UCP Journal *of* Law & Legal Education
Vol. 1, Issue 2 (January-June 2023)

Enforcement of Foreign Award and Public Policy Rules in Pakistan

Rana Rizwan Hussain*

Abstract

Public policy is a phenomenon that is difficult to be confined within boundaries. It is a variable notion that evolves with the growth and upbringing of society. It is mostly unwritten and un-codified. Therefore, it greatly bears the potential to be used in an unbridled manner by the competent authorities of the states against the enforcement of foreign awards. This feature of public policy emphasizes the need to chalk out those ideologies and canons in a state that give birth to its public policy rules and constitute to be the basis of it. Like every other country, Pakistan also has a public policy which provides grounds to its national courts to nullify those arbitral awards which are inconsistent to it. This article uses doctrinal research and primarily relies on caselaw in its descriptive analysis of the sources that constitute the foundation-stone of Pakistan's public policy and the principles that have evolved upon it.

Keywords: Public Policy, Foreign Award, International Law, Domestic Public Policy, Transnational Public Policy.

Introduction to Public Policy

Public policy is that set of principles on which the laws of a country are based. It is said to be the public conscience, which *inter alia* bears guidance for the state organs to follow in establishing their relationship towards the citizens. Every country has its own public policy that defines its public objectives. It exists in the form of fundamental principles generally observed by society in its moral, religious, economic, political and legal environment (Hunter & Silva, 2003). It evolves with the social, political and cultural

*Advocate High Court, founding partner at Hussain and Associates (Advocates & Legal Consultants); LL.M., Queen Mary, University of London. Member of Young ICCA association, Guest Lecturer at Management and Professional Development Department. e-mail: ranarizwanhussain@gmail.com.

Article History: Received; March 1, 2023; Received in revised form April 7, 2023; Received with Second Revision June 10, 2023; Accepted June 12, 2023
Available online July 21, 2023

upbringing of the society. In *Jones v. Kaney (2012),* the English Supreme Court held that 'public policy is not immutable' which means that it can develop as well as alter with time. In *Inland Water Transport Corporation Limited v. Brojo Nath Ganguly (1986),* the Indian Supreme Court while describing the evolving nature of public policy held as follows:

> "Public policy, however, is not a 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 the new transactions and changed circumstances and have at times not flinched from inventing a new head of policy. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to the public conscience."

In *Sardar Muhammad Yasin Khan Advocate v. Raja Firoze Khan (1996),* the Pakistani court explained the concept of public policy as under:

> "Public policy means any act the allowing of which would be against the general interest of the community. This policy has evolved with the growth of organized society. Certain standards in the domain of morality, used in its widest sense, have assumed sanctity on account of their acceptance by the general community. Therefore, any agreement which would destroy these standards or adversely affect the development of society or its organization has to be viewed from this angle and it is here that the principle of public policy is born."

In *Pakistan WAPDA v. Kot Addu Power Co. (2006),* the court came across a provision of law that referred to the public policy of Pakistan and while discussing the same, the court observed:

> "…public policy would mean that no man can lawfully do that which tends 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."

The findings given in the above cases establish that public interest is a major component of public policy. Thus, whatever is against public interest tends to be against public policy too. However, the public interest is not the only source of public policy. Rather it is just one element of it. Apart from that the values, ethical standards and good morals observed in a society also contribute to the public policy of that country.

Public policy is the social fabric which connects the members of a community to achieve certain common goals and prosperity. The breakdown of this social thread results in the disintegration of society. Therefore, the public policy in its un-codified form attains a status that is equivalent to the mandatory laws of a state. Public policy is taken to be the baseline of all the developments in a country and therefore it is safeguarded as such by the state.

Public policy of any country can be divided into three heads *i.e.,* domestic public policy; international public policy; and transnational public policy. These three heads of public policy (explained in better detail hereinunder) may entail similar rules but in most cases, they apply independently.

Public Policy as a Ground under the New York Convention to Refuse Enforcement of a Foreign Award

Public Policy is one of the grounds that has been made available to the competent authorities at contracting states of the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (1958) (hereinafter referred to as the "New York Convention") to refuse enforcement of a foreign commercial award. Article V(2)(b) of the New York Convention stipulates that the recognition and enforcement of an arbitral award may be refused

if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country. This provision of the New York Convention provides a great deal of authority to the national courts to refuse enforcement of a foreign award where it contravenes the public policy of that state. However, this authority is subject to certain limitations which have not been expressly stipulated in the New York Convention but are envisaged by it. In *Parsons & Whittemore Overseas Co. v. Societe Generale del, Industrie du Papier (1974),* the American Judge Joseph Smith said that the enforcement of a foreign award should be refused 'only where enforcement would violate the host state's most basic notions of morality and justice. Thus, the New York Convention which allows the competent authority of a state to refuse enforcement of an award for its being in contravention to the public policy of that state also anticipates the competent authority to give a narrow interpretation to this concept (Bockstiegel, 1986).

