Minor Dissertation

SCHOOL FOR ADVANCED LEGAL STUDIES
UNIVERSITY OF CAPE TOWN

February 2008

TOPIC: **THE PUBLIC POLICY EXCEPTION TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION**

Author: Mwila Chibwe -Kombe
KMBMWI001
Email: mckombe@yahoo.com

Supervisor: Professor R.H. Christie

Word Count: 24 465

Research dissertation presented for the approval of the Senate in fulfillment of part of the requirements for the Masters of Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of the Masters of Law dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

ACKNOWLEDGEMENTS

The completion of my entire study at the University of Cape Town would not have been possible without the hand of the Almighty God. I thank you Father for your Amazing Love and Grace.

I am grateful to my supervisor Professor Christie for his guidance, direction and time which are invaluable to me. I am also grateful to my lectures, Professor Cheadle, Judge Davis and Lise Bosman for imparting the knowledge I so earnestly desired.

My special thanks also go to my loving husband John Kombe for allowing me to leave home and come here to pursue the dream I have always wanted to achieve. Your overwhelming love, support, encouragement and patience are beyond what mere words can ever express. Thank you for your visits to Cape Town, keeping the home so well and playing double roles of father and mother to our daughter Chansa. I could not ask for a better husband. To Chansa my daughter, I know you are too young to understand my long absence from home but one day you will understand that I did it all for you. I know you always looked forward to receiving nice presents from Cape Town but not even those presents could make up for my absence. Thank you for being such a strong and independent child.

Mum and Dad, you have always supported every decision that I have made. I want to thank you for giving me life, love, support, encouragement and spiritual guidance. You laid a good foundation and I know this is what you always wanted me to achieve.

My thanks also go to Dr and Mrs. Chibwe for their words of encouragement and support. I am also grateful to Mr. and Mrs. Nebwe (Chilando my sister) for the love, support, prayers, and for providing a second home for Chansa. I am also grateful to my sister Mulenga and brothers Chomba and Kabungo for the encouragement and confidence in me. This kept me going throughout this period. To my cousins Sylvia and Chewe and my sister in law Maureen, I am grateful for your support in keeping the home well. To my nieces Nabanji, Chisha and Kabwe and nephew Musale, I thank you for being such great company to Chansa. To all my relatives and in-laws, thank you for your prayers, support, patience and understanding.

I am also grateful to the people who made my stay in Cape Town pleasant - Mr. and Mrs. Wonani and family, your, generosity, hospitality, patience, understanding and encouragement both morally and spiritually are highly appreciated. God will reward you greatly. To Mishinga Seyuba, my little sister, I thank you for your understanding, hospitality and thoughtfulness. Zamiwe Mtonga and family, thank you for your generosity. To my friends Theresa Kampata and Lillian Siyunyi, I thank you for your love, prayers and reassuring encouragement. I am also indebted to my employers Ministry of Justice for giving me paid study leave. To the Director of Public Prosecutions, my colleagues in the legal profession, members of staff at the Director of Public Prosecution's (DPP) Chambers I thank you for your support and the confidence in me. To my friends at University of Cape Town, thank you for the love and encouragement we shared. I shall miss you.

DEDICATION

This dissertation is dedicated to my parents Wilford and Adah Chibwe for giving me life and being a source of inexhaustible inspiration.
To my husband, John Kombe, this is for the love that we share.
To our daughter, Chansa Kombe for the joy you have brought to our lives.

TABLE OF CONTENTS

ABBREVIATIONS

CITEAC	China International Economic and Trade Arbitration Commission
CLOUT	Case Law on UNCITRAL Texts
CCJ	Common Court of Justice and Arbitration
ECJ	European Court of Justice
EC	European Community
ECOSOC	United Nations Economic and Social Council
FAA	Federal Arbitration Act
FERA	Foreign Exchange Regulations Act
GEC	General Electric Company
GPCL	General Principles of Civil Law
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILA	International Law Association
NCCP	New Code of Civil Procedure
NYC	New York Convention
PILA	Private International Law
PRC	People's Republic of China
OHADA	Treaty on Harmonisation of Business Law in Africa
UNCITRAL	United Nations Commission on International Trade Law
ZPO	Ziviprozeßordnung (German Code of Civil Procedure)

CHAPTER ONE

INTRODUCTION

Commercial arbitration is one of the most commonly used methods of resolving disputes in the international business arena. The attributes of arbitration that provide an impetus for growth are multivariate. This includes party autonomy, speed, economy, the pool of available arbitrators, consistency, avoidance of local courts and finality.[1] However, arbitration is not without limitations and therefore the avoidance of local courts is not absolute. Any successful party in an international commercial arbitration expects the award to be performed without delay and therefore winning the arbitration is half the battle. [2] This is particularly true where the award is not voluntarily carried out and the assets of the losing party are not at the seat of arbitration.

The effectiveness of international arbitral awards therefore depends on the recognition and enforcement of a valid arbitral award by a national court to which a successful party seeks.[3] This is the 'ultimate sanction' against the recalcitrant party for non- compliance with an award.[4] In this context, the arbitral process is greatly dependent upon national courts as they are given the ultimate supervision of the arbitral practice and substantive law that forms the basis of arbitral decisions.[5]

The main international instrument which is aimed at promoting the recognition and enforcement of these foreign arbitral awards is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the 'New York Convention'). One way this is done is by strictly limiting the grounds for refusing

---

[1] Richard W Naimark and Stephanie E Keer 'Post- Award Experience in International Commercial Arbitration' (2005) February/April *Dispute Resolution Journal* at 95.
[2] Redfern M and Hunter N *Law and Practice of International Commercial Arbitration* (2004) at 510.
[3] Hong Xiao 'Refusing Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York Convention in China: From the Judicial Experience of Europe and USA' (2005) 51(2) *US-China Law Review* Available at http://www.jurist.org.cn/doc/uclaw2005OT/uclaw20050707.pdf [accessed on 21st November 2007].
[4] Op cit at 513.
[5] Mark A Buchanan 'Public Policy and International Commercial Arbitration' (1988) 26 *American Business Law Journal* 511 at 512.

enforcement of such awards[6]. One of the grounds for refusing enforcement is where enforcement would be contrary to the public policy of the enforcement state.[7] This is usually referred to as the 'Public Policy Exception'. The public policy exception is an acknowledgment of the right of the State and its courts to exercise ultimate control over the arbitral process.[8] This ground is the most frequently litigated because when all other grounds for refusal are not sufficient, the debtor relies on the public policy as the last resort.[9] As a result, there has been a lot of controversy concerning this ground. The major reason is that public policy is a dynamic concept not susceptible to precise definition and therefore differs from state to state. The Convention has not attempted to define it. An English Judge in 1824 likened it to an 'unruly horse' which may lead you from sound law.[10]

However, some legal scholars having indicated that the public policy exception under the New York Convention refers to international public policy which is more restrictive than that of domestic public policy.[11] Case law has also construed this public policy exception narrowly indicating that a distinction is to be drawn between domestic considerations of public policy and international public policy.[12] Some countries have followed this approach and made a distinction while others clearly do not follow this approach.[13] Thus, there have been diverging interpretations by the courts over the years. Consequently, this has led to uncertainty and unpredictability in its interpretation and application by the national courts in the countries which have ratified the New York Convention.

---

[6] Troy L Harris 'The Public Policy Exception to Enforcement of International Arbitration Awards Under the New York Convention with Particular Reference to Construction Disputes' (2007) *Journal of International Arbitration* 9 at 10.

[7] Article V 2(b) of the United Nations Convention on the Enforcement of Foreign Arbitral Awards- 'New York Convention'.

[8] Audley Sheppard 'Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?' (2003)2(1) *Transnational Dispute Management* Available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm [Accessed 20th January 2008].

[9] Diana V Tapola 'Enforcement of Foreign Arbitral Awards: Application of the Public Policy Rule in Russia' (2006) 22 (1) *Arbitration International* 151.

[10] *Richardson v Mellish* [1824-34] All ER 258 at 258 per Burrough J.

[11] Fourchard Gaillard and Goldman on *International Commercial Arbitration* E. Gaillard and J Savage (eds) (1999) para 1617 Kluwer Law International CD ROM.

[12] Michael Hwang and Andrew Chan 'Enforcement and Setting Aside of International Arbitral Awards-The Perspective of Common Law Countries' Albert Jan van den Berg (ed) *International Arbitration and National Courts: The Never Ending Story ICCA International Arbitration Conference* (2000) at 156-157.

[13] Jean-Francois Poudret and Sebastian Besson *Comparative Law of International Arbitration* 2ed (2007) para 933 at 856-857.

SCOPE AND OBJECTIVE OF STUDY

This study focuses on the public policy exception under Article V 2(b) of the New York Convention. The Convention has been ratified by over 140 countries since its creation[14] as international commercial arbitration has developed in almost all advanced industries and regions of the world to provide a degree of legal certainty to the international business community.[15] However, the study will be limited to some of the major trading nations of the world. These are: England, the United States of America, India, Germany, Switzerland and China. Any reference to other countries will be for illustrative purposes only. It is important to mention that with the rapid economic development in Asia resulting in to China emerging in the international market, its status in the international arbitration landscape is of paramount importance to its trading partners.

One of the most distinctive and important features of the New York Convention is its emphasis on the legal certainty and predictability aimed at securing finality and worldwide enforcement of international arbitral awards.[16] On the other hand the Convention recognizes the function of public policy exception to be a guardian of the fundamental moral convictions or policies of the forum.[17] The courts therefore must strive to resolve these interests so that the purposes of the Convention are not undermined.

