public policy defence if it is of the view that the decision is erroneous on the merits.

According to various renowned scholars, if an economic union wishes to perform efficiently, a decision given by the court – like any other property interest – shall not have its significance weakened merely by passing a geographic border in the union, and the property interest represented by the decision as well as the legal mechanism for enforcement of rights in that

[1] Richardson v. Mellish [1824] 2 Bing. 252: 130 E.R. 294.
[2] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Jun. 10, 1958, 21 UST 2517, 330 UNTS 38 [hereinafter *New York Convention*].
[3] Besant v. Wood (1879) LR 12 C. D. 620.
[4] NIGEL ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1 (5th ed. 2009).

property interest shall be honoured and recognized throughout the union. However, in actuality, the unsuccessful party may wish to avoid carrying out the award.[5] The New York Convention provides a durable and effective mechanism to benefit the successful party and offers uniform standards for enforcement of an arbitral award. The losing party has the option to challenge the enforcement of an award and request for refusal by producing evidence relating to one of the grounds for such refusal set out in Article V(1). Further, the court holds the authority to refuse the enforcement at its discretion for reasons such as national public policy mentioned in Article V(2).[6] But the issue which arises is what constitutes the national public policy of the state deliberating over the enforcement? The public policy barrier happens to be an extremely controversial exception that can cause refusal of enforcement of an award.

This paper is aimed at critically analysing the role of the public policy barrier in the recognition and enforcement of international awards governed under the New York Convention with the help of precedents. Further, this paper examines and compares the implementation of Article V(2)(b) of the New York Convention in India as well as England, in light of the judicial pronouncements delivered by both judicial systems. The second part of this paper briefly discusses the history and application of the New York Convention with reference to the public policy exception. Further, this part clarifies that the New York Convention is not a result of a western approach and a lack of an alternative on the table simply because this convention is the

[5] David Westin, *Enforcing Foreign Commercial Judgement and Arbitral Awards in the United States, West Germany, and England*, 19 LAW & POLITICS INT'L BUS. 325 (1987).
[6] *New York Convention*, *supra* note 2.

best option for developing countries as it helps attract Foreign Direct Investment ("FDI").

The third part is the most significant aspect of this paper as it gives an overview and global perspective of the public policy doctrine and views Article V(2)(b) of the New York Convention with the outlook that this barrier of public policy is nothing but a necessary evil. It also provides certain amendments/modifications with regard to the defence under the New York Convention and scrutinises the narrow construction of Article V(2)(b). Lastly, this part briefly delves deeper into international public policy highlighting its consequences. In part four, this paper sets out the Indian and English public policy rule and gives a background of public policy doctrine in India and England. Further, it compares two Indian cases with two English cases pertaining to public policy exceptions. The concluding chapter enunciates the issues thrown up by the study and suggests a common mode ahead for the legal systems of India and England in dealing effectively with these issues.

II. THE NEW YORK CONVENTION: HISTORY AND APPLICATION

The Indian Parliament passed the Foreign Awards (Recognition and Enforcement) Act, 1961 to enforce the New York Convention (which came into force in 1958) which India ratified on July 13, 1960. It is pertinent to state that the United Kingdom did not ratify the Convention until 1975. The New York Convention, 1958 can undoubtedly be viewed as a milestone treaty for international commercial arbitration.[7] It is a breakthrough for the growth of

[7] ALBERT JAN VAN DEN BERG, THE NEW YORK CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (2nd ed. Springer 1981).

international arbitrations by establishing a scheme of cross-border recognition and enforcement of non-domestic arbitration awards. It is the backbone of the international management for the enforcement of international arbitral awards.[8]

An unvarying international arbitration system needs effective and systematic enforcement of non-domestic awards. The Convention expects its member states to accept and enforce foreign arbitral awards.[9] Even so, as the New York Convention was enacted, numerous nations were quite cautious to become a signatory. This tension emerged from the belief that perhaps the terms of the New York Convention were in violation of the domestic statutory provisions of individual states.