In *Orient Power Co. Ltd. v. Sui Northern Gas Pipelines Ltd. (2019)* the enforcement of foreign award was resisted on the ground that it contravened the public policy of Pakistan. The Division Bench of the Lahore High Court while declining the argument of the award-debtor held that the application of public policy exception for refusal of enforcement of foreign award was restrictive and limited to exceptional circumstances which would affect the most fundamental values of the state. It further observed:

> "...[T]he public policy exception should not become a back door to review the merits of a foreign arbitral award or to create grounds which are not available under Article V of the Convention as this would negate the obligation to recognize and enforce foreign arbitral awards. Such kind of interference would essentially nullify the need for arbitration clauses as parties will be encouraged to challenge foreign awards on the public policy grounds knowing that there is room to have the Court set aside the award."

An appeal was filed by the award-debtor before the Supreme Court of Pakistan, which was also dismissed. The court while declining the appeal added that the Article V(2)(b) of the New York Convention was merely a facility to the courts and not an obligation

upon them (Orient Power Co. (Pvt.) Ltd. v. Sui Northern Gas Pipelines Ltd., 2021).

Every country has its own public policy rules which provide a basis for the award-debtors to resist the enforcement of foreign awards under the New York Convention. Thus, an arbitral award that is recognized as enforceable in one member state of the New York Convention may not find the same fate in another state. Therefore, it is of vital importance to understand the public policy rules of the forum with utmost clarity and preciseness. The object of this paper is to bring forth the public policy rules of Pakistan which exist in different forms. Some of those rules have also been applied by the courts in different cases. These public policy rules of Pakistan can cause the refusal of enforcement of a foreign arbitral award in case of any inconsistency between them.

Domestic Public Policy

Domestic public policy is that aspect of public policy which is practised and observed within the territorial limits of a state. Thus, the domestic public policy of one state can very much be different from that of another, unless both share common values, ethical standards, culture and social upbringing. Therefore, the court judgments enunciating the domestic public policy principles of one state may not always be relevant for citing before the courts of another state. There is no such codification in Pakistan that exhaustively contains its domestic public policy, nor can the same be possibly done. However, the different principles of it have been used and applied in case law which help to understand it (*Sardar Muhammad Yasin Khan Advocate v. Raja Firoze Khan*, 1969). [1]

The domestic public policy can further be divided into two groups *i.e.,* substantive public policy and procedural public policy. Unlike substantive public policy which forms part of the substantive law, procedural public policy is the one that is accumulated into the

[1] "Public policy means any act the allowing of which would be against the general interest of the community. This policy has evolved itself with the growth of organized society. Certain standards in the domain of morality, used in its widest sense have assumed sanctity on account of their acceptance by the general community. Therefore, any agreement which would destroy these standards or adversely affect 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."

procedural law of every country. There are several public policy rules which are contained in the substantive and procedural laws of Pakistan.

Substantive Public Policy

The substantive public policy of Pakistan stems from the Objectives Resolution,[2] annexed to the Constitution of Pakistan (The Constitution of the Islamic Republic of Pakistan, 1973). The Objectives Resolution has been the genesis of drafting the Constitution of Pakistan which further provides guidelines for the development of laws. It being of pivotal importance serves as the origin of the domestic public policy of Pakistan.

Moreover, Part II of the Constitution of Pakistan, 1973, enumerates fundamental rights that shall be available to every citizen in Pakistan and further lays down the Principles of Policy[3]. Apart from the Objectives Resolution, it is the Part II of the Constitution that constitutes to be the basis of the public policy of Pakistan. However, it is an accepted position that neither the Objectives Resolution nor the Principles of Policy can be used to strike down the statutes (*Lahore Development Authority v. Imrana Tiwana*, 2015). Notably, no such findings have been given with regard to the court judgments or arbitral awards. Therefore, it can be presumed that an arbitration agreement or an arbitral award that goes against the Objectives Resolution or Part II of the Constitution, including the 'Fundamental Rights' and the 'Principles of Policy' can be nullified.

Apart from the Objectives Resolution, the fundamental rights as enumerated in Chapter 1 of Part II of the Constitution of Pakistan, 1973 constitute to be a part of the public policy of Pakistan. Moreover, certain common law principles as laid down in sections 23 to 30-C of the Contract Act (1872) are also recognized as public policy rules in Pakistan. In *Nan Fung Textiles v. Sadiq Traders*

[2] The Objectives Resolution was adopted by the Constituent Assembly of Pakistan on March 12, 1949. Prime Minister, Liaquat Ali Khan had presented it in the assembly on March 7, 1949. Objectives Resolution has been the genesis of drafting every constitution in Pakistan including the 1973 Constitution. Article 2-A of the Constitution of Islamic Republic of Pakistan, 1973, provides, "**Objectives Resolution to form part of substantive provisions:** - The principles and provisions set out in the Objectives Resolution reproduced in the Annexure are hereby made substantive part of the Constitution and shall have effect accordingly."

[3] Part II of the Constitution consists of two chapters (Article 8 – Article 40). Chapter 1, enlists the 'Fundamental Rights', whereas, Chapter 2, enunciates the 'Principles of Policy'.

(1982), the court while explaining the objects which are opposed to public policy held that they can be classified into five different heads which are as under:

(i) objects which are illegal by common law or by legislation;
(ii) objects injurious to good governance either in the field of domestic or foreign affairs;
(iii) objects which interfere with the proper working of the machinery of justice;
(iv) objects injurious to family life; and
(v) objects economically against the public interest.