The study on the public policy exception is therefore significant. The main objective of this thesis is to ascertain how public policy has been defined and how far it has been accepted. It will also consider whether or not it is possible to have a uniform understanding of public policy as provided for under Article V (2) (b) in the light of the

---

[14] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.htmlwww.wipo.int/amc/en/arbitration/ny-convention/parties.html [Accessed 8th February 2008].

[15] Xiabing Xu and George D Wilson 'One Country, Two- International Commercial Arbitration- Systems' (2000) 17(6) *Journal of International Arbitration* 47 para B Kluwer Law International CD Rom.

[16] Homayoon Arfazadeh 'In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception' (2002) 13 *American Review of International Arbitration* 43.

[17] Albert Jan van den Berg *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) at 360.

New York Conventions objective of attaining certainty and predictability. This will be done by analyzing the various approaches which have been taken by the aforementioned trading nations of the world in the interpretation and application of public policy exception through decided case law.

STRUCTURE

To achieve the objective of the analysis, the study is divided into the following chapters.

Chapter One This is the Introduction

Chapter Two This focuses on the international legal framework available in relation to the recognition and enforcement of foreign arbitral awards and which make reference to the public policy exception. The main one is the New York Convention. A brief overview of its historical development will be given outlining its objectives and purpose. Other regional Conventions will also be alluded to such as the Inter-American Convention on International Commercial Arbitration (Panama Convention), the European Convention, the Amman Arab Convention on Commercial Arbitration and the Arab Convention on Judicial Cooperation (Riyadh). Reference is made to the UNCITRAL Model law as it makes particular reference to the public policy exception under Article 36 (1) (b) (ii).

Chapter Three This chapter deals with the theoretical concept of public policy. This is done by giving a definition of the concept of public policy under Private International Law and the arbitration process. The three levels of public policy namely: domestic, international and transnational public policy as well as the other categories of public policy will be dealt with under this chapter.

Chapter Four After giving the theoretical definition of public policy, chapter 4 is intended to analyse how in practice the major trading nations of the world have interpreted and applied the public policy exception. This will be done by firstly giving an overview of the legislative framework on the enforcement and recognition of foreign arbitral awards and then the case law in relation to the public policy exception as developed through court decisions.

Chapter Five This is intended to answer the pertinent questions asked in this study. This will be done by drawing conclusions from the interpretation of public policy by the courts of the countries under study.

CHAPTER TWO

THE INTERNATIONAL LEGAL FRAMEWORK

1. Introduction

One of the most important features of an award in an international commercial arbitration is that it should be readily transportable, that is, capable of being taken from the State in which it was made under one system of law to other States in which it is able to qualify for recognition and enforcement under different systems of law. To render an award effective, means must be available for enforcing it and these means must be available internationally and not simply in the country in which the award was made.[18]This is particularly important as the enforcement of an award in the State where it was made is relatively simple than when it has to be enforced by the courts of other countries where the losing party has assets. In this regard, it has been stated that:

> The most effective method of creating an international system of law governing international commercial arbitration has been through international Conventions. These international Conventions have served to link national systems of law into a network of laws which, although they may differ in their wording, have as their objective the international enforcement of arbitration agreements and arbitral awards. [19]

The recognition and enforcement of arbitral awards has therefore been addressed in a number of regional and international Conventions, thus providing a legal framework. Most of these instruments make reference to public policy as a ground for refusing enforcement. The main international Convention is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention).

It is pertinent to explore this legal framework as a backdrop to our analysis of the public policy exception.

---

[18] Redfern and Hunter note 2 para 10-20 at 520.
[19] Ibid para 1-141 at 78.

2 HISTORICAL DEVELOPMENT OF THE NEW YORK CONVENTION

2.1 The Geneva Protocol of 1923

The increased use of international commercial arbitration after the First World War led the newly established International Chamber of Commerce (ICC) in Paris to promote an international convention by which one of the major obstacles of that time, the unenforceability of the arbitral clause, referring future dispute to arbitration, would be removed.[20] This initiative of the ICC resulted into the drawing up of the Geneva Protocol on Arbitration Clauses of 1923 under the auspices of the League of Nations.[21] This was the first international Convention to mark the importance of international commercial arbitration to the development of international trade.

The protocol had two objectives: Its first and main objective was to ensure that arbitration clauses were enforceable internationally, so that parties to any arbitration would be obliged to resolve their disputes by arbitration, rather than through the courts. Its second and subsidiary objective was to ensure that arbitration awards made pursuant to such arbitration agreements would be enforced in the territory of the state in which they were made.[22]

However, the Protocol was limited in range and effect in that, it only applied to arbitration agreements made between parties subject respectively to the jurisdiction of different contracting states.[23] In addition, it only provided for the domestic enforcement of Protocol awards. [24]

---

[20] Jan van den Berg note 17 at 6.
[21] Dominic Di Pietro and Martin Platte *Enforcement of International Arbitration Awards: The New York Convention of* 1958 (2001) at 15.
[22] Redfern and Hunter para 1-145 at 79-80.
[23] Ibid at 80.
[24] Ibid para 10-22 at 522.

2.2 The Geneva Convention of 1927

The limitations of the Geneva Protocol led to the promulgation of the Geneva Convention in 1927. The purpose of this Convention was to widen the scope of the Geneva Protocol by providing for recognition and enforcement of protocol awards within the territory of contracting states (not merely the state in which the award was made).[25] The award had to satisfy other additional requirements the most important being two requirements namely:

(i) That the award has become final in the country in which it has been made and

(ii) That recognition or enforcement of the award is not contrary to the public policy or to the principles of law of the country in which it is sought to be relied upon.[26]

Although the Convention was undoubtedly an improvement in comparison with the previous situation, it was still considered to be inadequate[27] and the requirements posed some problems. This is because the Convention placed upon the party seeking enforcement the heavy burden of proving the conditions necessary for the enforcement.[28] One of these requirements being that the award had become final in the country in which it had been made. This led to what became known as the problem of the "*double exequatur*". The reason was that in some countries, an exequatur had to be obtained first from the place in which the award was made in order to show that the award was final and another exequatur obtained from the court in the forum state, in order to enforce the award.[29]

Further, although the Convention made reference to public policy as a ground for refusing enforcement, there was no definition as to what constituted public policy. The lack of definition was worsened by the requirement provided for under Article 1(e) that the award should not be contrary to the "principles of the law" of the country in which enforcement was sought. This requirement meant that the award was open to attack not

---

[25] Ibid at 80.
[26] Geneva Convention of 1927 Article1 (d) and (e).
[27] Jan van den Berg note 17 at 7.
[28] Ibid at 7.
[29] Redfern and Hunter note 2 para 10-45 at 522.

merely on the grounds of public policy but also on grounds that it offended the legal principles of the forum state.[30] This was too broad a provision. The result defeated the purpose of commercial arbitration aimed at giving finality to awards.

2.3 The New York Convention

The aforementioned Geneva Convention encountered problems in its operations and therefore the ICC concluded that the system established by this Convention no longer met the requirements of international trade.[31] In 1953 after the Second World War, the ICC launched a project for a new international Convention. The Draft Convention issued in 1953, was aimed essentially at an arbitration which would not be governed by a national law. This was however not acceptable by most States.[32]

The United Nations Economic and Social Council (ECOSOC), to whom the ICC Draft Convention was presented, came forward in 1955 with another Draft Convention which remained much closer to the Geneva Treaties.[33] Unlike the ICC Draft which referred to 'International Arbitral Awards" the ECOSOC Draft Convention mentioned "Foreign Arbitral Awards". After consultations with various governments and non-governmental organisations, the ECOSOC convened the Conference on the International Commercial Arbitration which was held at the Headquarters of the United Nations in New York from May 20 - June 10 1958. This New York Conference of 1958 resulted in the adoption of what has become known as the New York Convention of 1958.[34]

2.3.1 Purpose and Objectives of the New York Convention

The New York Convention has made substantial improvement in comparison with the Geneva Conventions. It is the most extensively ratified international instrument in any domain[35] with over 140 countries including basically the major trading nations. The

---

[30] Ibid.
[31] Audley Sheppard 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 (2) *Arbitration International* 217 at 221.
[32] Jan van den Berg note 17 at 7.
[33] Ibid at 7.
[34] Ibid at 8.
[35] Fourchard Gaillard Goldman note 11 para 1666.

purpose and goal of this Convention were aptly put by the United States Supreme court in the case of *Fritz Scherk v Alberto- Culver Co*[36] when Justice Stewart delivered the opinion of the court. He stated:

> The goal of the New York Convention, and the principle purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.[37]

In short, the purpose and objective is to encourage the recognition and enforcement of arbitral awards made outside the country in which enforcement is sought.[38] It is also aimed at giving a much wider effect to the validity of private arbitration agreements.

Article 1(1) of the Convention has adopted an international attitude by providing a broader application of the Convention in that it applies to 'foreign' awards made in a State other than the State where recognition and enforcement is sought. The term 'foreign' is also generally interpreted as covering awards which are not considered 'national' because of certain foreign aspects which characterize the dispute, even if such awards have been made in the country where the benefit of the Convention is sought.[39] A State may however limit the application of the Convention by making reservations. These are contained in Article I (3).

