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## **RESEARCH AREAS OF INTEREST**

International Business Law; with particular focus on International Dispute Resolution, International Commercial Arbitration, Investment Law and Investment Arbitration, International Trade Law, Commercial Mediation, Contract Law, Bankruptcy Law, Secured Transactions Law, and Private International Law.

## **CURRENT ACADEMIC POSITIONS**

Doctoral Candidate (S.J.D.) in International Business Law, at the Central European University [QS World Rank by Subject: 151-200], since September 2015. Expected to graduate in May 2019. Submitted doctoral thesis on: "The Public Policy Enigma in International Commercial Arbitration (With Special Reference to Public Policy as a Ground to Refuse Enforcement of Foreign Arbitral Awards in India, and its Comparison with England, Singapore, and the United States)", under the supervision of Prof. Tibor Várady.

## **EDUCATION**

Degree/ Certificate	Institute/ University	Majors	Grades
LL.M. (2012-2014)	South Asian University (SAARC), New Delhi, India.	International Law	6.93/9 (77%)
B.S.L-LL.B. (2005-2010)	D.E.S. Law College (Fergusson) University of Pune, India.	Law	FIRST CLASS
Diploma in Geo-Politics and International Relations (2006-2007)	JRVGTI, Fergusson College, Pune, India.	International Relations	FIRST CLASS

## **TEACHING EXPERIENCE**

### **University of Yangon, Department of Law, Myanmar** (June 2017 – September 2017)

As a teaching fellow of Central European University's Global Teaching Fellowship Program, taught Business Law II (which included International Commercial Arbitration, Myanmar Arbitration Act, Investment Laws and Investment Arbitration, and Intellectual Property Rights) and Administrative Law, to Third Year and Fourth Year Law students, respectively. Introduced courses on International Commercial Arbitration and Investment Arbitration, at the University of Yangon. Also, introduced students to Computer based Legal Research.

### **Central European University, Budapest, Hungary** (September 2016 – April 2017)

Mentor/Coach of the Central European University's Vis International Commercial Arbitration Moot Team. Guided the team in conducting research, drafting memorandums, and helped in preparing for the oral presentations.

### **Vitasta School of Law and Humanities, Kashmir, India** (Oct. 2014 – Dec. 2014)

Taught courses on Public International Law and Labour Laws, to Fourth Year students of the five-year law course and the Second Year students of three-year law course, respectively.

## **RESEARCH EXPERIENCE**

**Hungarian Academy of Sciences, Budapest, Hungary** (January 2017 – August 2017)  
Research Fellow in the project on 'Using and Abusing Public Interest against Free Competition – Comparative Analysis of Federal Markets'; research project of Momentum Research Group, Hungarian Academy of Sciences (HAS) and Szeged University, Budapest, Hungary.

**Cornell Law School, Cornell University, New York, U.S.A** (Oct. 2017 – Dec. 2017)  
Was invited as Berger and Clarke Visiting Research Scholar. Conducted research in connection with my doctoral dissertation under the supervision of Prof. John Barcelo.

**The Dickson Poon School of Law, King's College London, U.K.** (Sept. 2018 – Oct. 2018)  
Was invited as Visiting Research Fellow. Worked on certain aspects of my doctoral dissertation under the guidance of Prof. Manuel Penades Fons.

## **PUBLICATIONS**

### Book Chapters

"*Abuse of Process' and Anti-Arbitration Injunctions in Investor-State Arbitration: Analysis of Recent Trends and the Way Forward*", in Csongor István Nagy (ed.), *Investment Arbitration and National Interest* (Council of International Law and Policy, Indianapolis, USA, 2018) [ISBN: 978-0-9858156-8-4] pp. 53-68 (16 Pages) **Peer-reviewed / Sole Author/ International**

"*India's Tryst with Free Trade: Overcoming the Inherent Challenges of Federalism*", in Csongor István Nagy (ed.), *World Trade and Local Public Interest: Trade Liberalization and National Regulatory Sovereignty* (Forthcoming, Springer, 2019) (18 Pages) **Peer-reviewed/ Sole Author/ International**

### Articles

"*Has the Public Policy Exception Returned to Haunt Indian Courts?*" (December 12, 2017) Kluwer Arbitration Blog (5 Pages) **Peer-reviewed/ Sole Author/ International**

"*The Kashmir Conundrum – An International Law Perspective*" (May 2016) Vol. V, Issue 03, The Kashmir Walla [ISSN: 2347 - 6451] (4 Pages) **Sole Author/National**

