

**‘PUBLIC POLICY’ AS THE ROOT CAUSE OF DUE PROCESS PARANOIA: AN EXAMINATION OF
THE STATUTE AND COURT DECISIONS IN INDIA**

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Abstract

“Due process paranoia” has been the buzzword in International Arbitration circles in the past few years. It has been seen that tribunals have been overly cautious in their approach while deciding whether or not to follow a particular (usually simplified) procedure. A major driver of this paranoia is the perceived enforcement risk associated with the awards and the impact of non-enforcement on the arbitrators. In this article, the author examines the Indian Arbitration and Conciliation Act and Indian jurisprudence to study enforcement risk and due process paranoia. It is argued that the real cause for the paranoia is not the actual due process clauses under the New York Convention. Instead, the origins of the paranoia lie in the old unruly horse of ‘public policy’ which incorporates the residuary notions of due process. While the courts have been able to provide sufficient clarity on how they will apply the due process clauses, they have been unable to do so in case of challenges on the grounds of public policy. Therefore, any effort directed towards addressing the paranoia needs to balance the requirements of providing sufficient flexibility to the jurisdictions in the application of the public policy clause and the necessity of providing confidence to the tribunals to go ahead with the proceedings without spending time and money to comply with minor and unnecessary procedural requirements.

I. Introduction

Rendering the award is an act distinct from enforcing the award. The tribunal renders the award by the authority vested in it by the contract between the parties. However, effective enforcement can only be carried out by the legal machinery of the state. In light of this, the law makes provision for the recognition and enforcement of the arbitral award.¹ Accordingly, the party in whose favour the award has been granted needs to approach the domestic courts of the country where it seeks to enforce the award.

It is utopian to expect the decision of the arbitral tribunals to be free from error in all cases. Therefore, the New York Convention provides seven grounds which can be invoked to refuse the enforcement of an arbitral award.² These seven grounds are usually considered to be an exhaustive list of the grounds on which a court may refuse enforcement.³ However, the

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¹ Convention on the Recognition and Enforcement of Foreign Awards of 1958 (June 10, 1958) 330 U.N.T.S 38, arts. III, IV [*hereinafter* “New York Convention”]; United Nations Commission on International Trade Law [UNCITRAL], Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/61/33, art. 35 [*hereinafter* “UNCITRAL Model Law”]; Arbitration Act, 1996, § 101 (U.K.); Arbitration & Conciliation Act, No. 26 of 1996, pt. II (India).

² New York Convention, art. V. According to it, recognition and enforcement of foreign arbitral awards may be refused if the parties were under some incapacity or the agreement is invalid, there is a violation of due process, the matter was inarbitrable, the composition of the arbitral tribunal or the procedure was not in accordance with the agreement or the law of the forum, the award is non-binding or has been set aside or suspended, the subject matter is inarbitrable under domestic law or the award is contrary to public policy. Article IV, Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 contained similar grounds for refusal of enforcement.

³ ANDREW TWEEDDALE, ARBITRATION OF COMMERCIAL DISPUTES 412 (2007).

enforcing court has the final discretion in deciding the applicability of any ground raised in this regard by the award debtor.⁴

The existence of this discretion and its exercise has fuelled the “*due process paranoia*” among arbitrators as they are unwilling to act resolutely for fear of the award being refused enforcement on the grounds of violation of due procedure.⁵ In a recent survey, leading practitioners have revealed that this perception of enforcement risk concern has influenced decisions they made when sitting as arbitrators.⁶ The reluctance has been driven by the presence of grounds such as ‘due process of law’ and ‘public policy’ which are inherently subjective and have variable applications across jurisdictions.