The first is the reciprocity reservation in which a State may declare that the Convention will apply to Convention awards, that is awards made in a State which is a party to the New York Convention. This reservation was adopted because during the draft of the Convention, some of the contracting States did not accept the principle of "universality" which would have allowed the enforcement of foreign arbitral awards irrespective of the country where it was made. [40]

---

[36] 417 US 506.
[37] Ibid at 520.
[38] *Parsons & Whittemore Overseas Co. v. Societie Generale de L'Industrie du Papier,* 508 F.2d 969 (2d Cir. 1974).
[39] Fourcard Gaillard Goldman note 11 para 1668.
[40] Di Pietro and Platte note 21 at 57.

The result of adopting this reservation therefore means that an award made in a non-contracting State does not benefit from the enforcement under the Convention in a State which has adopted the reservation. [41]It has therefore been advised that when seeking a suitable State in which to hold an international commercial arbitration, it is important to select a State that has adopted the New York Convention so as to improve the chances of securing recognition and enforcement of the award in other countries.[42] However, this reservation may lose significance because as it has already been alluded to, the Convention has been ratified by over 140 countries of the world including the world's major trading nations making the world inter linked.

The second one is the Commercial reservation which is to the effect that a contracting State will only apply the Convention to differences arising out of legal relationships whether contractual or not which are considered as commercial under the national law of the State making such a declaration. This reservation was inserted because at the New York Convention of 1958, it was believed that without the clause, it would be impossible for certain civil law countries which distinguished between commercial and non-commercial transactions to adhere to the Convention.[43]

This reservation has led to difficulties in interpretation as relationships which are regarded as "commercial" by one State may not necessarily be regarded as such by other States. Although in the international environment the word commerce should not be given a narrow meaning, the final decision as to what qualifies as commercial is for the law of the country where enforcement is sought.[44]

That notwithstanding, the effect of this Convention has been to secure a considerable degree of uniformity in the recognition and enforcement of awards in most of the important trading countries of the world.[45] It has therefore been praised in glowing

---

[41] Ibid.
[42] Redfern and Hunter note 2 para10-26 at 524.
[43] A J van den Berg (ed) *Year Book Commercial Arbitration,* Vol. XI (1986) para 107G at 408 Kluwer Law International CD Rom.
[44] Di Pietro and Platte note 21 at 61and 62.
[45] Redfern and Hunter para 10-20 at 520.

terms as a single most important pillar on which the edifice of international arbitration rests.[46]

2.3.2 The Enforcement Provisions under the New York Convention

A contracting State is under an obligation to recognize binding awards and to enforce[47] them.[48] The formalities for enforcement are simple in that the party seeking enforcement is only required to produce to the relevant court the duly authenticated original award or a duly certified copy thereof: and the original agreement referred to in Article II or a duly certified copy thereof.[49]

As already alluded to, the purpose of the Convention is to encourage enforcement of foreign arbitral awards. One way it does so is by strictly limiting the grounds for denying their enforcement and not permitting any review on the merits of the award. In that regard, Article V provides for exclusive procedural and substantive grounds for challenging the enforcement of an award.[50] Therefore, in the famous case of *Parsons & Whittemore Overseas Co v Societe Generale de L'Industrie du Papier (RAKTA),*[51] it was made clear that:

> Both the legislative history of Article V and the statute enacted to implement the United States' accession to the Convention are strong authority for treating as exclusive the bases set forth in the Convention for vacating an award.

---

[46] Ibid para 10-23 at 523.

[47] It is important to make a distinction between recognition and enforcement. "**Recognition** on its own is generally a defensive process. It will usually arise when a court is asked to grant a remedy in respect of a dispute that has been the subject of previous arbitral proceedings. The party in whose favour the award was made will have to produce the award to the court and ask the court to recognize it as valid and binding upon the parties in respect of the issues with which it dealt. The award may have disposed of all the issues raised in the new court proceedings and so put an end to the proceedings as *res judicata* that is to say, as matters in issue between the parties which have already been decided. By **Enforcement** on the other hand, it is meant that where the court is asked to enforce an award, it is asked not merely to recognize the legal force and effect of the award, but also to ensure that it is carried out, by using such legal means as are available. Enforcement goes further than recognition. In enforcement proceedings, the terms recognition and enforcement run together. One is a necessary part of the other." Redfern and Hunter para 10-11 and 10-12 at pg 516.

[48] Article III.

[49] Article IV.

[50] Troy L Harris note 6 at 11.

[51] See note 38 at para E.

Further, the burden of proof has shifted from the party seeking enforcement to the party against whom the enforcement is sought. The resisting party therefore has to prove the five grounds set out in Article V (1). The other two grounds are invoked at the court's own discretion. Therefore, the wording of this provision has been interpreted to give the Convention's pro-enforcement bias.[52] This pro-enforcement bias is itself considered to be a matter of public policy.[53]

It is important to set out the seven grounds for refusing enforcement as provided for under Article V as some are said to overlap with Article V(2)(b) which is the focus of the study. Article V provides:

> *(1)Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a)The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
>
> *(b)The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or otherwise unable to present his case; or*
>
> *(c)The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or*
>
> *(d)The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of parties, or, falling such agreement, was not in accordance with the law of the country where the arbitration took place; or*

---

[52] See *Scherk* case note 36 at para 519-520 and also *Parsons* case note 38 para A.
[53] Redfern and Hunter para 10-51 at 542.

(e)The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

In relation to Article V(2) (b) dealing with public policy, an Ad hoc Committee set up by the ECOSOC to prepare a draft Convention originally recommended a provision which referred to awards 'clearly incompatible with public policy or with fundamental principles
of law ('*ordre public*') of the country in which the award is sought to be relied upon.[54] However, this wording was not adopted in full as it is evident that the drafters of the New York Convention intended to limit Article V(2)(b) to public policy alone unlike the previous situation in the Geneva Convention which provided in pertinent part "contrary to the public policy or principles of law of the country". 'Principles of law' was therefore omitted from the Convention.

In spite of this, the Convention itself has offered no definition to public policy. In this regard, the public policy ground has generated the most discussion and litigation and often overlaps with other grounds such as Article V(1)(b) (due process), Article V(1)(d) improper procedure or composition of tribunal and Article V(2)(a)(non-arbitrability). The conceptual framework and interpretation of public policy referred to under the Convention is the subject of analysis under Chapter 3 and 4 of this thesis.

2.4 The Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington or ICSID Convention)

[54] Sheppard note 31 ILA Interim Report at 221-222.

The Convention on the Settlement of Investment Disputes between States and Nationals of other States which is also known as the Washington or ICSID Convention, is a multi lateral treaty formulated by the Executive Directors of the International Bank for Reconstruction and Development (the World Bank). It was opened for signature on 18th March 1965 and came into force on 14th October, 1966.[55]

The Convention has established the International Center for Settlement of Investment Disputes (ICSID) which is an autonomous international institution. The primary purpose of the ICSID is to provide facilities for conciliation and arbitration of investment disputes. Therefore in accordance with Article 25(1) of the Convention, its field of application is the settlement of investment disputes between private entities and member States.

The ICSID Convention provides for its own internal and extremely effective mechanism for the recognition and enforcement of ICSID awards.[56] ICSID awards must be recognized and enforced by its member States as if they were final decisions of their national courts.[57] Therefore ICSID awards are directly enforceable in its member States and do not depend on other international Conventions such as the New York Convention.[58]

However, Article 52 which sets out the grounds for annulment of the award does not expressly refer to public policy. The only grounds provided are: corruption on the part of a member of the tribunal; serious departure from a fundamental rule of procedure; and failure to state the reasons on which the award is based.

---

[55] Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home [Accessed on 21st January, 2008].
There are currently 155 signatories to the ICSID Convention. Of these, 143 have deposited their instruments of ratification to become ICSID contracting States. Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home [Accessed on 21st January, 2008].

[56] Fouchard Gaillard Goldman note 11 para 1663.

[57] Article 54 of ICSID Convention.

[58] Di Pietro and Platte note 21 at 18.

The first two are said to generally fall within the scope of domestic and international public policy.[59] Enforcement of an ICSID award cannot be challenged in the courts of the enforcement country, save on the grounds of sovereign immunity.[60] Perhaps this is due to the nature of the ISCID award.

3 REGIONAL ENFORCEMENT CONVENTIONS

3.1 The Inter- American Convention on International Commercial Arbitration (Panama Convention)

The Inter- American Convention on International Commercial Arbitration known as the Panama Convention was adopted in Panama on 30th January 1975. This Convention was signed by the Governments of the Member States of the Organisation of American States desirous of having a convention on international commercial arbitration.[61]

Under Article 1, the Panama Convention recognizes an agreement to submit existing or future disputes to arbitration. It also provides for the reciprocal enforcement of arbitral awards in member states as if the award were a final judgment of national court.[62] Unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic awards.[63] Although the Panama Convention refers to 'execution' of an award and not enforcement as the New York Convention, it has been stated that in practice, there is no difference.[64]

---

[59] Sheppard ' Public Policy and Enforcement of Arbitral awards' note 8. Domestic and international public policies are discussed in chapter 3 of this study.
[60] Ibid.
[61] Available at http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp [Accessed 26th February 2008].The States include United States of America, Argentina, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela. Four other governments signed the Convention but have not ratified it: Bolivia, the Dominican Republic and Nicaragua.
[62] Article 4 of the Panama Convention.
[63] R Doak Bishop and Elaine Martin 'Enforcement of Foreign Arbitral Awards' at 3 Available at http://www.kslaw.com/library/pdf/bishop6.pdf [Accessed on 26th February 2008].
[64] Redfern and Hunter note 2 at para 10-58 at 548.