To tackle the abovementioned concern, Article V of the Convention was relied upon. Article V(2)(b) specifically offers a way through which a member state can choose to refuse implementation of an international arbitral award if that award can be considered as conflicting with the public policy of the enforcing state. The New York Convention wants its member states to enforce the foreign arbitral awards granted by other members,[10] however, it also comprises of a public policy exception which permits any member state to refuse enforcement of a foreign award if that award is in contravention of its public policy, the most fundamental notions of principles of law[11] or the

[8] Gillis Wetter, *Present Status of the International Court of Arbitration of the ICC: An Appraisal*, 1 ARIA 91-93 (1990).
[9] *New York Convention*, *supra* note 2.
[10] *Id.*
[11] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/4/Rev.1, at. 13; Report by the Secretary-General, Recognition and Enforcement of Foreign Arbitral Awards, E/2822, Annex II, at 20-21 & 23.

morality of that state.[12] Countries like the United Kingdom, Kuwait, the United States, and Syria have narrowly construed the public policy exception.[13]

III. PUBLIC POLICY BARRIER: A NECESSARY EVIL

In 1853, the House of Lords in the UK defined public policy as a legal principle whereby no entity can legally carry out any activity which can be considered contrary to "public good."[14] Citing a public policy exemption seems to be a security mechanism that can be used under certain specific circumstances where it would be untenable for a judicial system to enforce the award without relinquishing the same premise upon which that system is based.[15] It is appropriate that a State wishes to enjoy the ability to not recognise and enforce an award that breaches that state's internal interpretations of domestic public policy.[16] It is pertinent to mention that there exist certain procedural defects and errors in the application of the public policy barrier.

Numerous judicial systems have approved the proposal that a substantive objection cannot be included within the ambit of the public policy doctrine at the time of enforcement if it comes to light that it existed when the arbitral proceedings were underway and it was possible to raise it before the

[12] Parsons & Whittemore Overseas v. Société Générale de l'Industrie du Papier (RAKTA), 508 F.2d 969, U.S. Court of Appeals, 2d Cir., United States of America, Dec. 23, 1974.
[13] Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160 (S.D.N.Y. 1987).
[14] Egerton -v- Brownlow (1853) 4 HLC 1.
[15] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards: Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards E/2822/Add.4, p. 2.
[16] Cour de Justice of Geneva (1998) XXIII Ybk Comm Arb 764.

tribunal,[17] or if it has been brought up and denied by the arbitral tribunal on merits. The English judiciary[18] has agreed with the above proposition, that a party that was ineffective in bringing up a substantive error with the tribunal, although it may have managed to do so, has rescinded the ability to do that at the time of enforcement.[19] With regard to the competency of any court to examine a foreign award on the grounds of public policy, [20] Article V(1) of the Convention offers that recognition can be denied "at the will of the party against whom it is to be invoked," whereas Article V(2)(b) denotes that enforcement can be denied in case the respective authority of the enforcing state deems such enforcement and recognition to be violative of its public policy.[21]

IV. ARTICLE V(2)(B) OF THE NEW YORK CONVENTION – GLOBAL PERSPECTIVE

In most of the member nations of the New York Convention, the "pro-enforcement" approach has been consistently upheld.[22] This pro-enforcement position is also undeniably perceived to be a public policy issue, as correctly established by the English judiciary in the case of *Westacre Investments Inc v.*

[17] Soinco SACI & Anr. v. Novokuznetsk Aluminium Plant & Ors., [1998] 2 Lloyd's Rep. 337, Court of Appeal, England and Wales [1998] CLC 730.
[18] Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd., [1999] 2 Lloyd's Rep. 65, Court of Appeal, England and Wales [2000] QB 288.
[19] Gao Haiyan & Anr. v. Keeneye Holdings Ltd. & Anr., [2012] 1 HKC 335, Court of Appeal, Hong Kong, Dec. 2, 2011, CACV 79/2011.
[20] Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd., [1999] 2 HKC 205, Court of Final Appeal, Hong Kong (1999) 2 HKCFAR 111.
[21] *Travaux préparatoires*, Recognition and Enforcement of Foreign Arbitral Awards: Comments by Governments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/3/Add.1, at 4.
[22] MGM Productions Group, Inc. v Aeroflot Russian Airlines, 2004 WL 234871 Court of Appeals, 2d Cir., NY.