"*Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards: A South Asian Perspective*" (2015) Vol. 02, No. 04, European Journal of Comparative Law and Governance [ISSN: 2213-4506] pp. 316-350 (35 Pages) **Peer-reviewed/ Sole Author/ International** {This research paper was listed as an essential reading for the participating High Court Judges of India, during the 'Conference for High Court Justices on Arbitration including International Arbitration', held at the National Judicial Academy, Bhopal, from 14<sup>th</sup> to 16<sup>th</sup> December, 2018.}

"*Targeted Killings: Through the Prism of International Law*" (Jan – June 2015) Vol. 01, No. 01, Shobith University Journal of Interdisciplinary Research [ISSN: 2394-8841] pp. 12-18 (7 Pages) **Peer-reviewed/ First author/ National**

"*Enforcement of Annulled Arbitral Awards: A Dichotomy of Approaches*" (August 2014) Vol. 06, No. 08, The Indian Arbitrator, An Online magazine of Indian Institute of Arbitration and Mediation [ISSN: 2456-3587] pp. 7-12 (6 Pages) **Peer-reviewed/ Sole Author/ National**

"*Right to Self-Determination as an International Rule of Law: Reality or Myth?*" (May 2014) Vol. 14, No. 153, LawZ [ISSN: 2347-6451] pp. 15-18 (4 Pages) **Sole Author/National**

"*Judicial Review: India, Pakistan and Sri Lanka*" (March 2014) Vol. III, Supreme Laws Today, D.L.T. Publications, India, pp. 41-45 (5 Pages) **Sole Author/ UGC Listed/ National**

#### Newspaper Columns

"Dishonouring the Constitution" – Greater Kashmir (02.12.2018)

"Anti-Incumbency: A Win-Win Situation for the Beneficiaries" – Rising Kashmir (23.12.2014)

#### **CONFERENCES/SEMINARS/PRESENTATIONS/CO-CURRICULAR ACCOLADES**

April 2018: Delivered a real-time online lecture to the senior LL.M. candidates of the **South Asian University, New Delhi**, on the topic "Arbitral Tribunals and Arbitral Proceedings, in International Commercial Arbitration".

April 2018: Participated and presented a paper on "Public Policy Exception in India: A Tale of Turbulent Past and a Promising Future" at an **international conference** on "60 Years of The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Key Issues and Future Challenges", at **Loyola University Andalusia, Spain**.

August 2017: Delivered a lecture on the topic "Introduction to International Commercial Arbitration", at the **Department of Law, East Yangon University, Myanmar**.

July 2017: Delivered a lecture on the topic "Introduction to International Investment Law and Investment Arbitration", at the **Department of Law, Dagon University, Myanmar**.

April 2017: Participated and presented a paper on "Decrypting the Role of Public Policy in Private International Law and International Commercial Arbitration" at an **international conference**, "Sixth Annual Conference of the American Society of Comparative Law – Young Comparativists Committee", at **Koç University, Istanbul, Turkey**.

April 2017: Participated as an arbitrator in the 24<sup>th</sup> William C. Vis International Commercial Arbitration Moot, in **Vienna, Austria**.

February 2017: Participated as an arbitrator in a two day international Training Program/Workshop on Vis International Commercial Arbitration Moot organized by Association Arbitri and Law Development Program, U.S. Department of Commerce and U.S. Embassy – Sarajevo, in **Mostar, Bosnia and Herzegovina**.

August 2016: Participated in a "Training Course on International Arbitration", organized by the **University of Leiden** and the **Permanent Court of Arbitration, at The Hague, The Netherlands**.

May 2016: Participated in an **international conference** and submitted a paper on "Investment Arbitration and National Interest: Central and Eastern European Experiences in the Light of the Upcoming EU-US Free Trade Agreement", organized by the Federal Markets "Momentum" Research Group and the Central European University, at the **Hungarian Academy of Sciences, Budapest, Hungary**.

September 2015: Submitted a paper and participated in an **international symposium** on "Reform of Secured Transaction Laws – Chinese and European Experiences Compared", organized together by the Central European University and Chinese-EU School of Law at the **Central European University, Budapest, Hungary**.

December 2012: Participated in the "1st Annual Convention of Indian Association of International Studies (IAIS)", organized in collaboration with the Institute for Research on India and International Studies (IRIIS), at the **India International Centre, New Delhi, India**.