The most important provision of the Panama Convention is Article 5 which provides the bases for refusing to recognize and execute an arbitral award.[65] It is almost identical to Article V of the New York Convention and this Convention has therefore been described as a carbon copy of the New York Convention.[66] The Convention expressly states that the party against whom an award is made has the burden of proving one of the grounds for refusing recognition.[67] In particular, Article 5 (2) (b) states:

> *The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which recognition and execution is requested finds:*
>
> *(b) That the recognition or execution of the decision would be contrary to the public policy ("ordre public") of that State.*

This explains why the wording of this Article is similar to that found under Article V (2) (b) of the New York Convention. In the same vein as the New York Convention, the Panama Convention does not provide a definition of public policy or *ordre public.*

3.2 The European Convention 1961

The European Convention on International Commercial Arbitration was made in Geneva under the aegis of the Trade Development Committee of the United Nations Economic Commission for Europe in 1961.[68] It was designed mainly for disputes arising out of contracts between European parties, in particular, East- West disputes but this did not limit membership to European States.[69]

The main focus of the European Convention is not the recognition and enforcement of arbitral awards.[70] It addresses various aspects of the arbitral procedure not covered by the

---

[65] Op cit at 4
[66] Chambers Yang and Marshal Chen 'International Commercial Arbitration in NET Era' Available at http://www.law-bridge.net/english/LAW/20055/0821584249562.html [Accessed on 3rd January 2008].
[67] Article 5 of Panama Convention.
[68] Redfern and Hunter note 2 para 1-149 at 82.
[69] Di Pietro and Platte note 21 at 19.
[70] Fourchard Gaillard Goldman note 11 para 1714.

New York Convention. Therefore as regards the recognition and enforcement of awards, the European Convention merely seeks to supplement the New York Convention.[71]

3.3 The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific- technical Cooperation (Moscow Convention)

The Moscow Convention was signed in 1972 and its original signatories were the Eastern European States which formed the Council for Mutual Economic Assistance.[72] However, the membership of this Convention has reduced following the withdrawal of the Czech Republic, Hungary and Poland and the non-existence of the German Democratic Republic. So it only applies to Bulgaria, Cuba, Mongolia, Romania and Russia.[73]

According to Article 1, the Convention regulates the settlement by arbitration of all disputes arising from economic and scientific-technical cooperation of the countries-parties to the Convention. The Convention in Article IV (1) and (2) provides that arbitral awards rendered by the arbitration courts shall be final and binding and they are to be voluntarily enforced by the parties failing which they may be enforced in the same way as final decisions made in the courts of the country of enforcement.

The Convention does not expressly refer to public policy as a ground for refusing enforcement it nonetheless sets out three grounds which closely resemble those set out in Article V(1) of the New York Convention. These are: lack of jurisdiction, denial of a fair hearing and the award has been set aside.[74]

3.4 Treaty on the Harmonization of Business Law in Africa (OHADA)

On 17th October, 1993, 16 African States[75] signed a treaty known as the Organisation pour l'Harmonisation du Droit des Affaires en Afrique (Organisation for the

---

[71] Ibid. See also Redfern and Hunter at para 1-149 at 82.
[72] Di Pietro and Platte note 21 at 18.
[73] Redfern and Hunter para 10-57 at 547.
[74] Article V (1)(a), (b), (c) of the New York Convention.
[75] The 16 African States are : Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Congo, Ivory Coast, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo.

Harmonisation of Commercial Law in Africa (the OHADA treaty) in Port Louis. The treaty's main objective is to correct the existing legal and judicial insecurity in the State Parties.[76] To this end, OHADA has designed, enforced and applied through the courts a substantial body of uniform commercial laws.[77] One of these laws is the Uniform Act on Arbitration adopted in 1999 by the Council of Ministers of OHADA. Arbitration under OHADA therefore incorporates this Act and the Arbitration Rules of the Common Court of Justice and Arbitration (CCJA)[78]. Both texts facilitate the implementation of arbitral awards, whether domestic or foreign.[79]

Although OHADA is aimed at providing a body of uniform commercial laws, for its member States, the Uniform Act on Arbitration states that foreign awards, including those made on the basis of rules different from those provided by the Uniform Act will be recognized either on the basis of the Uniform Act or under the conditions provided by international agreements.[80] In this respect, the New York Convention and ICSID Convention are renowned international agreements. [81]

Article 31 provides that recognition and enforcement shall be refused if the "award is manifestly contrary to a rule of international public policy of the member States" The CCJA, based in Abidjan, Cote d'Ivoire, supervises the application and interpretation of the Law, and a decision not to allow enforcement may be appealed to that court. It has been observed that this is the first attempt to harmonise public policy within sovereign States.[82]

---

[76] Available at http://translate.google.com/translate?hl=en&sl=fr&u=http://www.ohada.org/&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3DOHADA%26hl%3Den[Official site of OHADA- accessed on 21st January 2008].

[77] Available at http://www.tradeforum.org/news/fullstory.php/aid/497/OHADA_Four_Years_On:_One_Business_Law_for_16_African_Countries.html [Accessed on 21ST January 2008].

[78] In French, this is known as the *Cour Commune de Justice et d'Arbitrage.*

[79] G Kenfack Douajni 'The Recognition and Enforcment of Arbitral Awards in OHADA Member States' (2003) 20 (2) *Journal of International Arbitration* 205.

[80] Article 34 of OHADA Uniform Act on Arbitration.

[81] Op cit at 206.

[82] Sheppard note 31 ILA Interim Report at 224.

3.5 The Amman Arab Convention on Commercial Arbitration

The Council of Arab Ministers of Justice, during its fifth Session held in Amman, Jordan from April 11 to 14 1987, approved a new arbitration Convention called the Amman Arab Convention on Commercial Arbitration (Amman Convention).[83]This is a regional agreement signed by 14 Arab States.[84] The aim of the Convention is to develop 'a unified Arab system for commercial arbitration'.

The Amman Convention appears to be modeled on the International Settlement of Investment Disputes (ICSID) Convention, although it is not limited to the resolution of investment disputes.[85]

The enforcement provisions are provided for under Article 35. The Supreme Court of each contracting State has the power to enforce an award rendered pursuant to the Amman Convention by an arbitral tribunal. The only ground for refusing enforcement under this Convention is if the award is contrary to public policy. Public policy is not defined under this Convention but it has been stated that with this provision, the Amman Convention compares favourably with other Conventions.[86]

On the other hand, the Convention is considered to be of limited interest in international trade as it prescribes as the language of submissions and pleadings exclusively the Arabic language.[87] Therefore, the proceedings it contemplates are not accessible to most parties to international commercial agreements.[88]

---

[83] Mahir Jalili 'Amman Arab Convention on Commercial Arbitration' (1990) 7 (1) *Journal of International Arbitration* 139.

[84] The governments of the following States signed the Convention. The Hashemite Kingdom of Jordan, the Tunisian Republic, Algerian Democratic and People's Republic, Republic of Djibouti, Sudan, the Arab Republic of Syria, Iraqi, Palestine, the Lebanese Republic, the Libyan People's Socialist Arab Jamahiyira, the Kingdom of Morocco, the Islamic Republic of Mauritania, the Arab Republic of Yemen and the People's Democratic Republic of Yemen. 'The Amman Arab Convention on Commercial Arbitration' (1992) 7 *Arab Law Quarterly* 82 Available at http://links.jstor.org/sici?sici=0268-0556(1992)7%3A1%3C83%3ATAACOC%3E2.0.CO%3B2-0 [Accessed on 3rd January 2008].

[85] Op cit at 139.

[86] Ibid.

[87] Di Pietro and Platte note 21 at 19.

[88] Redfern and Hunter note 2 para 10-60 at 549.

3.6 The Arab Convention on Judicial Cooperation (Riyadh)

The Riyadh Convention was signed on 6th April 1983 and came into force in October 1985[89] by States of the Arab League of Nations.[90] It is a regional multilateral Convention between Arab States. It concerns enforcement and recognition not only of arbitral awards, but also court judgments.[91]

Article 37 of the Convention places upon the judicial authorities of each signatory State the obligation to recognize and enforce arbitral awards. It also provides five grounds for refusing enforcement. Article 37(e) provides thus:

> *The judicial authorities of this State can only refuse enforcement of the award in one of the following cases;*
> .....
>
> *(e) if the award is contrary to the Moslem Shari' a, public policy or good morals of the signatory State where enforcement is sought.*

From the above provision, it is evident that although there is no definition as to what constitutes public policy, it is possible to conclude that public policy is something different from Moslem Shari' a or good morals since all three terms are listed after each other, indicating that they are terms of different meanings.[92]

4 THE UNCITRAL MODEL LAW

The UNCITRAL Model Law on International Commercial Arbitration was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.[93] It owes its origins to a request made in 1977 by the Asian-African Legal

---

[89] Arab Convention on Judicial Cooperation *ICCA Handbook* Kluwer Law International CD Rom.
[90] Al Jadaan Law firm 'Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia' Legal500.com http://www.legal500.com/index.php?option=com_content&task=view&id=470&itemid=93 [Accessed 4th January 2008].
[91] Abdul Hamid El- Ahdab 'Enforcement of Arbitral Awards in the Arab Countries' (1995) 11 (2) *Arbitration International* 169 Source: Kluwer Law International CD Rom on Arbitration.
[92] Robert Conle 'Public Policy and enforcement of international commercial awards- curse or blessing?' Research dissertation presented for the approval of the Senate of the University of Cape town in fulfillment of part of the requirements for the Master of Laws, February 2007 para 2.2.5 at 12.
[93] International Commercial Arbitration: *UNCITRAL Secretariat Explanation of Model Law* Available at http://faculty.smu.edu/pwinship/arb-24.htm [Accessed on 26th February 2008].