Jugoimport-SPDR Holding Co Ltd.[23] The method of the US Courts was succinctly laid down in the *Sonatrach*[24] verdict where the court held that the various rulings that unquestionably tilt the judicial scales in support of arbitration are those judgements of the Supreme Court of the United States that actively endorse a biased solution to commercial disputes with international parties. The landmark decisions such as *Bremen v. Zapata Offshore Co.*,[25] *Scherk v. Alberto-Culver Co.*,[26] and the *Mitsubishi*[27] case countered the restrictive bias of domestic courts over maintaining authority across international commercial disputes. The German Federal Supreme Court uttered the perception in different terms[28] whereby foreign awards can be refused only in case the arbitration process in itself is experiencing a grave defect and impacts the foundation of the State and its economic activities. Similarly, French courts also draw a lucid line of distinction between the domestic and international public policy with regards to the annulment of arbitral awards.[29] The tendencies of courts from all over the globe show that member states to the New York Convention have turned to a restrictive approach to the public policy barrier to enforcement.

[23] Westacre Investments Inc. v. Jugoimport-SDPR Holding Co. Ltd., [1999] 2 Lloyd's Rep. 65, Court of Appeal, England and Wales [2000] QB 288.
[24] Sonatrach (Algeria) v. Distrigas Corp, (United States District Court) Massachusetts (1995) XX Y.B. Comm Arb at 795.
[25] The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 92 S. Ct. 1907 (1972).
[26] Scherk v. Alberto-Culver Co., 417 US 506 (1974).
[27] Mitsubishi v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985).
[28] Dutch Seller v. German Buyer, (1987) XII Y.B. Comm. Arb.at 489.
[29] SA Laboratories Eurosilicone v. Societe Bez Medizintechnik GmbH (2004) Revue deI'Arbitrage 133.

V. AMENDMENT OR REMOVAL OF ARTICLE V(2)(B)

Article V(2)(b) allows any member state to follow the international process of arbitration while permitting the enforcing state to deny any award not found in consonance to its public policy. Such right to refusal is conflicting with the object and purpose of the Convention and the international commercial arrangement. Therefore, it is only fitting that the New York Convention either be amended or Article V(2)(b) be repealed. Amendment may be done to Article V(2)(b) to ensure that any member nation, on finding a foreign award violative of its public policy, may call for intervention from a third neutral body to seek nullification of that award.

Another solution that has been suggested by many scholars is the complete deletion of Article V(2)(b) from the Convention. Any party which believes that a foreign award is unfair is free to turn to all the remaining provisions and rules laid down in the New York Convention to check the validity and correctness of the award.[30] As a result, the party might seek cancellation of the award in the state where it was granted. Complete elimination of Article V(2)(b) would eradicate the arbitrariness exercised by the enforcing state of foreign awards. This elimination would actually give the satisfaction to the international community that any and every arbitral award delivered will represent the disposal of the dispute resolution process and make it mandatory for all signatory states to effectuate the enforcement of awards.

[30] *New York Convention*, *supra* note 2.

VI. PUBLIC POLICY RULE IN INDIA AND ENGLAND

A. Background in India

Public Policy in India previously comprised of the fundamental policy and interests of India, morality, and justice which was successfully followed till a wide-ranging approach was taken. We will be discussing the dichotomy that exists in the Indian judiciary concerning the public policy exception.

The first-ever interpretation of the application of this exception was laid down in *Renusagar Power Co. Ltd. v. General Electric Co.*[31] *(Renusagar),* where a pivotal milestone was established that a court was not to evaluate an award on its merits and that a bigger issue than a mere violation of the law would be required, adding that the enforcement of the award can be denied in case the award is found in violation of the fundamental policy of Indian law, interests of India, and the wide notions of justice or morality. Next in line was *Oil and Natural Gas Co. v. Saw Pipes*[32] *(Saw Pipes)* in which a new ground of patent illegality was added to the grounds computed in *Renusagar*. The *Saw Pipes judgement* laid down that an award that is found to be patently violative of any statutory provision cannot be considered to be made keeping in mind public interest and any award of this kind will unfavourably impact the administration of justice.