2009-2010: Was member of the Editorial Board of the D.E.S. Law College's annual magazine **SWADES**.

December 2008: Participated in the national level seminar, "Students for Human Rights (SHR)", organized by **Human Rights Law Network (HRLN), at Mumbai, India**.

February 2008: Represented my college at the "Mock United Nations Assembly (MUNA)", a national level competition, organized by the **Rotary Club Pune, India**.

December 2007: Participated and represented my college at a four-day residential seminar "LSS (Liberty and Society Seminar), Bangalore, India", conducted by **Centre for Civil Society, India**

### **GRANTS AND AWARDS**

Awarded merit based scholarship (5000 USD) by the Central European University Foundation of Budapest (**International Organisation**), to conduct research at Cornell University Law School, New York, from October 2017 – December 2017.

Awarded merit based scholarship (7790 USD) by the Central European University Foundation of Budapest (**International Organisation**), to conduct research and teach at the Department of Law, University of Yangon, Myanmar, under the Global Teaching Fellowship Program, from June 2017 – September 2017.

Awarded research grant (2890 USD) by the Hungarian Academy of Sciences (**International Organisation**), to conduct research for a project on 'Using and Abusing Public Interest against Free Competition – Comparative Analysis of Federal Markets', from January 2017 – August 2017.

Awarded merit based scholarship (1500 USD) by the Central European University Foundation of Budapest (**International Organisation**), to attend the Training Course on International Arbitration organized by the University of Leiden and the Permanent Court of Arbitration, at The Hague, The Netherlands, in August 2016.

Awarded merit based 'Full CEU Doctoral Scholarship' by the Central European University Foundation of Budapest (**International Organisation**), from 2015-2018, to undertake S.J.D. program in International Business Law, Legal Studies Department, Central European University, Budapest, Hungary.

Awarded Partial merit based scholarship by South Asian University (**International University established by SAARC Member Countries**) from 2012-2014, to undertake LL.M. in International Law, at the South Asian University, New Delhi, India.

### **PROFESSIONAL EXPERIENCE**

**Office of Justice Mansoor Ahmad Mir, Former Chief Justice of H.P.** (Since April 2019)  
**Arbitration/Research Associate.** Assist Hon'ble Justice in high-stake commercial disputes in India by acting as arbitration cum research associate in the arbitration proceedings. The responsibilities include participating in the arbitral proceedings, and to assist in research and drafting.

**Leg'ally – The Law Firm, Srinagar, Kashmir, India** (January 2015 to June 2015)  
**Legal Associate.** Represented and advised clients in matters of litigation and dispute resolution, before the High Court and sub-ordinate courts of Jammu and Kashmir, and various other Tribunals/Commissions. The responsibilities included drafting of memos, researching, pleading and managing administrative/office affairs.

**Azhar-ul-Amin & Associates, Srinagar, Kashmir, India** (July 2014 to December 2014)  
**Legal Associate.** Represented and advised clients in matters mostly dealing with service writ petitions and of commercial nature (including commercial arbitration), apart from representing the Jammu and Kashmir Public Service Commission (an autonomous Constitutional body) before the High Court of Jammu and Kashmir. As a legal associate the responsibilities included office management, drafting, researching and arguing before the Hon'ble Courts and Tribunals.

**Chambers of Senior Advocate Gaurav Pachnanda, New Delhi** (Feb. 2013 to March 2013)  
**Intern.** Successfully completed internship with the then Senior Additional Advocate General, Jammu and Kashmir Government, at New Delhi. Assisted the senior advocate in drafting and research work, in matters listed before the Supreme Court of India and the High Court of Delhi. Also, assisted the senior advocate in commercial arbitration matters.

**Mishra & Associates, New Delhi** (August 2010 to June 2012)

**Junior Associate.** Assisted my seniors in drafting and research work, in matters listed before the High Court of Delhi. Also, contributed substantially in management of the office.

**M.V.Kini & Co., Pune, India** (January 2010 to April 2010)

**Intern.** Successfully completed internship (which was a part of practical training course in LL.B.) under the guidance of Adv. Pawan Pathak, at Pune, India. Assisted the learned advocate in drafting and researching in the matters related to Negotiable Instruments, and also in the cases listed before the Debt Recovery Tribunal, Pune.