Consultative Committee for a review of the operation of the New York Convention. The Committee maintained that there was a lack of uniformity in the approach of national courts to the enforcement of awards.[94]

The General Assembly in its resolution 40/72 of 11 December 1985 therefore recommended 'that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice'.[95]

The Model Law was therefore chosen as a vehicle for harmonization and improvement of national laws rather than attempting to revise the New York Convention. Thus, it covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects a worldwide consensus on the principles and important issues of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[96]

Article 34 deals with setting aside of an award while Article 36 with the grounds for refusing recognition or enforcement. Both these processes include public policy as a ground for setting aside and refusing enforcement. Article 36 (1) (b) (ii) states:

> *Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:*
>
> *(b) if the court finds that:*
>
> *(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.*

Although there is no reciprocity under the Model law, which is found under the New York Convention, in essence this provision reflects Article V (2) (b) of the New York

---

[94] Sheppard note 31 ILA Interim report at 223.
[95] UNCITRAL Explanation note 93.
[96] United Nations Commission on International Trade Law: 1985 UNCITRAL Model Law on International Commercial Arbitration.

Convention. The public policy referred to is of the State where enforcement is sought. However, just like the New York Convention, the Model Law does not define public policy.

It is important to note that during the discussions concerning Article 34, the United Kingdom delegation expressed concern that 'public policy' as understood in the common law jurisdiction, might not cover all cases of procedural injustice, for example, awards tainted by fraud, corruption or perjured evidence. A proposal was made for an addition to Article 34 of a more general formula to ensure the possibility of recourse in all cases of serious procedural injustice.[97] The discussion highlighted the difference between the common law concept of public policy and the civil law concept of *ordre public* (which would undoubtedly encompass breaches of procedural justice.[98] It was eventually decided not to expand the list of the grounds for setting aside.[99] However, the position was clarified in the Commissions report which stated:

> It was understood that the term 'public policy', which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording 'the award in conflict with public policy of the State' was not to be interpreted as excluding instances or events relating to the manner in which it was arrived at.[100]

5 CONCLUSION

From the foregoing, it is clear that an international legal framework for the recognition and enforcement of foreign arbitral awards is in existence, thereby contributing to the development of international commercial arbitration. However, it is also evident that although public policy is regarded as a guardian of the fundamental moral convictions or policies of the forum and thus can be found in almost every international convention or

---

[97] Broches 'Commentary on the UNCITRAL Model Law on International Commercial Arbitration' *International Handbook on Commercial Arbitration* J Paulsson (ed) Supp 11(January 1990) Kluwer Law International CD Rom.

[98] Sheppard ILA Interim Report note 31 at 223.

[99] Ibid at 224.

[100] Broches note 97.

treaty relating to recognition and enforcement of foreign arbitral awards, there is no definite meaning as to public policy.

Although an attempt to clarify the meaning of 'public policy' was made by the Commission dealing with Articles 34 and 36 of the Model law, it can be said that the clarification did not go far enough to address the issue of 'public policy'. This concept continues to be a source of concern for most lawyers in the field of recognition and enforcement of arbitral awards. What can be rightly stated at this juncture is that it is left open to the competent authority to interpret what public policy referred to in the New York Convention, Model Law and other enforcement Conventions means.

CHAPTER THREE

THE CONCEPT OF PUBLIC POLICY

1. Introduction

As it has been noted from the previous chapter, public policy is a traditional ground for refusal of enforcement of arbitral awards and is found in the Model law and in almost every international convention or treaty relating to these matters[101]. None of these legal instruments have attempted to define the 'concept of public policy'.

It is generally understood that the common law term public policy is the English equivalent of the term '*ordre public*' utilized in French in countries with civil law tradition.[102] Regrettably, this concept of public policy is difficult to grasp in both legal systems. The reason why this is so, is that the degree of fundamentality of moral conviction or policy is conceived differently for every case in the various States.[103]

In this regard, public policy has always been a source of concern for international lawyers.[104] In 1824, an English judge likened it to an unruly horse and stated in his dictum that:

> Public policy is a very unruly horse; and when you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail.[105]

A century later, Lord Denning disagreed and insisted reassuringly that:

> With a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles. It can leap the fences put up by fictions and come down on the side of justice.[106]

---

[101] Jan van den Berg note 17 at 360.
[102] Natalya Shelkoplyas *The Application of EC Law in Arbitration Proceedings* (2003) para 6.2.1 at 140.
[103] Op cit note 17 at 360.
[104] Arfazadeh note 16 at 43.
[105] *Richardson v Mellish* [1824-34] All ER 258 at 258 per Burrough, J.
[106] *Enderby Town Football Club v F.A* (1971) AC 591 at 606-607 (CA).

Despite this assurance, it has been stated that the common- law tradition continues to cherish the 'unruly horse' metaphor, convinced that public policy can at any time carry the courts to unpredictable destinations. The civil-law tradition regards the more or less analogous notion of *ordre public* as an inveterate 'Chameleon,' and thus, no less a threat to legal certainty and predictability.[107]

These metaphors make it clear that public policy is multifaceted and therefore will be given different meanings from state to state. It is imperative to analyze the theoretical concept of public policy. Although the scope of the thesis is on the public policy exception in the recognition and enforcement of foreign arbitral awards, it is pertinent to first give an overview of how public policy is defined under private international law as most of the terms used are borrowed from this area of law. It is intended that this will set the basis and give an understanding of how public policy is defined and categorized under the arbitration process.

2 THE DEFINITION AND CONTENT OF PUBLIC POLICY EXCEPTION IN PRIVATE INTERNATIONAL LAW

Private law problems arising from factual situations which are connected with more than one country are commonplace in the modern world. Much international commerce is carried out by way of dealings between parties based in different countries and investments are often made by individuals or companies in assets located in a country other than that in which the investor is based. With a view to achieving to some extent a satisfactory resolution to the private law problems to which such 'multi-country' factual situations give rise, developed legal systems have adopted special rules known as conflict rules which form the legal area known as conflict of laws or private international law.[108] The main justification for the conflict of laws is that it implements the reasonable and legitimate expectations of the parties to a transaction or occurrence.[109]

---

[107] Arfazadeh note 16 at 43.
[108] P Stone *The Confict of Laws* 1(1995) at 1.
[109] Lawrence Collins (ed) *Dicey and Morris The Conflict of Laws* 13 ed (2000) para 1-003 at 4.

In contra distinction to public international law, which seeks primarily to regulate the relations between different sovereign States and is at any rate in theory, the same everywhere, the rules of the conflict of laws are different from country to country.[110] Generally, the three kinds of problems which the conflict of laws is concerned with are: jurisdiction, choice of law and recognition and enforcement of foreign judgments.[111]

In the choice of law, rules typically refer a specified type of issue to a law with which or a law of a country with which a specified connection exits. In contract cases, the countries of the European Union are governed by the Law Applicable to Contractual Obligations of 1980 (Rome Convention) in determining the applicable law to the contract, while the other Commonwealth countries (excluding the United Kingdom)[112] by common law. For example, in the English conflict system, rights and obligations under a contract are governed by the law expressly or impliedly chosen by the parties or in the absence of party choice, by the law of the country with which the contract is most closely connected.[113] The Rome Convention and the common law permit the parties to choose the law of a country that has no connection with the contract. This freedom of choice underlies Article 3.3 which refers to the parties choosing a foreign law.[114]

However, it is recognized that this process of selection of the applicable law is characterized by blindness with regard to the substantive content of foreign law and the consequences of its application in the particular case.[115] This warrants a limitation to be placed on the choice of law. Foreign law which would normally be applicable or a foreign judgment which would normally be enforced or recognized will not be given effect to if to do so would be contrary to public policy.

---

[110] Ibid at 4.
[111] Stone note 108 at 2.
[112] R H Christie 'The Law Governing an International Construction Contract' (2007) at 2 Unpublished Lecture notes. In 1990 the United Kingdom achieved unity with other countries of the European Union in identifying the law governing an international contract. Section 2(1) of The Contracts (Applicable Law) Act 1990 gave statutory force to the Rome Convention on the Law Applicable to Contractual Obligations and by s 2(3) extended it to cases of conflicts between the laws of different parts of the United Kingdom such as England and Scotland.
[113] Op cit at 3.
[114] Op cit at 6.
[115] Shelkoplyas note 102 para 6.3.2.1 at 185.

It follows then that the two fields in the conflict of laws in which public policy operates are choice of law, where it denies effect to a foreign legal rule that would otherwise apply, and foreign judgments where it denies recognition to a judgment that would otherwise be entitled to it.[116] This is what is known as the public policy exception under private international law. In this regard the Rome Convention by Article 16 provides:

> The application of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.