The case of *Phulchand Exports Ltd. v. OOO Patriot*[33] *(Phulchand)* was overruled by the SC in 2013 in *Shri Lal Mahal Ltd. v. Progetto Grano Spa*[34]

[31] Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860.
[32] Oil and Natural Gas Corporation Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705.
[33] Phulchand Exports Ltd. v. OOO Patriot, (2011) 10 SCC 300.
[34] Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.

(Lal Mahal).[35] *Phulchand* established that the patent illegality condition must be adhered to even for foreign awards, thus, giving the Indian judiciary the authority to refuse enforcement of a foreign award on the said ground. However, the *Lal Mahal* case emphasized the decision given in *Renusagar*, establishing that the test laid down then will be considered appropriate for refusal of enforcement of a foreign award owing to the reason that *Saw Pipes* and *Renusagar* dealt with different contexts with respect to this exception.

The Apex court in *ONGC Ltd. v. Western Geco International Ltd.*[36] *(ONGC)* held that the following principles were to be considered applicable to the arbitral awards: duty to follow a judicial approach, application of principles of natural justice, and Wednesbury's Principle of Reasonableness. These three defined what comprised the "Fundamental Policy of Indian Law" and further expanded the purview of this exception. This judgement opened it up for the Courts to enjoy the right to review arbitral awards on their merit and to change the arbitral award under the banner of the "fundamental policy of India law." This thereby undermined the object of arbitration and minimized the credibility of arbitral proceedings.

At this juncture, significant changes were introduced with respect to Section 34 of the Arbitration and Conciliation (Amendment) Act, 2015. The 246th Law Commission Report recommended these changes fixated on confining the Courts from intervening with the arbitral awards on "public policy" grounds. This ensured that Courts could not interfere with the arbitral award and limited the scope of the exception as given in ONGC.

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[35] Oil and Natural Gas Corporation Ltd. v. Western Geco International Ltd., (2014) 9 SCC 263.
[36] *Id.*

In furtherance, in *Associate Builders v. Delhi Development Authority*[37] *(Associate Builders),* the Apex Court laid down that an award can be revoked on the ground of justice when such award is one that shocks the conscience of the Court. The Supreme Court ruled, in *Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India*[38] *(Ssangyong)* that the most fundamental principles of justice are violated when a coercive modification of the contract can be placed on a person who did not intend to do so. It observed that this course of action was contradictory to the basic principles of justice and shocked the court's conscience.

In the more recent judgements, the scope was revaluated by the Indian Judiciary. For instance, in *Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd. and Ors.*[39] *(Venture Global)* the court stated that any award which is violative of the public policy of India will be overturned since Section 34(2)(b)(ii) of the Act also includes those instances where the award may be induced by fraud. Cases like Venture Global reinforced that coping with the exception of public policy continually appears to be a challenge for the Indian judiciary as this case reopened the debate regarding patent illegality as a ground of breach of the public policy.

In the two most recent cases, *Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors. (Karia)*,[40] and *National Agricultural Cooperative*

[37] Associate Builders v. Delhi Development Authority, 2014 SCC OnLine SC 937.
[38] Ssangyong Engineering & Construction Co. Ltd. v. National Highways Authority of India, 2019 SCC OnLine SC 677.
[39] Venture Global Engineering LLC and Ors v. Tech Mahindra Ltd. and Ors., 2017 SCC Online SC 1272.
[40] Vijay Karia & Ors. v. Prysmian Cavi E Sistemi SRL & Ors., 2020 SCC Online SC 177.