**Human Rights Law Network (HRLN), Srinagar, Kashmir, India** (May 2008 to June 2008)

**Intern.** Assisted my seniors in drafting and research work, and attended proceedings at the High Court of Jammu and Kashmir, at Srinagar. Also, worked as the chief coordinator while organizing a national level seminar for HRLN, on the topic "STUDENTS FOR HUMAN RIGHTS", in coordination with the University of Kashmir, Srinagar.

**Centre for Public Policy and Research (CPPR - Chennai), India** (November to December 2007)

**Intern.** Was engaged for a project on collection of information of all legal procedures and bye-laws involved in starting small scale business, like that of fruit / vegetable seller, mutton shop, barber shop etc. within the jurisdiction of Srinagar Municipal Corporation, Jammu and Kashmir, India. The aim was to find out the impediments faced by the people in getting their licenses issued or renewed.

#### **PROFESSIONAL AFFILIATIONS/QUALIFICATIONS**

Bar Council of Delhi: Was admitted in 2010. Eligible to practice before all courts and tribunals in India

Member, Young International Council for Commercial Arbitration (YICCA)

Student Member, Chartered Institute of Arbitrators (CIArb)

Member, Young Singapore International Arbitration Centre (YSIAC)

Passed the **National Eligibility Test (NET)** conducted by University Grants Commission of India, in 2013: Eligible for lectureship at Indian Universities

#### **LANGUAGES**

English (Fluent), Urdu (Fluent), Hindi (Fluent), Kashmiri (Fluent), Punjabi (Can Speak), Arabic (Can Read)

#### **REFERENCES**

Tibor Várady, Professor Emeritus, Department of Legal Studies, Central European University, Budapest, Hungary. Email: varadyt@ceu.edu

Tibor Tajti, Professor and Head of the Department, Department of Legal Studies, Central European University, Budapest, Hungary. Email: tajtit@ceu.edu

Sai Ramani Garimella, Senior Assistant Professor, Faculty of Legal Studies, South Asian University, New Delhi, India. Email: ramani@sau.ac.in

WASIQ ABASS DAR\*

## 'ABUSE OF PROCESS' AND ANTI-ARBITRATION INJUNCTIONS IN INVESTOR-STATE ARBITRATION – AN ANALYSIS OF RECENT TRENDS AND THE WAY FORWARD

### Abstract

*The abuse of procedural rights in investor-state arbitration is often employed by investors as a strategy to maximize the possibility of a favorable decision. Initiating multiple or parallel arbitral proceedings, at times under different bilateral investment treaties, for the same or related claims is one such manifestation of abuse of process. In response, host states usually prefer to approach national courts for obtaining a relief against the abuse of process in form of an anti-arbitration injunction. Though a popular tool for state parties in investor-state arbitration, anti-arbitration injunctions granted by national courts, inter alia, are often criticized for being an interference with the arbitral tribunal's authority to decide on matters of admissibility and jurisdiction. This article examines the concerns associated with the notion of abuse of process in the context of investor-state arbitration and evaluates possible remedies against the abuse of process. While focusing on the practice of national courts to grant anti-arbitration injunctions, the article, based on recent trends, assesses the varying positions of national courts on the issue. Taking into account the concerns and apprehensions raised by both investors and host states, the article proposes a balanced approach where the scope of national courts is narrowed down when it comes to issuing anti-arbitration injunctions and only the supervisory courts are authorized to grant such injunctions.*

### I. Introduction

Investors, more often than not, have a perception that the national courts of a host state will have a sense of loyalty towards the host state and, therefore, will inevitably be partial while deciding the dispute.<sup>1</sup> This opinion, which may not always be incorrect, is one of the most significant driving forces influencing investors to opt for impartial international arbitration proceedings as a dispute settlement mechanism – instead of conventional litigation before the courts of the host state.

One of the peculiar features of investor-state arbitration is that it is a product of a treaty between states (the home state of the investor and the host state) that allows the investor to initiate international arbitration proceedings against the host state. Once the

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<sup>1</sup> Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, in *CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 71* (A.W. Rovine ed., Boston, 2010).