In this article, the author draws a nexus between ‘due process paranoia’ and the ‘due process of law’ as a ground for non-enforcement of foreign arbitral awards, and further examines a source of the paranoia beyond this clause. The author begins by analysing the scope and nature of ‘due process of law’. Further, through a study of the Indian statute and judicial decisions, the author examines whether the due process clause⁷ envisages all instances of due process violations, or if the public policy ground is also used to argue due process violation in certain cases. Finally, the author discusses the implications of the inconsistent understanding of ‘due process of law’ and public policy on the creation of the paranoia, lessons from the Indian experience, and suggests short term as well as long-term solutions to the paranoia.

II. Conceptualising Due Process in Arbitration

The term ‘due process’ can have varied meanings. It has its origins in the Magna Carta where following due process meant compliance with the law of the land.⁸ In modern-day constitutional jurisprudence, due process of law refers to legal procedures that are owed to an individual or an entity according to law.⁹ Therefore, it may seem surprising that due process is relevant in arbitration where there is no involvement of the State or its machinery *per se*. In order to understand the significance of the due process requirement in arbitration, we need to acknowledge that an arbitration award is a final and enforceable determination of the dispute between the parties. Consequently, if it is expected that the legal machinery of the state will enforce the award, it needs to be ensured that the tribunal has complied with the minimum procedural quality standard.¹⁰ This is important to impart legitimacy to a decision rendered by a non-judicial mind and introduce the necessary safeguards before depriving parties of their rights and property. Moreover, an arbitration agreement by its very nature is a restriction on one of the

⁴ China Nanhai Oil Joint Service Corp. v. Gee Tai Holdings Co. Ltd., (1995) XX Y.B. COMM. ARB. 671.

⁵ See Lucy Reed, *Ab(use) of due process: sword vs shield*, 33(3) ARB. INT’L 361 (2017); Remy Gerbay, *Due Process Paranoia*, KLUWER ARB. BLOG (June 6, 2016), available at <http://kluwerarbitrationblog.com/2016/06/06/due-process-paranoia/>.

⁶ Queen Mary University of London, *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* 10 (2015), available at <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>.

⁷ Section 48(1)(b) of the Act which corresponds to Article V(1)(b) of the Convention is popularly termed as the due process clause. The same was incorporated in Section 7(1)(a)(ii) of The Foreign Awards (Recognition and Enforcement) Act, 1961 before it was repealed by the 1996 Act.

⁸ Magna Carta, 1215, ch. 39.

⁹ Andrew T. Hyman, *The Little Word “Due”*, 38 AKRON L. R. 1, 23 (2005).

¹⁰ MATTI S. KURKELA & SANTTU TURUNEN, *DUE PROCESS IN INTERNATIONAL COMMERCIAL ARBITRATION* 2 (2d ed. 2010).

most important human rights, access to courts.¹¹ Therefore, the requirement of due process can be read as a compensation for the limitation imposed on the right to approach courts.¹² The requirement of due process manifests in the form of just, fair, and reasonable procedure, principles of natural justice,¹³ the right to be heard,¹⁴ the right to be adjudicated upon by a fair and impartial tribunal,¹⁵ the opportunity to defend oneself, timely access to opposition evidence and documents, and equality of treatment.¹⁶ In light of this wide scope and meaning ascribed to the due process clause along with the discretion vested in the courts, it is not unnatural that arbitrators are affected by the due process paranoia. In order to delve deeper into the causes of the paranoia, it will be useful to examine the provisions of the Indian Arbitration and Conciliation Act, 1996 [“the Act”]. Given that the discussed provisions of the Act are in *pari materia* with the New York Convention, the author will also quote decisions rendered under it to gain a better understanding of the legal position.