Marketing Federation of India v. Alimenta S.A. (NAFED),[41] conflicting decisions by the judiciary were observed, shedding light on the dichotomy that exists with respect to the enforcement of foreign awards under the public policy exception. The Supreme Court in *Karia* reiterated the significance of minimum judicial interference in arbitral proceedings while raising extraordinarily high costs in rejecting an appeal against the verdict of the Hon'ble Bombay High Court to allow enforcement of foreign awards. On the other hand, another coordinate bench of the Court in NAFED dismissed the order passed by the Hon'ble Delhi High Court which allowed enforcement of a foreign award.

The ruling in *Karia* declared that in order to prove a violation of the fundamental policy of the Indian legal framework, a breach of that legal principle or statute is required which can be seen as most basic and cannot be compromised. This case reinforced the time-honoured conceptions of fundamental policy and minimum judicial interference as laid down in numerous previous judgements.

While, the Court in *NAFED* ruled that the contract between the two parties was a contingent contract under Section 32 of the Indian Contract Act, 1872, which would be unenforceable on account of the lack of permission from the government. *T*hus, it was against the fundamental public policy of India to enforce such an award.

It is noteworthy that the approach of the judiciary has been targeted towards limiting the ambit of the exception, especially after the 2015

[41] National Agricultural Cooperative Marketing Federation of India v. Alimenta S.A., 2020 SCC OnLine SC 381.

Amendment. However, like two sides to every coin, there exists an opposing approach that upholds the public policy exception as a promising way to protect the basic principles of the legal system. As seen in *Karia*, the limiting approach has been accentuated while *NAFED* seems to be a huge setback to the growth in the direction of minimum judicial interference. Therefore, it is evident that there exists a dire need for a consistent approach towards the enforcement of non-domestic arbitral awards.

B. The Status in England

- A catena of decisions has recently come before the courts in England dealing essentially with the applications to set aside the awards under public policy as a result of the illegality. There is no rational strategy adopted by the English judges rather these problems have been dealt with by the courts on a case-to-case basis.
- In one of the leading cases, *Tinsley v. Milligan*[42] *(Tinsley)*, the illegality exception was scrutinized and the House of Lords established a rule-based reliance approach, popularly known as the "reliance test". Simply put, the test implied that if the defendant raised a defence of illegality, the court would have to examine whether the claim "relied" on the claimant's own illegal act. However, this test has been criticized time and again due to its drawbacks that it caused arbitrariness, ambiguity and could possibly result in injustice. This was because it concentrated on procedural hiccups instead of the policy factors behind the illegality, which raised confusion about what actually falls under the ambit of "reliance".

[42] Tinsley v. Milligan [1994] 1 AC 340.

- Further, in the landmark case of *Patel v. Mirza (Patel)*,[43] the reliance test laid down in *Tinsley* was overruled and the Supreme Court preferred to follow a flexible policy-based approach while examining the merits of the exception. For ascertaining whether public interest would be affected in this approach, it was deemed appropriate to weigh three main factors: (i) the fundamental intent of the restriction which has been breached and whether it would be strengthened by the rejection of the claim; (ii) any other appropriate public policy that could possibly bear the brunt of the denial of the claim; (iii) if the denial of the claim can be considered a proportionate reaction to the illegality of the claim. In deciding if it would be disproportionate to reject a claim on public policy grounds, a variety of considerations may be pertinent: including the severity of the misconduct, if it was expected, if both parties were equally liable, or how fundamental it was to the contract.
- Interestingly, pro-enforcement prejudice of the convention is seen as a public policy question in many countries including England. As a result, English courts have impliedly acknowledged the standard of public policy by repeatedly observing the barrier restrictively. Definitely, the English judiciary is averse to refuse enforcement of an arbitral award on this ground. The English Court of Appeal acknowledged in *RBRG Trading (UK) v. Sinocore International (RBRG)*[44] that there exists a high threshold for rejecting the enforcement of an arbitral award on public policy grounds.

[43] Patel v. Mirza [2016] UKSC 42.
[44] RBRG Trading (UK) Limited v. Sinocore International Co. Ltd. [2018] EWCA Civ 838.