# **INDIA'S TRYST WITH FREE TRADE: OVERCOMING THE INHERENT CHALLENGES OF FEDERALISM**

WASIQ ABASS DAR<sup>1</sup>

## **Abstract**

Federal States, usually, have this intrinsic characteristic of providing fiscal autonomy to its federating or subnational units. India, although, not a purest form of federal state, reflects a federal structure where the constituent states do enjoy, to some extent, financial autonomy in terms of regulating trade and commerce. As an economy, India has come a long way from being a socialist style closed economy to a predominantly liberal and globalized one. India's tryst with free trade, primarily, started with the major economic reforms of 1991 – when it adopted the mantra of liberalization, privatization, and globalization. Like many other federal states, India has not been immune to the challenges that a federal system encounters while engaging in trade and commerce at a multilateral level. In times when India has evolved from a closed economy to a prominent global market, and aims at becoming an economic power to reckon with, identifying and managing the inherent challenges to free flow of trade becomes crucial to keep a check on the possible provincialism and protectionism.

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# Understanding Public Policy as an Exception to the Enforcement of Foreign Arbitral Awards

## *A South-Asian Perspective*

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### Abstract

The paper, as the title suggests, aims at understanding and exploring the doctrine of public policy as a ground for refusing enforcement of foreign arbitral awards. Public Policy is one such ground provided in the New York Convention as well as in the UNCITRAL Model Law, which is most often invoked in the national courts to challenge or refuse the enforcement of foreign arbitral awards. What makes it more complicated is the lack of common world-wide definition of public policy or practice on its application, as the same varies from State to State. The traces of ambiguity, subjectivity (at the hands of the courts in terms of interpretation of the concept), and unpredictability associated with the concept of public policy have at times significantly thwarted the effectiveness and efficiency of international commercial arbitration. This paper attempts to understand and explore the enigma of public policy as an exception to the enforcement of foreign arbitral awards. Apart from revisiting various scholarly works on this issue, interpretation of this concept by various judicial institutions across the globe (with special focus on India, Pakistan, Bangladesh and Sri Lanka) has been attempted, followed by a comparative analysis, to analyse its application on the ground. This paper argues and suggests that a more desirable method of interpreting public policy, i.e. narrow interpretation, is the need of the hour, keeping in consideration the growing demands of international trade and commerce.

### Keywords

International Commercial Arbitration – Public Policy – enforcement – foreign awards – India – Pakistan – Bangladesh – Sri Lanka



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INDIA (<http://arbitrationblog.kluwerarbitration.com/category/india/>),  
PUBLIC POLICY (<http://arbitrationblog.kluwerarbitration.com/category/public-policy/>)

## Has the Public Policy Exception Returned to Haunt Indian Courts?

(<http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/>)

Wasiq Abass Dar (<http://arbitrationblog.kluwerarbitration.com/author/wasiq12/>) (Central European University, Budapest) / December 20, 2017 (<http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/>) / 1 Comment (<http://arbitrationblog.kluwerarbitration.com/2017/12/20/public-policy-exception-returned-haunt-indian-courts/#comments>)

On 1 November 2017, a division bench of the Supreme Court of India (hereinafter SCI) **referred** ([http://supremecourt.gov.in/supremecourt/2013/29119/29119\\_2013\\_Judgement\\_01-Nov-2017.pdf](http://supremecourt.gov.in/supremecourt/2013/29119/29119_2013_Judgement_01-Nov-2017.pdf)) the matter between *Venture Global Engineering LLC and Tech Mahindra Ltd.* to a larger bench, in view of the diverging opinions emerging from the division bench. In substance, the SCI was looking at the legality of the order of the High Court, which reversed the Trial Court's decision to set-aside the award on grounds of violation of public policy of India.

### Facts:

Venture Global Engineering LLC (hereinafter VGE), a company incorporated under the U.S. laws; and Tech Mahindra Ltd., formerly known as Satyam Computers Pvt. Ltd (hereinafter Satyam), an Indian Company, entered into a joint venture and shareholder agreement in Oct 1999. Section 8 of the Agreement defined 'events of default', and the rights and obligations of parties upon the occurrence of the 'event of default'. One of the clauses in Section 8 of the Agreement provided that, within 30 days after becoming aware of the occurrence of the 'event of default', the non-defaulting party shall have the option to either purchase the defaulting shareholder's shares at the **book value** or cause the immediate dissolution and liquidation of the joint venture company.

Between March 2003 and May 2004, 21 members of the Group of Companies, of which the VGE was a member, filed for bankruptcy and were declared bankrupt. Bankruptcy, as per Section 8 of the Agreement, was categorized as 'event of default'. Consequently, disputes arose between the parties, and Satyam invoked the arbitration clause that provided for LCIA arbitration, with laws of State Michigan, United States, as the governing law of the agreement. The clause also provided for compliance with the relevant laws of India.