III. Due Process in Section 48(1)(b) of the Act

Often considered the most important and popular ground,¹⁷ violation of due process as a ground to refuse enforcement is incorporated in Section 48(1)(b) of the Act.¹⁸ Interestingly, neither this nor any other ground explicitly uses the phrase “*due process*”. This clause can only be invoked in cases where the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was not given proper opportunity to present its case.¹⁹ Though there is no definition of ‘proper notice’, for the purposes of this section, a notice is not be deemed to be proper if it is not issued at all, if it is irregular such that it fails to specify the time and place of arbitration, or if the notice period is insufficient.²⁰ In other words, parties must be given a fundamentally fair hearing²¹ at a meaningful time and in a meaningful manner.²²

However, it has been widely accepted that the notice requirement would be violated only if the party did not learn about the arbitration proceedings,²³ or the arbitrator’s appointment,²⁴ in

¹¹ G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948), art. 8; G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966), art. 2; European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (Nov. 4, 1950) ETS 5, art. 6.

¹² KURKELA & TURUNEN, *supra* note 10, at 2.

¹³ JUSTICE R S BACHAWAT’S LAW OF ARBITRATION AND CONCILIATION 2372 (Anirudh Wadhwa & Anirudh Krishnan eds., 5th ed. 2010).

¹⁴ Bernard Hanotiau & Olivier Caprasse, *Arbitrability, Due Process, and Public Policy Under Article V of the New York Convention*, 25(6) J. INT’L ARB. 721, 727 (2008).

¹⁵ O.P. MALHOTRA, THE LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1678 (3d ed. 2014); Osamu Inoue, *The Due Process Defense to Recognition and Enforcement of Foreign Arbitral Awards in United States Federal Courts: A Proposal for a Standard*, 11 AM. REV. INT’L ARB. 247 (2000).

¹⁶ GARY B. BORN, INTERNATIONAL ARBITRATION: CASES AND MATERIALS 1156 (2d. ed. 2011).

¹⁷ MALHOTRA, *supra* note 15, at 1677.

¹⁸ Arbitration & Conciliation Act, No. 26 of 1996, § 48(1)(b). – “*the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his case*”.

¹⁹ See *Centrotrade Minerals & Metal Inc. v. Hindustan Copper Ltd.*, (2006) 11 SCC 245 [*hereinafter* “*Centrotrade*”].

²⁰ *Sohan Lal Gupta v. Asha Devi Gupta & Ors.*, (2003) 7 SCC 492; *Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, (1985) X Y.B. COMM. ARB. 461 (Italy).

²¹ *Minmetals Germany GmbH v. Ferco Steel Ltd.*, [1999] CLC 647 (U.K.).

²² *Iran Aircraft Indus v. AVCO Corp.*, 980 F. 2d 141 (2d Cir. 1992).

²³ For instance, a party which did not receive a formal notice but nonetheless participated in the arbitration proceedings and presented its case would be deemed to have waived the procedural irregularity.

addition to the failure to issue the notice. The phrase ‘otherwise unable to present his case’ would include all residuary situations in which the party might not have been able to present his own case or rebut the case of the opponent.²⁵ This phrase can provide unbridled discretion to the enforcing courts, which in turn can further the paranoia.

An important question that arises is whether the test for proper notice and ability to present his case is that of the jurisdiction in which the award is sought to be enforced, or of the jurisdiction in which the award was rendered. Another possibility could also be to test the procedure followed in a particular arbitral proceeding as against international or universal notions of due process, if any. However, no court has taken the latter position.²⁶ It has been consistently opined that this provision sanctions the application of the forum State’s standards of due process.²⁷ However, courts have allowed enforcement even when there has been a violation of the domestic notion of due process as the same might not constitute a due process violation under the New York Convention.²⁸ In a majority of occasions, in all jurisdictions including India, courts have favoured a strict and narrow construction of the grounds for refusal.²⁹ Therefore, only serious violations of due process leading to a denial of justice and causing substantial prejudice,³⁰ have resulted in the refusal to enforce foreign arbitral awards and not mere technical non-compliance.³¹

This is culled out by the practice of courts in India as well as the other Convention jurisdictions. Notwithstanding the vague language, courts seem to have been fairly consistent in their application of this provision. For instance, arbitrators not functioning together,³² non-conformity with principles of natural justice,³³ award obtained without supplying statement of claims and documentary evidence to opposite party,³⁴ non-disclosure of names of arbitral tribunal,³⁵ not copying a letter send to the tribunal to the other party,³⁶ party being unaware of opposite party’s arguments,³⁷ the arbitrator’s refusal to consider evidence that was delayed due to disruption by September 11 terrorist attacks³⁸ have all resulted in courts refusing to grant enforcement under this provision.