Article 16 therefore derogates from its main rule referring most contractual issues to the proper law, by permitting the forum to insist on the respect of its own stringent public policy. The question is: how is public policy defined under conflict of laws? The general definition of public policy as given from the web is that:

> Public policy or ordre public is the body of fundamental principles that underpin the operation of legal systems in each State. This addresses the social, moral and economic values that tie a society together: values that vary in different cultures and change over time.[117]

The Blacks Law Dictionary has also defined it broadly as:

> Principles and standards regarded by the legislature or the courts as being of fundamental concern to the State and the whole of society.[118]

What these two definitions expound is that public policy reflects some moral, social, economic or legal principles 'so sacrosanct as to require [their] maintenance at all costs and without exception'.[119] In the field of conflict of laws, public policy traditionally serves as a protective device for the safeguard of the forum state's fundamental notions

---

[116] J Bloom 'Public Policy in Private International Law and Its Evolution in Time' (2003) *Netherlands International Law Review* 373 at 374 Available at http://journals.cambridge.org/download.php?file=%2FNLR%2FNLR50_03%2FS0165070X03003735a.pdf&code=ef19812221827e351d84a553e6b92ef1 [Accessed 8th February 2008].

[117] Available at http://www.google.co.za/search?hl=en&defl=en&q=define:Public+policy&sa=X&oi=glossary_definition&ct=title [Accessed on 28th January 2008].

[118] Bryan A Garner (ed) *Blacks Law Dictionary* (2004) 8th ed at 1267.

[119] Vesselina Shaleva 'The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19 (1) *Arbitration International* 67 at 68 citing Geoffrey Chavelier Cheshire et al...*Cheshire and North Private International Law* 11ed(1987) at 131.

of justice and equity.[120] Thus according to its function, the public policy exception may be defined as a 'mechanism that corrects the choice of law designation for substantive reasons, namely the defence of the forum's fundamental legal principles and moral values.'[121] It therefore acts as a barrier blocking the passage of foreign law,[122] to prevent miscarriage of justice. This is the traditional 'negative effect' attached to it.

Difficulties arise in attempting to answer these two challenging questions: what is the content of public policy? How do you define the principles and values that constitute the public policy of a particular State? Although it is difficult to define the exact contours of the concept, States nonetheless have identified some principles and values which they consider to be fundamental. Thus, national jurisprudence is helpful.

2.1 Examples:

2.1.1 England

In England, the rule is that:

> English courts will not enforce or recognize a right power, capacity, disability or legal relationship arising under the law of a foreign country, if the enforcement or recognition of such right, power, capacity, disability or legal relationship would be inconsistent with the fundamental public policy of English law.[123]

Put simply, a foreign law or a right arising under foreign law will not be enforced if its enforcement would affront some moral principle the maintenance of which admits of no possible compromise.[124] What is usually in question is not the foreign law in abstract but the results of the enforcement. Whilst it is difficult to classify those cases in which the courts would refuse to enforce a foreign acquired right, the following have been suggested as the probable classification:

---

[120] Arfazadeh note 16 at 46.
[121] Thomas Guedji 'Theory of the Lois de Police, a Functional Trend in Continental Private International Law- a comparative Analysis with Modern American Theories' (1991)39 *American Journal Comparative Law* 660 at 679.
[122] Julian D M Lew *Applicable law in International Commercial Arbitration* (1978) at 532.
[123] Dicey and Morris note 109 at 81.
[124] Ibid at 131.

(a) Where the fundamental conceptions of English justice are disregarded

The established rule is that a foreign judgment cannot be recognized if it offends the principles of natural justice for example, where a defendant is denied the opportunity of presenting his case. Another rule is that a contract obtained by coercion,[125] duress or undue influence is unenforceable in England.

(b) Where the English conceptions of morality are infringed

A contract or transaction would be objectionable in English eyes if it tends to promote immorality even though the foreign legal system regards it unobjectionable.[126] However, public policy will also be applied in transactions which can be regarded as 'quasi-immoral' if the transaction is also regarded as immoral by another directly affected country. [127]

(c) Where the contract prejudices the United Kingdom in its conduct of foreign affairs

This principle arises by virtue of being a signatory of the United Nations Charter 1945 and as a permanent member of the Security Council- the United Kingdom is committed to the orderly and lawful conduct of foreign relations. In this regard transactions that seek to undermine friendly relations and contracts involving trading with an alien enemy may be unenforceable.[128]

(d) Where a foreign law or status offends the English conceptions of human liberty and freedom of action

Being a signatory to the European Convention on Human Rights and Fundamental Freedoms 1950, the English courts would refuse to recognize and enforce those foreign laws that were discriminatory or resulted in legal incapacity.[129]

---

[125] *Kaufman v Gerson* [1904] 1 KB 591.
[126] John Obrien *Conflict of Laws* 2ed (1999) at 169.
[127] See *Lemenda Trading Co Ltd v African Middle East Petroleum Co Ltd* [1988] 1 ALL ER 513 case, where Philips J described a contract (governed by English law) in which the claimant would use influence with the minister in charge of oil companies in Qatar to procure renewal of a supply contract to be contrary to general principles of morality and therefore unenforceable.
[128] Obrien note 126 at 170.
[129] Ibid.

2.1.2 Canada

In Canada a leading Canadian author has stated that:

> The Canadian courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's fundamental public policies, its "essential public or moral interest" or its "conception of essential justice and morality".[130]

Just like the English conflict of laws, this rule addresses the concrete situation that applying the rule of enforcing a foreign law would produce.[131] However, in the absence of legislation establishing the effect of public policy, it is for the courts to define its precise limits according to their judgment and good conscience depending on the nature of the question that arises.[132]

2.1.3 China

China has even gone a step further and provides under Article 150 of the General Principles of Civil law of the People's Republic of China (GPCL)[133] that:

> The application of foreign laws or international custom and usage in accordance with the provisions of this chapter shall in no way violate the socio-public interests of the People's Rebublic of China.

It is with this rule that the first elaborate expression of the doctrine of ordre public is encountered within China's private international law.[134] One striking thing about the ordre public reservation rule is that it is targeted not only at foreign laws but also at international custom and usage, which is a phenomenon without parallel in the laws of

---

[130] Jean- Gabriel Castel and Janet Walker *Canadian Conflict of Laws* (2003)5ed Chapter 8 at 8.11(loose leaf).
[131] Bloom note 116 at 375.
[132] Op cit at 8.11.
[133] The GPCL was adopted at the Fourth Session of the Sixth National People's Congress on April 12, 1986 and came into force on January 1 1987. It is intended to create a consistent framework for civil law interpretation in the People's Republic of China and is heavily influenced by the German Civil Code. Available at http://en.wikipedia.org/wiki/General_Principles_of_the_Civil_Law_of_the_People's_Republic_of_China [Accessed on 28th January, 2008].
[134] Yongping Xiao and Zhengxin Huo ' Ordre Public in China's Private International Law' (2005) 53 *The American Journal of Comparative Law* 653 at 658.

any other countries.[135] Although the doctrine of *ordre public* in China exits, it is shrouded beneath a misty veil as the wording 'socio-public interest' are not precise and therefore ambiguous.[136]

2.2 Does the application of public policy under domestic law differ from that under the conflict of laws?

It can be stated from the outset that most legal systems make a distinction while applying the said rule of public policy between a matter governed by domestic law and a matter involving conflict of laws. Again, examples of the countries referred to will be made:

In England, it is established that, it is not every limb of the domestic doctrine of public policy that must apply in every action. The application of the doctrine of public policy in the field of conflict of laws is more limited than that in the domestic law and courts are slower to invoke public policy in cases involving a foreign element than when a purely municipal legal issue is involved.[137] The reason for this approach was explained by Professor Graveson as:

> This concern of law in the protection of social institutions is reflected in its rules of both municipal and conflict of laws. Although the concept of public policy is the same in nature in these two spheres of law, its application differs in degree and occasion, corresponding to the fact that transactions containing a foreign element may constitute a less serious threat to municipal institutions than would purely local transactions.[138]

For instance, the particular rule of public policy that the defendant invokes may be of an overriding nature and therefore enforceable in all actions. Or it may be local in the sense that it represents some feature of internal policy. If so it must be confined to cases governed by domestic law and it should not be extended to a case governed by foreign law.[139] Therefore, in order to ascertain whether the rule is all-pervading or merely local, it

---

[135] Ibid at 659.
[136] Ibid.
[137] *Renusagar v General Electric Co. (GEC)* Supreme Court of India 7 October 1993. Reported in Yearbook Commercial Arbitration A J van den Berg (ed) Vol XX (1995) para 29. See also P M North and JJ Fawcett *Cheshire and North's Private International Law* (1992) at 129.
[138] *Renusgar* case citing R H Graveson *Conflict of Laws* 7th ed at 165.
[139] North and Fawcett note 137 at 129.

must be examined in the light of its history, the purpose of its adoption, the object to be accomplished by it and the local conditions.[140]

Similarly, in Canada, a distinction is made. It has been stated thus:

> In conflict of laws, public policy must connote more than local policy as regards internal affairs. It is true that internal and international public policy both stems from the national policy of the forum but they differ in many material respects. Rules of public policy and public morals in the internal legal sphere need not always have the same character in the international sphere....Public policy in conflict of laws cases represents national policy operating on the international level. [141]

In this regard, if foreign law is to be denied effect on public policy grounds, it must violate some fundamental principle of justice; offend international norms or prevalent conception of good morals, or some deep-rooted tradition of the forum.[142]

In China, some authors have also alluded to this distinction. It has been stated that:

> Although the basic spirit and function of the doctrine of ordre public is similar no matter where it is invoked, the way it is conceived in private international law, versus domestic law, must be carefully distinguished....courts should be more scrupulous in applying the doctrine of ordre public when a foreign element is involved than when a purely municipal legal issue is at hand and should not invoke ordre public, save in cases where the application of foreign law or enforcement of foreign judgment would offend some legal, moral, social or economic principle so fundamental to China so as to require its maintenance at all costs and without exception.[143]

In summary, what this entails is that the conception of ordre public in private international law is narrower and more limited than in civil domestic law. A distinction is therefore made in the application of public policy in domestic law and under conflict of laws.