The award was delivered in April 2006, where the arbitrator rejected claims of VGE, and *inter alia*, directed VGE to sell their 50% shares to Satyam at book value. This was followed by litigations both in the U.S. and India.

VGE filed a civil suit in India before the City Civil Court in Secunderabad – where it sought a “declaration that the award is illegal and without jurisdiction”, and “a decree for granting of permanent injunction” against Satyam from getting the award enforced. The court granted an *ex parte* injunction order, restraining Satyam from enforcing the award. Satyam challenged the order before the High Court of Andhra Pradesh, where the said appeal was allowed, and the City Civil Court was directed to adjudicate afresh on merits.

Satyam's prayer before the City Civil Court for rejection of the plaint and dismissal of the suit was accepted. VGE's appeal against the order before the High Court was dismissed. VGE approached the SCI, which allowed the appeal (***Venture-I***) (<http://supremecourt.gov.in/jonew/judis/30104.pdf>); directing, *inter alia*, that VGE was entitled to challenge the award before Indian Courts, as Part I of the Arbitration and Conciliation Act of India (hereinafter ACA) was applicable even to a foreign award according to the

law laid down in **Bhatia International's case** (<http://supremecourt.gov.in/jonew/judis/18322.pdf>). The SCI, without expressing any opinion on the merits of the claims made by parties, directed that "the Trial Court was at liberty to transfer the case to the competent court to decide the case...". Accordingly, setting-aside proceedings under Section 34 of the ACA were initiated before the Court of 2<sup>nd</sup> Additional Chief Judge (hereafter Trial Court), Hyderabad, in 2008.

Meanwhile, in January 2009, B. Ramalinga Raju, who was the Chairman and Founder of Satyam, disclosed that balance sheets of Satyam had been manipulated to present inflated profits. Upon this disclosure, VGE filed an application before the court to present additional facts and argued for setting-aside of the award on an additional ground of being against the public policy of India. The Trial Court allowed VGE's application. Satyam challenged the order before the High Court, arguing that application for setting-aside was not filed within the prescribed limitation period under the Indian law, and new ground of challenging the award could not be invoked after the expiry of the limitation period. The High Court allowed the application of Satyam, which led to another round of litigation before the SCI. VGE challenged the decision of the High Court, and the SCI in **Venture II** (<http://supremecourt.gov.in/jonew/judis/36650.pdf>) allowed the appeal – restoring Trial Court's order. The SCI emphasized that the facts revealed after the making of the award are relevant, in order to establish whether the making of the award has been induced by fraud.

Following the *Venture II* SCI judgment, the Trial Court allowed the application of VGE, and set-aside the award. The Trial Court reasoned that the transfer of 50% shares of the Joint Venture Company to Satyam at *book value*, as directed in the award, as against *fair value*, violated the provisions of the Foreign Exchange Management Act, 1999 (hereinafter FEMA) – hence against the public policy of India. It also held that the facts revealed by Ramalinga Raju constitute fraud and misrepresentation on part of Satyam – having a causative link with the facts that formed the basis of the award, therefore against the public policy of India. Satyam challenged the award before the High Court. Allowing the appeal, the High Court reversed the Trial Court's decision. VGE, aggrieved by the decision of the High Court, filed an appeal before the SCI.

#### Decision:

**Justice Sapre** observed that the Trial Court correctly found the direction to transfer shares at book value instead of fair value as a violation of FEMA – hence against public policy. He largely relied on the definition of expression 'public policy' discussed in **Associate Builders' case** (<http://supremecourt.gov.in/jonew/judis/42114.pdf>). It was held that violating FEMA provisions would amount to patent illegality and, thus, public policy of India was violated. Taking a cue from the findings of the SCI in *Venture I* and *Venture II*, he observed that suppression of material facts on part of Satyam clearly has a causative link inter se the companies involved. He further reasoned that had the facts been brought before the shareholder of the joint venture, VGE would have been able to get first right to terminate the agreement and seek relief against Satyam – as a breach on Satyam's part happened prior to VGE's bankruptcy. Also, as suppression of material fact continued during the arbitration proceedings, the proceedings and the subsequent passing of the award cannot be said to have held fairly or reasonably. Finding that the award was tainted by fraud committed by Satyam, it was held to be against public policy of India.