²⁴ RUSSELL ON ARBITRATION 406 (David St. John Sutton ed., 21st ed. 1997).

²⁵ *Id.*

²⁶ ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 298 (1981).

²⁷ Parsons & Whittemore Overseas Co. Inc. v. Société Général de L’Industrie du Papier RAKTA and Bank of America, (1976) I Y.B. COMM. ARB. 205 (United States).

²⁸ See VAN DEN BERG, *supra* note 26.

²⁹ It is the general rule that the grounds for refusal of enforcement in Article V of the Convention have to be construed narrowly. See JULIAN LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 706 (2003).

³⁰ Sohan Lal Gupta v. Asha Devi Gupta & Ors., (2003) 7 SCC 492; LEW ET AL., *supra* note 29, at 711, 712.

³¹ Corporacion Transnacional de Inversiones, SA de CV v. STET International, (2000) 49 OR (3d) 414.

³² P.C. MARKANDA, LAW RELATING TO ARBITRATION AND CONCILIATION 1153 (8th ed. 2013).

³³ *Id.*

³⁴ Centrotrade, (2006) 11 SCC 245.

³⁵ Danish Buyer v. German Seller, (1979) IV Y.B. COMM. ARB. 258 (Ger.).

³⁶ U.S. Firm P v. German Firm F, (1997) II Y.B. COMM. ARB. 241 (Ger.).

³⁷ Portuguese Co. A v. Trustee in Bankruptcy of a German Co. X, (1987) XII Y.B. COMM. ARB. 486 (Ger.).

³⁸ Centrotrade, (2006) 11 SCC 245.

On the other hand, enforcement has been done in cases on the other end of the spectrum where, for instance, limited time was provided for oral arguments in light of extensive written submissions,³⁹ no opportunity was given to provide a written reply to a typed list of points that had already appeared in the full statement of parties,⁴⁰ the party did not participate in further proceedings despite the plea of the tribunal being *functus officio* being rejected by the tribunal,⁴¹ parties were given an opportunity to provide their own religious law experts,⁴² notice did not set out the details of the claim but the correspondence between the parties meant that respondents were fully aware of the claim,⁴³ or when the party refused to appear before the tribunal despite repeated notices⁴⁴.

IV. Due Process in Section 48(1)(d) of the Act

Facets of due process can also be found in Section 48(1)(d) of the Act,⁴⁵ which mandates that the tribunal should comply with the procedure stipulated in the agreement or failing such stipulation, the procedure followed in the seat of arbitration.⁴⁶ The provision seems to be similar to Section 48(1)(b): an award is refused enforcement under this provision if it is shown that the procedure adopted by the tribunal was not only materially different from the mandated procedure, but also actually affected the ability of the party to present his case.

Therefore, if the party participated in the proceedings without objecting to the procedural non-compliance, it would be deemed that the party had waived its right to the procedure.⁴⁷ In effect, it is clear that this provision cannot be invoked to refuse enforcement as long as the procedure is in accordance with what is stated in the agreement or failing that, is in compliance with the procedure of the jurisdiction where the arbitration took place. It is noteworthy that this provision has been one of most unsuccessful grounds to refuse enforcement.⁴⁸

V. Need to locate the Due Process Paranoia beyond the actual ‘Due Process Clause’

While Section 48(1)(b) could be said to be vaguely worded, courts have been consistent in its interpretation. At the same time, Section 48(1)(d) seems to provide sufficient guidance to the courts which apply it. Therefore, a mere combined reading of Sections 48(1)(b) and 48(1)(d) would seem to suggest that the due process paranoia on grounds of enforcement risk⁴⁹ is misplaced as far as ‘due process’ violations are concerned. However, the same need not be true

³⁹ RUSSELL, *supra* note 24, at 406.