Additionally, the courts in Pakistan have applied the public policy rules in a range of cases which further clarify the concept of public policy. In *Pakistan Muslim League (N) v. Federation of Pakistan (2007),* a few members of a political party, while leaving the country gave an undertaking that they would never return to Pakistan. The court found such an undertaking to be against fundamental rights and observed that no right that was based upon public policy could be waived by any person. In *Amjad Ali v. The State (2013),* the accused was involved in the commission of a heinous offence. After the conviction, a compromise between the parties took place. The court rejected to give effect to the compromise with the observation that compounding a non-compoundable offence was against public policy because that offence was committed against the society.

A foreign award that is opposed to the public policy of Pakistan cannot be enforced in the country. However, the party invoking this ground has to establish before the court that the public policy of Pakistan is actually infringed. The mere assertion that an award is against public policy is not sufficient to prevent the enforcement of the award. In *Islamic Republic of Iran Shipping Lines v. Hassan Ali and Co. (2006),* an objection over the enforcement of an award was raised that the same was against the public policy of Pakistan. The party resisting the enforcement of the award failed to cite any law or public policy rule that was contravened by the award. The court observed that the mere contention that the award was against the public policy of Pakistan was not sufficient to resist its enforcement.

Some of the substantive public policy principles applied by the courts in Pakistan are as under:

i. An agreement to finance litigation with an improper object is against public policy.

Though not all agreements to finance litigation are against public policy but those which are made with an improper object, either to harm any third party or to take undue advantage of the litigant's weak position are against public policy. *In Ali Shah v. Anwar Hussain (1995),* one of the parties tried to use the rights of another party by prompting him to initiate litigation against a third party with an improper object. The former offered to bear all expenses of litigation and further, it was agreed that in case of success, the spoils of the litigation shall be shared between the both. The court found this agreement to be champertous and observed as under:

> "…coming to the legality of the agreement whereby petitioner agreed to finance prosecution of two suits for pre-emption it is true that in our country such agreements are not directly prohibited. However, such agreements are examined under section 25 of the Contact Act as to whether a particular agreement is opposed to public policy or not? It is equally true that every agreement to finance a litigation per se is not opposed to public policy rather there may be a case in which it would be in furtherance of law, equity, justice and necessary to resist oppression e.g., that a suitor, who has a just and complete title to a property but not means to retrieve the same, therefore, in this situation, the agreement would be legal and justified. The golden rule which has evolved in the sub-continent is that such agreements have to be carefully scrutinized and when found to be unconscionable, unjust, or inequitable or for an improper object or as against law or oppressive or leading to vexatious litigation the same would be attracted being against public policy."

ii. Conditions applied in a sale which may result in depriving a person of his lawful property are against public policy

In *Abdul Rasheed v. Water and Power Development Authority (WAPDA) (2013),* a writ petition was brought before the court with the grievance that the petitioner who had lost his money bonds was declined to be entertained by the respondent either by

way of issuing the duplicates of those bonds or by releasing the benefits which accrued on them. The request of the petitioner was turned down on the basis of a clause given in a brochure which provided that no claim of whatsoever nature was acceptable to the issuer in case the bonds or coupons were stolen, lost or destroyed by him. It added that the payment of the bonds and coupons would be made on maturity to the holder of them without identification. While adjudicating on the matter one of the issues faced by the court was whether the above clause was opposed to public policy for it being in conflict with the fundamental rights of the citizens of Pakistan, as contained in the Constitution of Pakistan, 1973. The court deliberated the issue and found that if the provision was allowed to prevail it would not only result in depriving the petitioner of his lawful property but also entitle a thief or a non-owner to receive the money that did not belong to him. The court added that the protection given by the above clause to the holder of the bonds was provocative for criminal minds to commit theft of those bonds. To that end, the court declared the said clause to be against the public policy on the grounds; first, it deprived an owner of his lawful property; and second, it encouraged the commission of a crime. The findings of the court respectively on both points were as under:

> "It is apparent that if the clause/condition is allowed to prevail, the petitioner will be deprived of his money for all times to come, unless, by the stroke of luck he was able to retrieve the lost bonds. The condition is expropriatory in nature, and as such Court will not easily lean in favour of its validity." [Para 11]
>
> "Suppose the bonds are taken in possession by another person through a criminal act, for instance by deceit or through theft. According to this clause, the criminal would be entitled to receive the money as against the purchaser/investor. Why should the criminal act be made so attractive and profitable has not been answered by learned counsel for respondents No. 1 & 2. I am very clear in my mind that a criminal cannot and must not be allowed to reap the fruit of his crime. This clause, therefore, conflicts with the clear and undisputed public policy that a criminal deserves to be punished rather than rewarded. The clause, therefore, is void for being

opposed to public policy under section 23 of the Contract Act, 1872." [Para 13]

iii. Charging an extravagant rate of interest on the amount of loan is against public policy.