In response to the claimant's contention in *RBRG* that enforcement of an international arbitration award under the New York Convention would be in contradiction to the English public policy, numerous principles were highlighted by the Court of Appeal which must be accounted for, in case of a public policy challenge. *Firstly*, the "public policy" grounds for refusing enforcement must be construed narrowly and it must be acknowledged that there always exists "a strong public policy to support enforcement." Though there could arise a ground for refusing enforcement, the Court holds the authority to nonetheless allow enforcement. *Secondly*, if the tribunal decides that illegality was not an issue, any inquiry into the facts is dissuaded unless in exceptional circumstances. *Thirdly*, if there exists illegality under English law, public policy exception would be adopted only where illegality represents principles of universal instead of strictly domestic foreign policy. *Lastly*, there must be a close correlation between the claim pursued and the illegality in the dispute. Consequently, the court decided that the correlation between the defendant's fraud and enforcement of the Award was not a valid and sufficient ground for adopting the exception.

Henceforth, it is as clear as day that the English judiciary has adopted a pro-enforcement bias when it comes to public policy and this is further highlighted by the greater standards set for the application of the exception. The numerous principles to be applied and conditions to be met for the enforcement of an award to be denied on public policy grounds simply strengthen our belief that the English judiciary in fact aims at construing the scope of this exception very narrowly.

C. India and England in Contrast

The public policy doctrine is undoubtedly governed by numerous standards and tests both in Indian and England. We have observed in the previous section how India and England both have shown their inclination towards a solely restrictive interpretation of the public policy exception and application of a pro-enforcement approach.

Indian courts have, on various occasions, tried to restrict implementation of the public policy exception and made efforts to align its goal with that of the New York Convention. The moment India started to receive appreciation for being able to control the unruly horse, the very recent decision in *Vijay Karia* has breathed fresh life in the discussion once again. However, there are still matters like *NAFED* which act as hurdles in the ultimate aim of making India an arbitration-friendly jurisdiction for foreign investors.

In the cases we have discussed, the English Courts' approach to public policy has always faced a high standard before refusal of enforcement of an arbitral award. England has clearly adopted a unidirectional pro-enforcement bias. This brings us to the inference that it is high time India also adopts a consistent approach taking inspiration from England and finally deciding on the level of acceptable judicial interference and enforcement decisions.

VII. IMPACT ON INVESTMENT

Industrialization in India contributed to a remarkable increase in global trade and business. In order to match the industrial prosperity and prevent lengthy trials, the parties turned to arbitration as the alternative dispute resolution procedure. If we look back at the history of the Arbitration and Conciliation Act, 1996, ("the Act") it is as clear as day that the purpose was to strengthen the dispute resolution mechanism while increasing trade with foreign entities. After the liberalisation of the economy, it was only appropriate that a comfortable environment be provided to investors for increasing FDI in India.

This increasing trade not only requires foreign investment in a few limited sectors but also in PSUs, defence sector, exports, infrastructure among others. The need for greater investment has been emphasised time and again since it will eventually lead to an addition to the nation's GDP and holistic economic growth. This will be the perfect example of killing two birds with one stone since India has a huge population and abundant manpower to cater to the needs of foreign investors, ultimately creating job opportunities and reducing unemployment in the country.

Anyone willing to invest in a country would naturally be apprehensive of the dispute resolution options available in case a dispute arises. The concern that comes to light here is if the investors witness the level of judicial interference in India, they would not be willing to invest their time and capital in a country with greater control of courts. The Government of India, at this juncture, must acknowledge that the ultimate objective is to encourage investment instead of creating an unsafe and volatile market setting.

A. Current State of Affairs

Judgements such as the *NAFED* verdict have serious implications regarding potential investments in India since every foreign investor would inquire about the host country's conflict resolution mechanism to establish if it really is powerful, safe, business-friendly, and so forth. Therefore, it became a necessity for India to make it crystal clear that the country will now be undertaking an anti-judicial interference stance to deal with enforcement of foreign awards on paper and in practicality. In this turbulent time came the much-awaited Vedanta ruling which reinstated this in the minds of foreign investors.