---

[140] Ibid.
[141] Jean- Gabriel Castel and Janet Walker note 128 Chapter 8 at pg 8.11(loose leaf).
[142] Ibid.
[143] Xiao and Huo note 134 at 673-674.

3 THE DEFINITION OF PUBLIC POLICY UNDER THE ARBITRATION PROCESS

International commercial arbitration is a private method of dispute resolution, chosen by the parties as an effective way of putting an end to disputes between them, without recourse to the courts of law. [144]

There are many stages in this process, beginning with the arbitration agreement and ending with the recognition and enforcement of the arbitral award. Public policy arises at two stages during this process. First during the arbitration itself, where the possible conflict between the applicable legal systems is resolved by the arbitrator; and secondly when the arbitral award is enforced before the national court.[145] In all these stages, public policy functions as a means of promoting the interests of international trade. This part is concerned with the definition of public policy exception during the enforcement stage.

It has been admitted that it is notoriously difficult to provide a precise definition of public policy in the context enforcement of arbitral awards. [146] Perhaps this is the reason why the New York Convention, the main enforcement Convention does not provide any guidance on the interpretation of public policy.

If we take the general definition of public policy earlier referred to that public policy reflects some moral, social, economic or legal principles 'so sacrosanct as to require [their] maintenance at all costs and without exception',[147] the question to be asked is: is this broad definition of public policy the one envisaged under Article V (2) (b) of the New York Convention and Article 36(1) (b) (ii) of the Model Law which is known as the public policy exception?

Article V (2) (b) is not explicit on this point, but many leading authors have with no doubt stated that the reference in this provision to public policy is in fact a reference to

---

[144] Redfern and Hunter note 2 at para 1-01 at 1.
[145] Shaleva note 119 at 69.
[146] Sheppard note 31 ILA Interim Report at 218.
[147] See Shaleva note 119 at 68.

the international public policy of the host jurisdiction.[148] Further, the scope of the public policy exception to the enforcement of arbitral awards depends on the enforcement court's perception of what constitutes 'public policy'[149] and most of the cases generated support the views of the leading authors.[150] In this context therefore, the most often quoted is that of Judge Joseph Smith in *Parsons case*[151] in which he held that:

> Enforcement of a foreign arbitral award maybe denied on public policy grounds 'only' where enforcement would violate the forum State's most basic notions of morality and justice.[152] *(emphasis added)*

Public policy has therefore been construed restrictively and given a narrow approach. As a result of this, it has been stated that:

> Not all public policies fall within the public policy exception. Given the narrow approach to the public policy exception, the meaning of 'public policy' in the public policy exception is narrower than the ordinary meaning of that phrase. Most of the restrictions on the scope of the public policy exception are inherent in the nature, characteristics and categorization of public policy. [153]

In view of the foregoing, it is pertinent at this juncture to outline the characteristics and categorization of public policy which have narrowed the public policy exception in the context of enforcement of arbitral awards. This will be done with reference to the Recommendations made by the International Commercial Arbitration Committee of the International Law Association which conducted a six year study into the application of public policy by the enforcement courts.

3.1 Characteristics of Public Policy

(a) *Territorial/ geographical relativity*

---

[148] Fouchard Gaillard Goldman note 11 para 1710. See also Albert van den Berg note 14 at 361.
[149] Winnie (Jo-Mei) Ma ' Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons For and From Australia'. A thesis submitted to Bond University in the fulfillment of the requirements for the Degree of Doctor of Legal Studies (SJD) 2005 para 2.1 at 57 Available at http://epublications.bond.edu.au/theses/ma/ [Accessed on 12th December 2007].
[150] The approach of the various countries on the interpretation will be given in Chapter 4.
[151] *Parsons & Whittemore Overseas Co v. Societie Generale de L' Industrie du Papier, [1974] 508 F.2d 969 (2d Cir.)*
[152] Ibid.
[153] Winnie Ma para 2.2 at 58.

Public policy is relative in territorial sense in that it is confined to the public policies of the enforcement States.[154] In this regard, this characteristic deals with the question: Whose Public Policy?

Article V (2) (b) of the New York Convention provides that enforcement of an award may be refused, if enforcement of the award would be contrary to 'public policy of that country'. Similarly, the 1927 Geneva Convention, the 1975 Panama Convention, the 1983 Riyadh Convention and the UNCITRAL Model Law all expressly refer to the public policy of the State where enforcement is sought. This therefore means that the contravention of another State's public policy alone does not justify non-enforcement of an award under the public policy exception.[155]

In France, Fouchard *et al* have noted that no account should be taken of domestic public policy rules of a foreign jurisdiction.[156] Further, in the *Renusagar case*, the Supreme Court of India rejected a contention to consider the public policy of the country whose law governed the contract or the country of the place of arbitration. Thus, it was stated that:

> The words 'public policy' instead of 'public policy of India' did not mean that the court was free to examine the validity of an award from the point of view of whether it violated the public policy of the country in which it was rendered or the country whose law governed the contract.[157]

To strengthen and further elaborate this position of territorial relativity, the ILA recommended that a court verifying an arbitral award should do so by reference to those principles considered fundamental within its own legal system rather than in the context of the law governing the contract, the law of the place of performance of the contract or the law of seat of arbitration.[158]

---

[154] Ibid para 2.2 at 58.
[155] Winnie Ma opcit para 2.2.1 at 59.
[156] Fourchard Gaillard and Goldman note 11 at para 1647.
[157] *Renusagar case* at paras 18 and 19.
[158] Pierre Mayer and Audley Sheppard 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 (3) *Arbitration International* 249 ILA Recommendation 2(a) at 258.

This position may be different in England. In the case of *Regazzoni v K.C. Sethia*,[159] there was an international contract concluded between a businessman domiciled in England and a business man domiciled in Switzerland. A contract perfectly legal with regard to the English 'proper law' was however considered null and void according to Indian law which prohibited the trade of jute with South Africa, following the apartheid measures imposed on the Indians.

The question which arose before the House of Lords was whether the violation of a foreign law, which was neither the proper law nor the *lex fori*, nor the law of the place of performance, could lead to an intervention of the international public policy of the forum (which was also that of the *lex contractus*). It was held that 'the English court will not enforce a contract or award damages for its breach if its performance would involve doing an act in a foreign and friendly State which violates the law of that State.'[160]

There have been conflicting interpretations on this decision which have not been limited to one single ground or legal interest. In the context of territoriality, one author commented that:

> The decision appeared to be based on the desire to recognize certain solidarity with a friendly State that is an application of "comity", in the traditional sense of the great Dutch Statutists or of Joseph Story, or an example of what Savigny called the *freudliche Zulassung,* that is of a factor aimed at correcting the rigidity of the territoriality of private international law.[161]

However, the cases are limited to situations where performance is illegal both under English law and the actual place of performance.[162]

(b) *Temporal relativity*

---

[159] [1958] AC 301. A similar situation was taken in the case of *Solemainy v Solemainy* [1999] QB 785. In this case the English Court of Appeal refused to enforce an award giving effect to a contract between a father and son, which required the smuggling of carpets out of Iran, in breach of Iranian revenue laws and export controls.

[160] Ibid at 302.

[161] Pierre Lalive *Transnational (or Truly International) Public Policy and International Arbitration* ICCA Congress series no. 3 (1986) 258 at para 76 Kluwer International CD Rom.

[162] Sheppard note 31 ILA Interim Report at 244.

The temporal sense of relativity means that public policy is constantly changing and evolving and is therefore confined to public policies that are applicable at the time of enforcement proceedings.[163] It is as a result of this characteristic that uncertainty and ambiguity as to its actual content can also be said to be essential characteristics of public policy.

(c) *Extra-territoriality*

The fact that the New York Convention is confined to foreign awards, the prevailing view is that the public policy exception is confined to the enforcement State's public polices which have extra-territorial or cross-border application, that is those intended for international transactions or relationships.[164]

(d) *Fundamentality*

The public policy exception is confined to the enforcement State's fundamental public polices. The interpretation of this would mean only those serious and very important principles affecting the most important part of the enforcement State's public policy will fall under this exception.

3.2 Categories of Public Policy

Public policy is known to be in existence at different levels.[165] This has led to the following categories:

3.2.1 National Public Policy

This is the public policy which relates to one nation and is based on national law. This national public policy is further divided into: domestic or internal public policy and international or external public policy.[166] Just like in the field of conflict of laws, it is important to draw attention to the important distinction between the two as the distinction is gaining increasing acceptance in matters of arbitration as well.[167]

---

[163] Winnie Ma para 2.2.1 at 60.
[164] Ibid at 62.
[165] Lew *Applicable Law in Commercial Arbitration* note 122 at 533.
[166] Di Pietro and Platte note 21 at 181.
[167] Jan van den Berg note 17 at 360.