In Mian Muhammad Asif v. Muhammad Riaz (2005), one of the parties borrowed Rs. 200,000/- from the other with Rs. 8,000/- monthly interest. The borrower paid the interest amount for a few months and then failed to continue with its payment. The lender filed the suit for recovery of the actual amount with interest that was accepted to the extent of the actual amount but was dismissed to the extent of interest. An appeal against the judgment of the trial court was filed by the lender which was declined for the reason that the rate of interest imposed by him was extravagant and unbelievable. The court while declining the appeal held as under:

> "…[E]ven if it is accepted, the rate of interest (Rs. 8,000 per month on Rs. 200,000) appears to be very high and unbelievable, which is also against the public policy being disproportionate to the amount borrowed and has also not been proved through convincing evidence. Therefore, apart from the reason given by the learned trial court, we find that the claim for recovery of interest has not been proved and find no force in RFA."

iv. Recovery of loans with compound interest is not against public policy

In *United Bank Limited v. Kulnoor Muhammad Munir (1991),* a suit for recovery of money was filed by the bank against its customer to recover the amount transferred in an over-draft issued to the customer and used by him. The claim of the bank was swollen up with the penal and compound interest on the said amount. The defendant admitted the claim to the extent of over-draft but denied paying the penal and compound interest on the ground that payment of the same was against public policy. The court declined the claim to the extent of penal interest but allowed the compound interest with the following findings:

> "Penal interest could only be charged if there was an agreement, providing for it, between the parties. Since there was no such agreement, the plaintiff was not entitled to charge penal interest. […] As for the remaining part of the issue, the claim for recovery of the

> loan with compound interest cannot possibly be against public policy."

Acquisition of Majority Shares of an Insurance Company by a Banking Company is Against Public Policy

In *Adamjee Insurance Co. v. Muslim Commercial Bank Ltd. (2003),* a banking company acquired the majority shares of an insurance company which was challenged before the court. The court observed that both the businesses *i.e.*, banking and insurance were two separately regulated regimes. The business of an insurance company was regulated under section 6 of the Insurance Ordinance, 2000, and was subject to the supervision of the Securities and Exchange Commission of Pakistan. Whereas, the business and affairs of a banking company were strictly controlled by the State Bank of Pakistan. Moreover, both companies had different objects and different spheres of activities that could not be intermingled in lieu of their respective Memorandums of Association. The court, therefore, found that the acquisition of majority shares of an insurance company by a banking company was not in consonance with law and public policy. To that end, the court observed as under:

> "Where a company comes into existence for the attainment of a specified and specialized object then all other objects are incidental and ancillary to the main or principal object formed, therefore, it will not be wrong to say at all that other objects mentioned in object clause are to be pursued in furtherance of its principal object clause which in the instant case is the Banking Business. […] Acquisition of majority shares of an Insurance Company (plaintiff) by Banking Company (defendant) is in violation of law and public policy."

i. A claim for recovery of money paid as a bribe is against public policy.

In *Muhammad Ramzan v. Secretary Revenue Division, Islamabad 2002,* the complainant who was an advocate by profession claimed to have paid Rs. 50,000/- as a bribe to the respondent for releasing a car that was seized by the Customs authorities in the performance of their duties. The respondent failed to release the car according to the alleged promise made by him which caused to be filed a complaint against him by the advocate

coupled with the prayer to recover Rs. 50,000/- paid to him as a bribe. The respondent not only refused to have received the illegal gratification but also submitted that he neither had the authority nor was in a position to release the car to the complainant that was seized by the Customs department in the course of its operations. The court dismissed the complaint brought by the advocate with the following findings:

> "It is not understood as to why an Advocate should have paid a large sum of money to an official who had nothing to do with the seizure of the vehicle and subsequent proceedings. The complaint thus appears to be false and frivolous. It is regrettable that a member of the Bar should indulge in immoral, illegal and shameful acts of paying bribes. The claim for recovery of the bribe amount allegedly paid by him is illegal and against public policy. The claim even if proven would have not entitled the claimant to recover any amount. Such amount would have been deposited in the Government treasury."

ii. Awarding contracts by a public authority through abuse of discretion is against public policy

No one can award a contract to someone by abusing the authority vested in him (*Mehram Ali v. Federation of Pakistan*, 1998). In *Muhammad Akram v. Government of Pakistan (1999)*, a governmental authority responsible for granting contracts of performing public functions awarded a contract without inviting the public offers that was assailed before the court. The court nullified the contract for its having been issued through the abuse of discretion made by the public functionary and held as under:

> "In the circumstances, particularly keeping in view the tenure of the contract, we are constrained to infer that the power entered into the contract by respondent No. 2, which is a public body has not been exercised honestly, fairly, and in the public interest. It is settled law by now, that exercise of such power is amenable to judicial review. […] In the circumstance, we are constrained to allow this petition to the extent that two contracts dated 23.02.1997 are declared to be against the public policy and public interest…."

iii. Agreement to transfer land for the construction of a school with the condition to recruit the donor at a specific post in the school was held to be against public policy

In *Hameedullah v. Headmistress Government Girls School, Chokara (1997),* a suit for the specific performance of the agreement was brought before the court. According to the terms of the agreement, the defendant was to recruit the plaintiff at a specific post of the government school in consideration of the allotment of land by the plaintiff for the construction of the school. The trial court allowed the specific performance but the same was reversed by the appellate court which found the agreement to be of sale of a public position in its nature and thus against the constitutional guarantees. The appellate court nullified the agreement for its being opposed to public policy and observed as under:

> "… it is clear that the agreement between the Government and the appellant was in the nature of sale of public office, consideration being the transfer of land, Sale of public office cannot be a legal transaction. It is completely illegal and against public policy. Therefore, such an agreement is hit by section 23 of the Contract Act, which makes it void. As the agreement amounting to the sale of public office is void and illegal, specific performance, therefore, cannot be granted."

iv. Compounding a non-compoundable offence is against public policy

There are many cases in Pakistan, wherein it has been held that a non-compoundable offence cannot be compounded as it undermines social justice (*Amjad Ali v. The State*, 2013; *Muhammad Akhtar alias Hussain v. The State*, 2007; *Ghulam Farid v. The State*, 2006; *Qasim Khan v. Jalal*, 1987; *Akbar Ali Khan v. Elahi Bakhsh Bepari & others*, 1961). In *Muhammad Akhtar v. The State (2007)*, the petitioner was convicted of offences such as *zina*, death, and terrorism against which an appeal was filed by the accused that was dismissed. After failing in all the remedies, the petitioner found himself to be helpless and tried to enter into a compromise with the aggrieved party, wherein, he succeeded. After the compromise, he applied to the court for acquittal on the basis of that compromise. The court found that the petitioner was convicted in the offences which were not compoundable. To decline to give effect to the

compromise, the court relied on another case (*Muhammad Nawab v. The State*, 2004) wherein it was held as under:

> "It may be noted that tabulation of the offences as made under section 345, Cr.P.C. being unambiguous removes all doubts, uncertainty and must be taken as a complete and comprehensive guide for compounding the offences. The judicial consensus seems to be that the legislature has laid down in this section the test for determining the classes of offences which concern individuals only as distinguished from those which have reference to the interest of state and courts of law cannot go beyond that test and substitute for it one of their own. It is against public policy to compound a non-compoundable offence."

In *Lal Mia v. Abdul Ghani (1953),* the court held that it was against the public policy to make a trade of felony or to stifle prosecution in an offence that was non-compoundable in law.

v. Transfer of property by way of *Pagri* is against public policy

In *Aziz ur Rehman v. Pervaiz Shah (1997)*, the landlord served the notice of eviction of a building to his tenant. After the tenant refused to vacate the building, the landlord initiated the eviction proceedings before the rent controller. The said legal action was opposed by the tenant on the ground that he had taken possession of the building by paying the money by way of *Pagri*, therefore, the eviction proceedings were not maintainable. The court repelled the contention and allowed the eviction petition with the following findings:

> "Now examining the plea relating to the payment of '*Pagri',* it may be seen that same admittedly does not form terms or conditions of tenancy. There is hardly any doubt that concept of *'Pagri'* is contrary to public policy, therefore, on the settled principles, any supra-contractual arrangement which negates tenancy, would not affect the maintainability of eviction proceedings."

vi. Mere fact that the chosen arbitrator happened to be the chief executive of the respondent corporation would not render the arbitration agreement illegal and against public policy

In *Dar Okaz Printing and Publishing Limited Liability Company v. Printing Corporation of Pakistan (Pvt.) Ltd. (2003),* an application under section 34 of the Arbitration Act, 1940, for a stay of court proceedings was filed on the ground that the contract between the parties contained an arbitration clause. The said application was resisted by the other party on the ground that the arbitration clause provided the Chief Executive of the defendant corporation to be the sole arbitrator that made him a judge in his own cause. Thus, the same was void for its contravening the principles of natural justice. The court declined the argument on the ground that the plaintiff at the time of entering into the arbitration agreement did not object to the competence of the Chief Executive of the defendant corporation to act as arbitrator, thus, the same could not be raised at a later stage. The court further held:

> "In our view, the term employed in the arbitration clause expressly reflects the mutual intention of the parties to resolve all disputes concerning the implementation and execution of the contract through the nominated arbitrator jointly agreed upon without any duress or coercion. At any rate, the mere fact that the chosen arbitrator happens to be the Chief Executive of the respondent corporation would not render it illegal and against public policy."

vii. Sale of any food item which is unfit for human consumption is opposed to public policy

In *Abdul Razzak & Co. v. Assistant Collector Customs (1993),* the plaintiff participated in an auction for the sale of betel nuts held by the defendant. Before the auction, a sample of betel nuts was shown to the bidders for determining the quality of the nuts. The plaintiff being the highest bidder won the bid and deposited Rs. 200,000/- as earnest money. Later on, the plaintiff was allowed to examine the rest of the nuts. After the examination, it transpired that the quality of the remaining betel nuts was deteriorated and they were not fit for human consumption. A laboratory test obtained by the plaintiff corroborated the same. The plaintiff instead of making the outstanding payment to the defendant filed a suit for recovery of

Rs. 200,000/- on the ground that the sample shown before the auction did not tally with the rest of the quantity. The suit was defended on the ground that the betel nuts were not used only for human consumption but also for industrial purposes. Therefore, they were still usable items. Whereas, the defendant failed to prove before the court that the betel nuts had any use other than human consumption. The court, therefore, decreed the suit of the plaintiff on the ground that the sale of any eatable that was not fit for human consumption was against public policy. In this regard, the court held as under:

> "Having regard to the fact that the only use of betel nuts, established in the case, is that for human consumption, the sale of such betel nuts, as may be unfit for human consumption, by a government department would neither be proper nor desirable for that would be putting public health in jeopardy by encouraging the nefarious trade of selling for human consumption, sub-standard articles, prepared from rotten betel-nuts. This would undoubtedly be opposed to public policy. This being so, the alleged agreement to purchase the disputed goods would be void for being opposed to public policy…."

viii. Relinquishing the right of inheritance by a female heir is against public policy

Relinquishing the right of inheritance by a female heir is against public policy (*Ghulam Ali v. Ghulam Sarwar Naqvi*, 1990). In *Rab Nawaz Khan v. Waziran Mai (2004)*, a relinquishment deed was allegedly signed by the plaintiff relinquishing her right to inherit the property. Later on, the validity of the said relinquishment deed was challenged on the ground that the same was a result of fraud. The defendant resisted the challenge on the ground that the deed was registered and the presumption of truth was attached to it. The court before deciding upon the issue of fraud dealt with the point of whether relinquishing the right of inheritance was in accordance with law. To that end, the court observed:

> "The devolution of property takes place through inheritance immediately without any intervention at the time of death of the original owner of the property. […] The relinquishment of the right of inheritance is against public policy, morality and undue influence, which concepts are to be decided on the basis of Islamic

> teachings and principles. The respondent could not opt contract out of this protection and the act of relinquishment was void and ineffective and the act of relinquishment by sister was void, ineffective and her inheritance having accrued in her favour on her father's death remained intact at all the relevant times."

ix. An agreement excluding the jurisdiction of one court where concurrent jurisdiction is vested with two courts is not against public policy

There are several cases in Pakistan wherein it has been held that the parties with mutual consent can oust the jurisdiction of one court where the same is vested concurrently with two or more courts (*Asadul Haq v. Balochistan Glass Limited*, 2011; *Standard Insurance Co. v. Pak Garments Ltd.*, 1998; *Kadir Motors (Redg.) Rawalpindi v. National Motors Ltd. (Karachi)*, 1992; *State Life Insurance Corporation of Pakistan v. Muhammad Saleem*, 1987). In *Pakistan State Oil Co. Ltd. v. Malik Hadi Hussain (2013)*, a suit was brought before the court that was based upon an agreement between the parties. The defendant filed an application under Order VII Rule 10 of the Code of Civil Procedure,1908 of Pakistan before the court for the return of the suit on the ground that clause 28 of the agreement provided for the exclusive jurisdiction of the competent court at Karachi. The plaintiff resisted the application on various grounds including that the jurisdiction of the competent court at Lahore could not be ousted through agreement between the parties. The court declined the contention and held that where the concurrent jurisdiction was vested with two or more courts, the parties could oust the jurisdiction of other court(s) in favour of one of them and such an agreement was neither unlawful nor against public policy. To that end, the court relied upon another case of the Supreme Court of Pakistan, wherein it was observed:

> "…agreement between the parties agreeing to refer their disputes arising between them to one court having jurisdiction could not be considered contrary to the public policy as the same does not contravene the provisions of section 28 of the Contract Act, 1872, and in such eventuality parties to the agreement would be bound to follow the same" (State Life Insurance Corporation of Pakistan v. Muhammad Saleem, 1987).

Apart from the above, there is another aspect of the domestic public policy of Pakistan that is observed in the procedural laws of the country. The procedural laws which are based upon public policy rules are essential to be complied with by any judicial forum in the course of proceedings.

Procedural Public Policy

In Pakistan, courts have dealt with the procedural public policy in various cases, *e.g.*, the doctrine of *res-judicata* is said to be based upon a public policy rule that there should be an end to litigation (*Muhammad Latif Khan v. Muhammad Rasheed Khan*, 2012; *Abdul Hadi v. Jamia Masjid Eidgah*, 2009; *Sanesra Start Screen Industries v. Jamia Masjid Eid Gah*, 2009). Likewise, in *Muhammad Aslam v. The State (2012),* it was held that the requirements of section 367 of the Criminal Procedure Code, 1898, which relate to the writing of judgment are based upon public policy. A few other principles of procedural public policy that have been clarified in the case law are as under:

(i) trial of a suit without impleading necessary parties is against public policy and the scheme of codified law (*University of the Punjab v. Malik Jehangir Khan*, 1994; *Muhammad Siddique v. Yahya Khan*, 1994)

(ii) sections 496, 497, 498, 561 and 337(3) of the Code of Criminal Procedure, 1898 are mandatory for their being based on the principles of public policy and public interest (*Rehmat Masih v. The State*, 1968);

(iii) administration of oath to an accused is an incurable illegality and opposed to public policy (*Muhammad Arshad v. The State*, 2007);

(iv) what could not be done directly could not be done indirectly and no agreement against public policy was valid (*Habib Bank (Pvt.) Ltd. v. ABN Graner (Pvt.) Ltd.*, 2001);

(v) object of the law of limitation was to regulate the course and manner for providing relief or remedy and the restriction of the time limit was an outcome of public policy (*Riyasat Begum v. Ejaz Ahmed*, 2013);

(vi) all technicalities should be avoided unless it was essential to comply with them on the ground of public

policy (*Sardar Muhammad Yasin Khan Advocate v. Raja Firoze Khan*, 1969);

(vii) the principle that judgment or order passed by a de-facto judge cannot be set aside on the ground that his appointment was violative of law rests upon the doctrine of necessity and public policy (*Amjad Hussain v. Ghulam Rasool Mir*, 1991).