India recently amended its Insolvency and Bankruptcy Code, 2016 in light of the COVID-19 pandemic with a view of protecting businesses, but the suspension of insolvency proceedings has led to India acting in breach of its Bilateral Investment Treaty obligations with respect to the provision of fair and equitable treatment to its foreign investors. This will inevitably lead to a higher number of disputes and substantially increase the expenditure on fighting foreign claims. This further makes it unfavourable for foreign investors to invest in India.

Adding to these roadblocks is the recent Arbitration and Conciliation (Amendment) Ordinance, 2020, which aims at imposing an unconditional stay on arbitral awards induced by frauds. Arbitration has become an alternative for litigation as time passes by but provisions like these hinder the confidence of investors to invest in India. Section 48 of the Act already provides for grounds of fraud for foreign awards. This ordinance just portrays the

regressive approach undertaken by the legislature towards arbitration and takes India ten steps back.

In a situation like ours, where India intends to successfully portray its pro-enforcement stance in the international playfield, and there is still an inconsistency in the judiciary when it comes to the actual implementation of this stance, the government has to step in and take on more responsibility for the ultimate goal. Parties are challenging the foreign arbitral awards which are against them, to extract the most out of their existing trade partners, however, the idea is not to challenge and get benefit out of one foreign affiliation. Rather, the purpose is to solicit more investors and increase the opportunities for FDI in the country.

VIII. CONCLUSION – THE WAY FORWARD

India undoubtedly needs foreign investment for overall economic development. For that, it is absolutely necessary that the dispute resolution framework or the arbitration process needs to be way more robust that it acts as a catalyst in the path towards achieving this goal. It is no more a mystery that when foreign arbitral awards are not challenged over and over again, investments would rise. Therefore, the country is aware of the implications, however, the concern regarding implementation still remains.

Looking on the bright side, India, over the past six years has called for foreign investment by promising to provide a business-friendly environment. With this, India has managed to successfully scale upwards to the 63rd rank in 2020 from 142nd in 2014 in the World Bank's Ease of Doing Business Rankings finally becoming one of the top ten destinations for FDI. In the same

rankings, United Kingdom held the 8th rank all over the world making it one of the strongest and most favourable destinations for business and investment.

In order to achieve greater progress in the international commercial sector, India needs to take the cue from countries like England to establish a more investor and arbitration-friendly framework. The stable regulatory regime of the Indian Government and the strong financial climate has guaranteed that foreign investment makes its way into the country. India has taken a variety of steps in past years, like easing the FDI specifications throughout industries.

However, it is still worrisome for the country that foreign business entities willing to invest in India are still facing the ever-prevalent dilemma of whether India can be considered an arbitration-friendly state or not. This concern has just grown bigger as a result of numerous judgements where India has been held liable for violating its bilateral investment treaties with foreign states. In 2011, the arbitral tribunal held India liable for breaching the Indian-Australian BIT in the case of *White Industries Australia Ltd. v. Republic of India*[45] on the grounds that the Indian judiciary had been unable to cope with White Industries' jurisdictional claim in more than nine years. Cases like this have shed light upon the inefficiency of the judicial system which has, yet again, strengthened the doubts in the minds of foreign investors.

The solution that comes to mind is the role of the government and policymakers where the fulfilment of all BIT obligations is kept at utmost priority to attract foreign investors. More attention needs to be paid to

[45] White Industries Australia Ltd v. Republic of India, IIC 529 (2011).

international investment law which will only add to the existing skill and knowledge of the officials in control of international transactions.

The key factor behind India's reputation as "non-friendly jurisdiction" for arbitration is the level of judicial intervention by Indian courts. India has actively taken a pro-enforcement outlook intending to be an international arbitration hub, to which both the 2015 and 2019 amendments to the Act and the various judgements act as concrete proof. In order to achieve this status in the global arena, policy changes need to be introduced with a consistent approach of the judiciary as well as a holistic enhancement of the arbitration mechanism in India.