⁴⁰ D.L. Miller and Co. Ltd. v. Daluram Goganmull, AIR 1956 Cal 361.

⁴¹ Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860.

⁴² International Investor KCSC v. Sanghi Polyesters Ltd., 2003 (1) ALT 364.

⁴³ European Grain & Shipping Ltd. v. Seth Oil Mills Ltd., (1983) VIII Y.B. COMM. ARB. 371.

⁴⁴ Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., (2008) 4 ARB. L. R. 497.

⁴⁵ A case might fall under this category as long as it violates the mandated procedure. However, it will attract clause (b) only if there is violation of fundamental due procedure. See Barbara Steindl, *The Arbitration Procedure - The Development of Due Process Under the New York Convention*, in AUSTRIAN Y.B. INT'L ARB. 255, 260 (Gerold Zeiler et al. eds., 2008).

⁴⁶ Arbitration & Conciliation Act, No. 26 of 1996, § 48(1)(d).

⁴⁷ RUSSELL ON ARBITRATION 468 (David St John Sutton et al. eds., 23rd ed. 2007).

⁴⁸ Albert Jan van den Berg, *Refusals of Enforcement under the New York Convention of 1958: the Unfortunate Few*, in ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 75, 81 (1999).

⁴⁹ For a discussion on the notion of ‘enforcement risk’, see Remy Gerbay & Badar Al Raisi, *Due Process Paranoia (Part 2): Assessing the Enforcement Risk under the English Arbitration Act*, KLUWER ARB. BLOG (Feb. 20, 2017), available at <http://arbitrationblog.kluwerarbitration.com/2017/02/20/due-process-paranoia-part-2-assessing-the-enforcement-risk-under-the-english-arbitration-act/>.

as the real problem with potential due process violations can lie outside the actual due process clauses.

As shown earlier, Section 48(1)(b) merely focuses on the right of the parties to receive a notice and to be heard. Therefore, it envisages a narrow understanding of due process and excludes several other fundamental requirements of due process which were discussed earlier. Further, the author argues that Section 48(1)(d) also does not offer sufficient protection against all due process violations.

There are two reasons for the same. *First*, it is evident that this clause gives effect to the idea of party autonomy which forms the cornerstone of arbitration. Commentators note that though the parties can control every aspect of arbitration including the applicable procedure, their ability to decide for themselves is subject to the notions of public policy,⁵⁰ mandatory and non-delegable provisions of the domestic law,⁵¹ fundamental notions of due process,⁵² and inviolable rules of natural justice⁵³. However, if the parties agreed to a procedure in violation of the aforesaid and the tribunal decided in accordance with this procedure, Section 48(1)(d) cannot be invoked. *Second*, Section 48(1)(d) remedy might also not be available in cases where the procedure of the forum state is followed due to the failure of the parties to stipulate the procedure. This is because the Model Law,⁵⁴ as well as the domestic law⁵⁵ of most countries, stipulate that in case of failure of parties to provide for the procedure, the arbitral tribunal would have the authority to conduct the arbitral proceedings in the manner it considers appropriate, subject to the duty to act fairly and treat the parties equally.⁵⁶ Therefore, it is clear that there is no real ‘procedural law of the country where the arbitration took place’ which can be said to have been violated as per Section 48(1)(d). It is either the agreement of the parties or the discretion of the arbitrators. Both can constitute violations of fundamental due process; however, these violations will not enable a party to invoke Section 48(1)(d).