International Public Policy

The term 'International Public Policy' is a red herring (Hunter & Silva, 2003, P. 378) which casts an impression that it consists of principles, which are commonly practiced by nations across the world. Conversely, it is that set of principles, ethical standards and values, which are observed by a state and its nationals in their international transactions. Thus, the international public policy of one state can very much be different from that of another. Article 1502.5 of the French legislation (French Code of Civil Procedure– Book IV, 1981)[4] refers to the international public policy of France. Fouchard, Gaillard, and Goldman, while commenting on it said that the international public policy to which this Article refers could only mean the French idea of international public policy or in other words, the set of morals and ethical standards, the breach of which could not be undergone by the French legal order, even in international cases (Gaillard & Savage, 1999, pp. 953–954). These scholastic opinions lead to the conclusion that the international public policy of Pakistan would entail those principles, a breach of which would not be tolerated by Pakistan in cross-border

[4] **Article 1502 of French Code of Civil Procedure – Book IV**: - appeal of a court decision granting recognition or enforcement is only available on the following grounds:

1. if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
2. if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
3. if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
4. if due process 11 has not been respected;
5. if recognition or enforcement is contrary to international public policy. *[Emphasis added]*

transactions. The international public policy of Pakistan can very much be different from the public policy of any other state.

In *Raziq International v. Panalpina Management (2014)*, the agreement between a Swiss and a Pakistani party contained a dispute resolution clause that provided for the exclusive jurisdiction of Swiss authorities in case of any dispute between the parties. After the differences erupted, the Pakistani party instituted a suit before the court in Pakistan that was opposed by the Swiss party through an application for the return of the plaint. The plea taken by the latter was that the parties should not be allowed to bypass their contractual bargain that provided for the disputes to be settled by the Swiss court. The court in Pakistan allowed the contention and stayed the proceedings in favour of the competent court in Switzerland. The court decision reveals that an agreement excluding the jurisdiction of a national court in favour of a foreign court while entering into an agreement with a foreign party is not against the international public policy of Pakistan.

Transnational Public Policy

Transnational public policy consists of general principles of morality, which are accepted by all the civilized nations of the world (Committee of International Commercial Arbitration, 2000). It involves the classification of principles which are generally recognized by political and legal systems around the world (Hunter & Silva, 2003, p. 367). It is also termed as 'truly international public policy' (Lalive, 1986, pp. 295-296). Transnational public policy may be narrower in its scope but it is more consolidated and forceful with respect to its application by the concerned authorities in the states. Principles of natural justice *e.g.*, nobody can be condemned un-heard; nobody can be a judge in his own cause; equal opportunity of hearing, *etc*, constitute to be a part of transnational public policy, which cannot be overlooked by any competent authority performing judicial functions.

Conclusion

Pakistan is an Islamic state with a constitutional set-up. Its public policy roots out of the injunctions of Islam and from the constitution which is the supreme law of the land. The constitution

in return is again based on the principles of Islam, thus, the Islamic ideology remains to be the cornerstone of the public policy of Pakistan. In addition, the common law principles of public policy contained in sections 23 to 30-C of The Contract Act, 1872 are also prevalent in Pakistan. In *Ghulam Ali v. Ghulam Sarwar Naqvi (1990),* the Supreme Court observed, "In Pakistan's Constitutional set-up, with the Objectives Resolution being its part, new situations with new principles of public policy with Islamic Ethos or spirit would have to be defined and applied."

Since the ratification of the New York Convention, there has not been any precedent in Pakistan refusing the enforcement of a foreign award on the ground of public policy. Yet, it is obvious that an award rendered by any international arbitral tribunal, seeking its enforcement in Pakistan can face a successful challenge if it contravenes the public policy principles enumerated above. Thus, in any arbitration with a Pakistani party, if there is a likelihood for the award to seek enforcement in Pakistan, the tribunal must be cautious about the enunciated principles of public policy and their sphere in Pakistan.

References

Abdul Hadi v. Jamia Masjid Eidgah, (2009) MLD 679

Abdul Rasheed v. Water and Power Development Authority (WAPDA), (2003) CLC 471

Abdul Razzak & Co. v. Assistant Collector Customs, (1993) PLD Karachi 227

Adamjee Insurance Co. v. Muslim Commercial Bank Ltd., (2003) CLD 463

Akbar Ali Khan v. Elahi Bakhsh Bepari & others, (1961) PLD Dacca 518

Amjad Ali v. The State, (2013) PLD Federal Shariat Court 42

Amjad Hussain v. Ghulam Rasool Mir, (1991) PCrLJ 685

Asadul Haq v. Balochistan Glass Limited, (2011) CLC 294

Azizur Rehman v. Pervaiz Shah, (1997) SCMR 1819

Bockstiegel, K.-H. (1986). Public Policy and Arbitrability in Pieter Sanders, Comparative Arbitration Practice and Public Policy in Arbitration. *ICCA Congress Series No. 3,* 189.