**Justice Chelameswar**, had a different opinion. In substance, he observed that the Trial Court had failed to provide reasons as to how the award, which directed the transfer of shares on book value instead of fair value, would violate the public policy of India. Criticizing the Trial Court, he observed that in absence of any basis in facts, or identification of the provision of law with which the award is in conflict with, the conclusions drawn cannot legally be sustained. On the issue of the alleged fraud committed by Satyam and its influence on the award, Justice Chelameswar sided with the finding of the High Court that fraud was not proved before any court. He observed that the Trial Court's theory that concealment and misrepresentation of facts by Satyam establish a causative link, making the award opposed to the public policy of India, was also not supported by cogent reasons. He stressed that in *Venture II*, the SCI emphasized only upon the relevance of pleading those 'concealed facts', and did not hold that the 'concealed facts' constituted material facts rendering the award liable to be set-aside. He supported the decision of the High Court, that the appeal be dismissed, and the award restored.

#### Comment:

*Venture III*, is a reminder that dealing with the public policy exception continues to be a struggle for the Indian courts. Although the SCI produced diverging opinions in the case at hand, as far as the making of the award being induced by fraud is concerned, one cannot ignore to notice that both opinions agree upon the legal position that if the causative link is proved between the frauds committed and the award rendered, then such an award would be in violation of public policy of India. Justice Sapre's observation that violation of FEMA is contrary to public policy of India takes us back to the same debate as to whether patent illegality, on the face of it, should be taken as violation of public policy of India. It is pertinent to note that the SCI on multiple occasions, for example in **Associate Builders** (<http://supremecourt.gov.in/jonew/judis/42114.pdf>), **Mc Dermott International** (<http://supremecourt.gov.in/jonew/judis/27762.pdf>), **Centrottrade Minerals** (<http://supremecourt.gov.in/jonew/judis/27735.pdf>), **J.G. Engineers** (<http://supremecourt.gov.in/jonew/judis/37943.pdf>), has stressed that patent illegality, if of trivial nature, should not be held against public policy. Patent illegality must go to the very root of the matter. The amended version of ACA, in Explanation (2A) of Section 34(2)(b)(ii), also seems to support this proposition. Now that the matter has been referred to a larger bench, it will be interesting to see how the legal issues will finally be settled, and how the decision will shape the approach of Indian courts as far interpretation of the public policy exception is concerned.

# ENFORCEMENT OF ANNULLED ARBITRAL AWARDS: A DICHOTOMY OF APPROACHES

WASIQ ABASS DAR



*In international trade and commerce, parties belonging to different geographical jurisdictions with varied legal systems are involved. To avoid potential legal complications, international commercial arbitration is the favoured system of dispute resolution. One of the most important reasons for this is the universal enforcement of arbitral awards. There could also be circumstances where the award passed is flawed. The author analyses the norms or practices where an international arbitral award can be annulled and also looks at situations where an annulled award could also be enforced.*

AUTHOR: WASIQ ABASS DAR IS A 2<sup>ND</sup> YEAR LL.M STUDENT OF SOUTH ASIAN UNIVERSITY, NEW DELHI, INDIA

## INTRODUCTION

As a matter of fact, international trade and commerce involves parties belonging to different geographical jurisdictions where legal systems may vary as far as the laws and procedures involved are concerned, there by leading to complicated and conflicting situations. And to avoid these potential legal complications, international commercial arbitration comes into picture as the most sought after alternative dispute resolution (ADR) mechanism. It not only has the distinction of being less time consuming mechanism, but also permits a great degree of flexibility, which is more often than not denied in the traditional judicial settlement<sup>1</sup>.

One of the most important features of international commercial arbitration is the universal enforcement of arbitral awards. It would hardly serve any purpose to have a mechanism like international commercial arbitration if the awards are not effectively enforced against the losing party, i.e. the award-debtor. Having said that, it is important at this juncture to appreciate and note that this universal enforceability of arbitral awards is not absolute as enforceability may be refused by the national court of the State where enforcement is sought. As Simon Greenberg states, "the challenge and enforcement of the awards highlights the delicate balance between the autonomy of the arbitral process and the control of the national courts."<sup>2</sup>

### (Footnotes)

<sup>1</sup> Oscar Samour, 'Public policy Exception to Recognition and Enforcement of Arbitral Awards under the New York Convention'. <<http://consortiumelsalvador.com/descargas/consortium261.pdf>>

<sup>2</sup> Simon Greenberg & Others, *International Commercial Arbitration, An Asia-Pacific Perspective* (CUP, Cambridge 2011).