VI. Public Policy: The Unruly Horse Causing the Paranoia

Section 48(2)(b) of the Act provides for the refusal of enforcement of foreign arbitral awards in case the same is contrary to the public policy of India. Invoking this provision in cases of due process violation holds a twofold importance; *first* it covers general due process violations that are excluded from the ambit of Section 48(1)(b)⁵⁷ and 48(1)(d), and *second*, it can be invoked by

⁵⁰ RUSSELL ON ARBITRATION 243 (David St. John Sutton ed., 20th ed. 1982).

⁵¹ MALHOTRA, *supra* note 15, at 880.

⁵² A due process violation is considered fundamental if it touches the issue of fairness or concerns the independence and impartiality of tribunal. *See* TWEEDDALE, *supra* note 3, at 415; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION, 3497 (2d ed. 2014).

⁵³ BACHAWAT, *supra* note 13, at 1152.

⁵⁴ UNCITRAL Model Law, art. 19(2).

⁵⁵ *See, e.g.*, Arbitration & Conciliation Act, 1996, No. 26 of 1996, § 19(3) (India); Arbitration Act, 1996, § 34 (U.K.); International Arbitration Act, 1974, art. 19(2), sch. 2 (Austl.); International Arbitration Act, 2002, art. 19(2), sch. 1 (Sing.); Commercial Arbitration Act, 1985, art. 19(2), sch. 1 (Can.); Arbitration Act, 1996, art. 19(2), sch. 1 (NZ).

⁵⁶ UNCITRAL Model Law, art. 18; Arbitration & Conciliation Act, 1996, No. 26 of 1996, § 18; Arbitration Act, 1996, § 33 (U.K.); International Arbitration Act, 1974, art. 18, sch. 1 (Austl.); International Arbitration Act, 2002, art. 18, sch. 1 (Sing.); Commercial Arbitration Act, 1985, art. 18, sch. 1 (Can.); Arbitration Act, 1996, art. 18, sch. 1 (NZ).

⁵⁷ The scope of Article V(1)(b) of the Convention was not expanded because it was felt that if other basic rights of defence were violated, enforcement could be refused on the grounds of public policy. *See* UN ECOSOC, *Report of the Committee on International Arbitral Awards*, E/2704: E/AC.42/4/Rev.1, ¶ 37 (1955).

courts *sua sponte* unlike Section 48(1) defences and hence, there is no necessity for the party to prove the violation of due process.⁵⁸

Before proceeding further, it is important to address the line of thought which advances the argument that the explicit provision of specific due process violations in 48(1)(b) should mean the exclusion of other notions of due process from the rubric of public policy.⁵⁹ This argument fails to consider that the unambiguous exclusion of certain ideas of due process from Section 48(1)(b) is merely a historical vestige. This provision is premised on Article V(1)(b) of the Convention which was included to account for the special importance accorded to fair hearings under international law.⁶⁰ If we dig deeper, we find that Article V(1)(b) was in turn borrowed from the 1927 Geneva Convention,⁶¹ providing further credence to its historical and political origins. Therefore, it can be said that the mere effect of specific due process requirements being present in Section 48(1) is that for these particular violations, the party arguing for non-enforcement will have to furnish conclusive proof while for other due process violations; the court can find violations on its own accord.⁶²

It is widely accepted that ‘public policy’ as used here, covers fundamental principles of law and justice in substantive as well as procedural respects.⁶³ The latter requires courts to ensure that there are no infirmities with the conduct of the proceedings by the tribunal.⁶⁴ In fact, even court practice shows that the public policy ground is significant for due process violations. This is where the uniformity in application ceases and paranoia can arise. The scope and understanding of what ‘public policy’ means varies across jurisdictions. Moreover, even though there is a general consensus that public policy as envisaged here should be construed as narrowly as possible;⁶⁵ practice seems to suggest a wide divergence in the application of this provision.

To begin with, Indian courts were not provided with any guidance as to the meaning of public policy. After going back and forth multiple times, the apex court concluded that for the purposes of Section 48(2)(b), public policy can be understood to mean (i) the fundamental policy of Indian law; (ii) the interests of India; or (iii) justice or morality.⁶⁶

⁵⁸ VAN DEN BERG, *supra* note 26, at 300.