Committee of International Commercial Arbitration. (2000). *Interim Report on Public Policy as a Bar to Enforcement of International Arbitral Awards* (p. 7). International Law Association, London Conference.

Dar Okaz Printing and Publishing Limited Liability Company v. Printing Corporation of Pakistan (Pvt.) Ltd., (PLD Supreme Court 808 2003).

French Code of Civil Procedure– Book IV, Article 1502 (1981).

Gaillard, E., & Savage, J. (Eds.). (1999). *Fouchard Gaillard Goldman on International Commercial Arbitration* (pp. 953–954). Kluwer Law International.

Ghulam Ali v. Ghulam Sarwar Naqvi, (1990) PLD SC 1

Ghulam Farid v. The State, (2006) PLD SC 53

Habib Bank (Pvt.) Ltd. v. ABN Graner (Pvt.) Ltd., (2001) PLD Karachi 264

Hameedullah v. Headmistress Government Girls School, Chokara, (1997) SCMR 855

Hunter, M., & Silva, G. G. e. (2003). Transnational Public Policy and its Application in Investment Arbitrations. *Journal of World Investment*, *4*(3). Werner Publishing Company Ltd.

Inayat Ali Shah v. Anwar Hussain, (1995) CLC 1906

Inland Water Transport Corporation Limited v. Brojo Nath Ganguly, (1986) AIR SC 1571

Islamic Republic of Iran Shipping Lines v. Hassan Ali and Co. Cotton (Pvt.) Ltd., (2006) CLD 153

Jones v. Kaney, (2012) SCMR 1298

Kadir Motors (Redg.) Rawalpindi v. National Motors Ltd. (Karachi), (1992) SCMR 1174

Lahore Development Authority v. Imrana Tiwana, (2015) SCMR 1739

Lal Mia v. Abdul Ghani, (1953) PLD Dacca 149

Lalive, P. (1986). Transnational (or Truly International) Public Policy. *VIII International Congress on Arbitration, ICCA, Congress Series, 3,* 295–296.

Mehram Ali v. Federation of Pakistan, (1998) PLD SC 1445

Mian Muhammad Asif v. Muhammad Riaz, (2005) YLR 2493

Muhammad Akhtar alias Hussain v. The State, (2007) PLD Supreme Court 447

Muhammad Akram v. Government of Pakistan, (1999) CLC 745

Muhammad Arshad v. The State, (2007) PLD Lahore 324

Muhammad Aslam v. the State, (2012) PCr.LJ 739

Muhammad Latif Khan v. Muhammad Rasheed Khan, (2012) MLD 86

Muhammad Nawab v. The State, (2004) SCMR 1170

Muhammad Ramzan v. Secretary Revenue Division, Islamabad, (2002) PTD 1872

Muhammad Siddique v. Yahya Khan, (1994) CLC 1374

Nan Fung Textiles Ltd. v. Sadiq Traders Ltd., (1982). PLD Karachi 619

Orient Power Co. (Pvt.) Ltd. v. Sui Northern Gas Pipelines Ltd., (2019) CLD 1082

Orient Power Co. (Pvt.) Ltd. v. Sui Northern Gas Pipelines Ltd., (2021) CLD 1069

Pakistan Muslim League (N) v. Federation of Pakistan, (2007) PLD Supreme Court 642

Pakistan State Oil Co. Ltd. v. Malik Hadi Hussain, (2013) YLR 2769

Pakistan WAPDA v. Kot Addu Power Co. Ltd., (2000) PLD Lahore 461

Parsons & Whittemore Overseas Co., Inc v. Societe Generale del, Industrie du Papier RAKTA and Bank of America, (1974) 508 F. 2d 969 (2nd Cir.)

Qasim Khan v. Jalal, (1987) PLD Lahore 398

Rab Nawaz Khan v. Waziran Mai, (2004) MLD 1699

Raziq International (Pvt.) Ltd. v. Panalpina Management Ltd., (2014) PLD Karachi 175

Rehmat Masih v. The State, (1968) PLD Lahore 1035

Riyasat Begum v. Ejaz Ahmed, (2013) CLC 597

Sanesra Start Screen Industries v. Jamia Masjid Eid Gah, (2009) CLC 67

Sardar Muhammad Yasin Khan Advocate v. Raja Firoze Khan, (1969) PCrLJ 1414

Sherbano v. Kamil Muhammad Khan, (2012) PLD Karachi 293.

Standard Insurance Co. v. Pak Garments Ltd., (1998) SCMR 1239.

State Life Insurance Corporation of Pakistan v. Muhammad Saleem, (1987) SCMR 393.

State Life Insurance Corporation of Pakistan v. Rana Muhammad Saleem, (1987) SCMR 393

The Constitution of the Islamic Republic of Pakistan, (1973).

The Contract Act, (1872).

United Bank Limited v. Kulnoor Muhammad Munir, (1991) CLC 1758

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958.

University of the Punjab v. Malik Jehangir Khan, (1994) MLD 452.