The Christopher Bathurst Essay Prize (winner)

"To what extent should a jurisdiction's public policy influence whether an international arbitral award is recognised or enforced in that jurisdiction?"

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I. INTRODUCTION

1 As a starting point, an enforcement jurisdiction may rightly consider its public policy when enforcing international awards. But this right should be fettered to a large extent to accord with the enforcement jurisdiction's international obligations and the commercial realities of international arbitration.

II. THE ENFORCEMENT JURISDICTION IS ENTITLED TO CONSIDER ITS PUBLIC POLICY WHEN ENFORCING INTERNATIONAL AWARDS.

2 An enforcement jurisdiction has the fundamental right to consider its public policy when enforcing international awards, because enforcement proceedings call upon the police powers of that jurisdiction. Before it invokes its police powers, the enforcement jurisdiction must balance a pro-arbitration attitude against other public interests e.g. anti-corruption. This balancing act was of concern in the Singapore case of *AJU v. AJT* [2011] SGCA 41, and analogous concerns will arise vis-à-vis the provisions of U.K. Bribery Act 2010. At the 2002 New Delhi Conference, the International Law Association's report acknowledged this right of the enforcement jurisdiction at ¶24:

> "*The Committee recognises the ultimate right of State courts to determine which constitutes public policy in their respective jurisdictions, and to determine whether an arbitral award should be enforced or not, particularly given that enforcement may require the support of the police powers of the State.*"

3 This ultimate right is reflected in the Singapore International Arbitration Act (Cap. 143A) (the "**IAA**") and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "**NY Convention**"). Specifically, section 31(4)(b) of IAA

mandates consideration of the public policy of *Singapore* before international awards are enforced. Article V(2)(b) of the NY Convention mirrors this by refusing enforcement on the basis of the "public policy of that [enforcement] country."

4 Even if the enforcement jurisdiction applies notions of international public policy, it is because these notions are consonant with that jurisdiction's public policy. In the Hong Kong case of *Hebei Corp v. Polytek Engineering Co* [1991] HKCFA 40, Sir Anthony Mason concurred at ¶98:

> "*No doubt, in many instances, the relevant public policy of the forum coincides with the public policy of so many other countries that the relevant public policy is accurately described as international public policy.* ***Even in such a case, if the ground is made out, it is because the enforcement of the award is contrary to the public policy of the forum****...*"
>
> (Emphasis added)

5 Civil law jurisdictions have made similar judicial pronouncements as exemplified by the Swiss Federal Supreme Court in the case of *X v. Y* [1996] ASA Bull 550 at 555:

> "*[A]n award is inconsistent with public policy if it disregards those essential and widely recognised values which,* ***according to the prevailing values in Switzerland****, should be the founding stones of any legal order.*"
>
> (Emphasis added)

6 Hence, as a starting point in enforcement proceedings, the enforcement jurisdiction may rightly apply its public policy in accordance with prevailing values as determined by that jurisdiction.

III. BUT THE ENFORCEMENT JURISDICTION'S RIGHT TO APPLY ITS PUBLIC POLICY SHOULD BE FETTERED TO A LARGE EXTENT.

A. THE JURISDICTION'S RIGHT SHOULD BE RESTRICTED IN ACCORDANCE WITH THE MODEL LAW AND NY CONVENTION WHICH ARE PART OF THE JURISDICTION'S LAWS.

7 First, an enforcement jurisdiction's application of its public policy must be consistent with the circumscribed public policy doctrine under the UNCITRAL Model Law on International Commercial Arbitration (the "**Model Law**") and/or the NY Convention, because that jurisdiction had incorporated these international instruments as part of its laws and hence ought to follow the spirit of the law. In *Re Parsons & Whittemore Co* 508 F.2d 969, the U.S. Second Circuit Court of Appeals explained at 974:

> "*[A] circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.*"

8 In an oft-cited pronouncement echoing the pro-arbitration Second Circuit's stance, the Singapore Court of Appeal has held that it would not enforce awards which "shock the conscience,… clearly be injurious to the public good, or… violate the forum's most basic notion of morality and justice" (*PT Asuransi v. Dexia Bank* [2006] SGCA 41 at ¶59). Both judicial definitions of a circumscribed role for an enforcement jurisdiction's public policy are supported by the NY Convention's *travaux préparatoire,* which delineate public policy as "fundamental notions and principles of justice" vis-à-vis substantive and procedural elements of the arbitration.

9 Moreover, by restrictively applying its public policy as with other jurisdictions, the enforcement jurisdiction rightly takes cognisance of common values across jurisdictions in this globalised world. In this regard, the enforcement jurisdiction should be less hasty to interfere with international awards as compared to domestic awards. In the context of conflicting foreign court judgments which separately annulled and enforced the same awards, the English Court of Appeal held in the case of *Yukos Capital v. OJSC Rosneft* [2012] EWCA Civ 855 at ¶151:

> "*The standards by which any particular country resolves the question whether the courts of another country are 'partial and dependent' may vary considerably…* ***Normally such recognition [of foreign judgments] will be given and, if it is to be refused, cogent evidence of partiality and dependency will be required***."
>
> (Emphasis added)

10 This reasoning applies equally to international awards. In a similar vein, the Hong Kong Court of Appeal has held that while the use of mediation during arbitration proceedings may demonstrate a real or apparent risk of bias to the enforcement courts, the latter must accord due weight to "an understanding of how mediation is normally conducted in the place where it was conducted" (*Gao Haiyan v. Keeneye Holdings* [2011] HKCA 459 at ¶102). Hence the court enforced the award.

B. FURTHERMORE, A NARROW INFLUENCE OF THE JURISDICTION'S PUBLIC POLICY ACCORDS WITH THE COMMERCIAL REALITIES OF INTERNATIONAL ARBITRATION.

11 Second, an enforcement jurisdiction should accord less weight to its public policy vis-à-vis the enforcement of international awards because the reality is that parties choose arbitration over litigation for greater predictability of enforcement. The raison d'être of

international arbitration is to obtain a decision which is enforceable across jurisdictions and avoids problems associated with enforcing foreign judgments. It is this commercial reality which the Hong Kong court astutely noted in the case of *A v. R* [2009] HKCFI 342 at ¶¶24-25:

> "*Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration… **To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration.***"
>
> (Emphasis added)

12 In addition, upholding the efficacy of the parties' arbitration agreement by a limited application of the enforcement jurisdiction's public policy promotes a pro-arbitration climate. This is critical if the enforcement jurisdiction seeks to reap the commercial benefits of international arbitration. In *Re An Arbitration* [1995] SGHC 232, Prakash J declared at ¶45:

> "*As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad.*"

13 In contrast, the Indian Supreme Court has since extended its expansive interpretation of public policy in *Saw Pipes* from setting aside proceedings to enforcement proceedings (*Phulchand Exports Ltd v. OOO Patriot* [2011] 10 SCC 300). Given that Indian *domestic* public policy now applies to enforcement of *international* awards, commercial parties will think twice before enforcing awards in India and this will adversely affect India's potential commercial gains from international arbitration.

14 Hence, the enforcement jurisdiction's international obligations and the commercial realities of international arbitration support a narrow influence of that jurisdiction's public policy on enforcement proceedings.

IV. CONCLUSION

15 On the basis of the foregoing, while the enforcement jurisdiction retains the ultimate right to consider its public policy when enforcing international awards, this right should be fettered to a large extent.

(*1,300 words*)