⁵⁹ International Bar Association, *Report on the Public Policy Exception in the New York Convention* (2015), available at http://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recognntn_Enfrcemnt_Arbitl_Awrd/public_policy15.aspx.

⁶⁰ UNCTAD, *Dispute Settlement: International Commercial Arbitration*, UN Doc UNCTAD/EDM/Misc.232/Add.37, 32 (2003).

⁶¹ Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, (Sept. 26, 1927), 92 L.N.T.S. 301, art. IV(C).

⁶² VAN DEN BERG, *supra* note 26, at 300.

⁶³ UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, vol. XVI, ¶ 297 (1985).

⁶⁴ Vyapak Desai et al., *Public Policy and Arbitrability Challenges to the Enforcement of Foreign Awards in India*, in ENFORCING ARBITRAL AWARDS IN INDIA 201, 2016 (Nakul Dewan ed., 2017).

⁶⁵ Oil & Natural Gas Corporation Ltd. v. Saw Pipes, AIR 2003 SC 2629; Penn Racquet Sports v. Mayor International Ltd., (2011) XXXVI Y.B. COMM. ARB. 293; S.I. Strong, *Enforcing Class Arbitration in The International Sphere: Due Process And Public Policy Concerns*, 30 U. PA. J. INT'L L. 1 (2008).

⁶⁶ Shri Lal Mahal Ltd. v. Progetto Grano Spa, (2014) 2 SCC 433.

Subsequently, on the recommendation of the Law Commission of India,⁶⁷ judicial interpretations of 'public policy'⁶⁸ were incorporated in the statute. The provision was amended to explicitly provide that public policy would be violated if (i) the making of the award was induced by fraud or corruption; (ii) fundamental policy of Indian law was contravened, or (iii) the award was in conflict with the most basic notions of morality or justice.⁶⁹ Notwithstanding the amendment, it is not inconceivable that the requirement of a minimum due process would be subsumed not only by the fundamental policy of Indian law but also by the most basic notions of justice.⁷⁰

There have been several instances globally,⁷¹ as well as in India, where awards have been refused under the public policy grounds for procedural irregularities.⁷² For instance, refusal of the arbitrator to allow cross-examination of a witness,⁷³ non-disclosure by the claimant before the arbitrators of one of the agreements involved in the case,⁷⁴ arbitral tribunal not considering the expiration of limitation period,⁷⁵ existence of bias,⁷⁶ breach of natural justice,⁷⁷ and parties being on unequal footing in the appointment of arbitrators⁷⁸ have all been considered as serious violations of procedure and hence, violative of the public policy. In all these cases and otherwise too, even when the tribunal may have complied with the agreed procedure, courts have refused to enforce the award as contrary to public policy if the same is in violation of inherent notions of due process.⁷⁹ Similarly, enforcement could also be refused by resorting to the public policy ground when the conduct of the tribunal and the procedure adopted by it were antithetical to the fundamental requirements of due procedure.

VII. Conclusion

It is undeniable that compliance with the fundamental and basic notions of due process in arbitral proceedings is paramount to ensure the sanctity of the arbitral award. In recognition of this, violation of due process has been provided as a separate ground for refusal to enforce a

⁶⁷ Law Commission of India, *Report No. 246, Amendments to the Arbitration and Conciliation Act 1996, 57 (2014)*, available at <http://lawcommissionofindia.nic.in/reports/report246.pdf>.

⁶⁸ *Renusagar Power Plant Co. Ltd. v. General Electric Co.*, AIR 1994 SC 860; *Shri Lal Mahal Ltd. v. Progetto Grano Spa*, (2014) 2 SCC 433.

⁶⁹ Arbitration & Conciliation (Amendment) Act, 2015, No. 3 of 2016, § 22 (India).

⁷⁰ Fundamental Policy of Indian law has been interpreted to mean that the tribunal should not act in an arbitrary, capricious or whimsical manner or be influenced by any extraneous consideration. It also includes compliance with principles of natural justice and principle of *Wednesbury* reasonableness. See *Oil & Natural Gas Corporation Ltd. v. Western Geco International Ltd.*, (2014) 9 SCC 263; *Associate Builders v. Delhi Development Authority*, 2014 (13) SCALE 226.

⁷¹ *Corporacion Transnacional de Inversiones, SA de CV v. STET International*, (2000) 49 OR (3d) 414.

⁷² IHAB AMRO, *RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THEORY AND IN PRACTICE*, 157, 159 (2013); ANTON G. MAURER, *PUBLIC POLICY EXCEPTION UNDER THE NEW YORK CONVENTION: HISTORY, INTERPRETATION AND APPLICATION*, 169 (2013).

⁷³ *Compagnie de St. Gobain - Point à Mousson (France) v. The Fertilizer Company of India, Ltd.*, (1976) I Y.B. COMM. ARB. 184 (Fr.).

⁷⁴ *Biotronik Mess- und Therapiegeräte GmbH & Co. v. Medford Medical Instrument Company*, (1977) II Y.B. COMM. ARB. 250. (D.N.J. 1976).

⁷⁵ *German Buyer v. German Seller*, (1980) V Y.B. COMM. ARB. 260 (Ger.).

⁷⁶ *Transocean Shipping Agency Pvt. Ltd. v. Black Sea Shipping*, (1998) 2 SCC 281.

⁷⁷ Audley Sheppard, *Interim ILC Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) ARB. INT'L 217 (2003).

⁷⁸ Pierre Mayer & Audley Sheppard, *Final ILC Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19(2) ARB. INT'L 249 (2003).

⁷⁹ *Danish Buyer v. German Seller*, (1979) IV Y.B. COMM. ARB. 258 (Ger.).

foreign arbitral award. The language of the due process clause(s) and of the corresponding judicial interpretation has been moderate and does not seem to justify the due process paranoia that has gripped some arbitrators and arbitral tribunals around the world. It is clear that public policy seems a more likely culprit. As demonstrated, the two specific due process clauses do not contemplate every conceivable due process violation. Therefore, due process violation as a violation of public policy is a useful and necessary tool for parties. However, the need to preserve the sanctity of arbitration as a legitimate means of dispute resolution has to be balanced with the concerns arising from misuse of due process and undue attention to due process.

It is often said that public policy is an unruly horse, and once you sit astride on it, you never know where it will carry you.⁸⁰ In order to ensure that the horse is restrained and the paranoia is addressed, courts should allow the invocation of public policy ground only when the facts of a case have been tested on the touchstone of Section 48(1)(b) and/or 48(1)(d) and when enforcement will lead to gross violation of fundamental procedural rights vested in a party.

It is suggested that one of the solutions to the due process paranoia lies in better access to information which could result in a more accurate and realistic assessment of enforcement risks.⁸¹ This article is an attempt to provide information about the risks in India by examining the statute and judicial practice. However, the author suggests that a long-lasting solution to the paranoia lies in the creation of guidelines providing for due process violations similar to the IBA Guidelines on Conflicts of Interest in International Arbitration. Based on past practice and experience, jurisdictions could be divided into groups depending on the strictness of due process requirements in a particular jurisdiction and instances of actions that amount to violations could be provided for the guidance of tribunals. At the same time, the international community needs to start the process of building consensus on international notions of due process which can be codified and subsequently adopted (with modifications) by different jurisdictions.

⁸⁰ Richardson v. Mellish, (1824) 2 Bing. 252 (U.K.).

⁸¹ Remy Gerbay, *Due Process Paranoia*, KLUWER ARB. BLOG (June 6, 2016), available at <http://kluwerarbitrationblog.com/2016/06/06/due-process-paranoia/>.