3.2.1.1 Domestic or Internal Public Policy

This public policy represents those local standards or rules that are not subject to the parties' freedom to contract.[168] It is aimed at conforming laws, regulations and customary provisions, and ultimately the legal relationships of the country to the beliefs and morals considered necessary for the attainment of a civilized way of living in a particular country at a certain period in time.[169] This kind of public policy is therefore very stringent and tends to be applied accordingly.

3.2.1.2 International or External Public Policy

This public policy is based on national law but deals with matters characterized by elements of "extraneity" with the jurisdiction which cause the application of different rules.[170] It is public policy which applies not only to purely internal matters but even to matters with a foreign element by which other States are affected.[171] Therefore, it is international as it operates within the law area of private international law. However, although it contains certain truly international elements, it is a national policy concerned with international relations and can be sanctioned only by a national judge.[172] This definition appears to be vague although it is said that international public policy results in a much more limited set of rules representing every basic belief of a particular country unlike domestic public policy.

It is important to mention that none of the international enforcement conventions or the UNCITRAL Model Law referred to in chapter 2 explicitly mention 'international public policy'. During the drafting of the UNCITRAL Model Law, a proposal was made to qualify public policy as 'international public policy,' but this was rejected. This is

---

[168] Buchanan note 5 at 513.
[169] Di Pietro and Platte note 21 at 181.
[170] Ibid.
[171] *Heibei Import & Export Corp v Polytek Engineering Co. Ltd* Court of Appeal of Hong Kong: Special Administrative Region 9 February (1999) Reported in *Year Book Commercial Arbitration* A J van den Berg (ed) Vol XXIVA (1999) at 652.
[172] Jan van den Berg note 17 at 360.

basically due to the difficulties in defining 'international public policy'.[173] The OHADA Uniform Act is the only regional enforcement instrument which has explicitly made reference to the 'international public policy' of the member States.[174]

However, as already alluded to, many leading authors have stated that public policy referred to under Article V(2)(b) of the New York Convention is international public policy other than domestic public policy which is traced back to the Geneva Convention of 1927.[175] The reason for this assertion is that the framers of the Convention intended to limit the scope of public policy so that foreign arbitral awards are subject only to those principles and concepts of public policy which are relevant for relations with a foreign element and not to extend to international cases with purely internal notions.[176]

Similarly, the ILA also endorsed international public policy as the test for determining the enforceability of foreign awards. Recommendation 1(c) therefore states:

> The expression 'international public policy' is used in the recommendations to designate the body of principles and rules recognized by a State, which by their nature, may bar the recognition or enforcement of an arbitral award rendered in the context of international commercial arbitration when recognition or enforcement of the said award would entail their violation...

It is evident from the foregoing that the expression "international public policy" is understood in the sense given to it in the field of private international law, namely, that part of the public policy of a State which, if violated, would prevent a party from invoking foreign law or judgment or foreign award.[177]

The resultant effect of this distinction is that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. This means that the number of matters considered to fall under public policy in

---

[173] Broches note 97 *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990). See also Third Working Group report UN- Doc. A/CN.9/233 at para 154.
[174] See Article 31 of OHADA Uniform Act on Arbitration.
[175] Julian D M Lew et al *Comparative international Commercial Arbitration* (2003) para 26-112 at 720 and Fouchard Gaillard and Goldman note 9 at para 1710 and also Jan van den Berg note 14 at 361.
[176] Hong Xiao note 3 at 55.
[177] Mayer and Sheppard note 158 ILA Recommendation 1(b) at 251.

international cases is smaller than in domestic cases.[178] International Public Policy therefore has a more limited scope. In this regard, the chances of enforcement being denied on the basis of public policy are reduced. This accords with the pro-enforcement bias of the New York Convention.

3.2.2 Transnational or Truly International Public Policy

Certain French and Swiss authors maintain that this is another level of public policy which exists,[179] pertaining to the international community as a whole and which may be capable of universal application. Although an authoritative meaning of the term transnational seems to be lacking, the meaning that appears obvious is that of consensus.[180] Thus the concept of transnational public policy is said to represent the existence of an international consensus as to universal standards or accepted norms of conduct that must always apply and provide limitations to public as well as private international relationships and transactions.[181] This consensus is evidenced by Conventions which are binding on the State parties or through established practice accepted by the international community of States.

This concept comprises fundamental rules of natural law, principles of universal justice, *jus cogens*[182] in public international law, and the general principles of morality accepted by what are referred to as civilized nations.[183] As with international public policy, transnational public policy is narrower than domestic public policy.[184] However, their field of application differs.

---

[178] Jan van den Berg note 17 at 360.
[179] Ibid at 361.
[180] Fernando Mantilla-Serrano 'Towards A Transnational Public Policy' (2004) 20 (4) *Arbitration International* 333 at 335.
[181] Buchannan note 5 at 514.
[182] Article 53 of the *Vienna Convention on the Law of Treaties* defines *'jus cogens'* as a norm accepted and recognized by the international community of States as a whole from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
[183] Mayer and Sheppard ILA Final Report note 158 at 259.
[184] Di Pietro and Platte note 21 at 181.

International public policy operates in the field of private international law and is therefore subject to the choice of law process. Its application is conditional upon its law area being the relevant forum (for enforcement) or being the applicable law.[185]

By contrast, transnational public policy is not concerned with the forum-foreign law distinction as it operates primarily in the field of public international law.[186] It operates at a much higher level detached from the national systems of law and not conflicting with the party's party autonomy. Examples of public policy of this kind are human rights as codified in the international Declaration promulgated by the United Nations, corruption, drug trafficking, smuggling, terrorism[187] and the abhorrence of racial, religious and sexual discrimination.[188]

However, the precise content of this category is unclear. Moreover, the rules can be deemed to be covered to a large extent by 'international public policy'.[189] This would explain the very few cases in which the courts or arbitral tribunal have expressly applied transnational public policy in the arbitration context. In the Italian case of *Allsop Automatic Inc v Technoski snc*[190] the Milan Court of Appeal seemingly had transnational public policy in mind when describing international public policy when it observed that:

> We must say where the consistency [with public policy] is to be examined, reference must be made to the so called international public policy, being a body of universal principles shared by nations of similar civilization, aiming at the protection of fundamental human rights, often embodied in international declarations or conventions.

Further, the Swiss Federal Tribunal in the case of *W. v F. and V.* [191] was in favour of taking into account a 'universal conception of public policy', under which an award will be incompatible with public policy if it is contrary to the fundamental moral or legal principles recognized in all civilized countries.

---

[185] Winnie Ma note 149 para 3.4 at 88.
[186] Ibid.
[187] Sheppard note 31 ILA Interim Report at 221.
[188] Okezie Chukwumerije *Choice of Law in International Commercial Arbitration* (1994) at 192
[189] Jan van den Berg note 17 at 361.
[190] 4 December 1992, extract in the Year Book Commercial Arbitration XXII (1997)725.
[191] Case cited in Sheppard note 31 at 221 ILA Interim Report foot note 19; Case dated 30 December 1994.

It would appear that the lack of clear distinction between transnational and international public policy as both aim at protecting the fundamental principles shared by nations would lead to uncertainty as to its application in as far as enforcement of arbitral awards is concerned.

3.2.3 Regional Public Policy

This is the public policy which can be found in State's or extra- national communities.[192] Going by the categories of public policy referred to, this may manifest as either international or transnational public policy but unlike transnational public policy, regional public policy may not bind non-member States. The following are the two examples of public policy falling under this category.[193]

3.2.3.1 Moslem Sharia

Moslems have a common understanding of public policy. It is expressed in the Sharia which is a body of Islamic religious law and therefore a legal framework within which the public and some private part of life are regulated for those living in a legal system based on Muslim principles of jurisprudence and those living outside the domain.[194] This law applies across a swathe of Muslim countries. The two sources of Sharia which are mandatory are the Qur'an and Sunna which are embodied in the *Hadith,* the deeds and sayings of the Prophet.[195]

As already mentioned in Chapter two, enforcement of an arbitral award would be refused under the Riyadh Convention which is a regional multilateral Convention between Arab States, if the award would be contrary to Moslem Sharia. This is considered to be regional public policy reflecting the interests shared by the Arab member States.[196]

---

[192] Loukas Mistelis 'International Law Association- London Conference (2000) Committee on International Commercial Arbitration 'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcement of (Foreign) Arbitral Awards' (2000) 2 *International Law Forum du droit international* 248 at 251.
[193] Ibid.
[194] Available at http://en.wikipedia.org/wiki/Sharia [Accessed on 30th January 2008]
[195] Samir Saleh 'The recognition and enforcement of foreign arbitral awards in the states of the Arab Middle East' in Julian D M (ed) *Contemporary Problems In International Arbitration* (1987) at 342.
[196] Mistelis note 192 at 251.

In relation to enforcement of arbitral awards, the two main problems which are most likely to arise in practice in the procedure for enforcement of arbitral awards are the concepts of interest *(riba)* and aleatory or uncertain obligation *(gharar)*. These are concepts deeply rooted in the scriptural source, the Qur'an.[197]

The prohibition of interest strictly applied in Hanbali law (Saudi Arabia, Qatar) and Zyadi law (North Yemen) is linked to the Prophetic prohibition of charging interest on a loan. The underlying idea is the reprehensibility of the exploitation of a borrower by a lender.[198] The underlying idea in relation to the prohibition of aleatory contracts is that parties to a contract must be fully aware of their obligations at the time they enter into the contract; therefore an element of risk in a contract is equivalent of a gamble and results in immoral gain.[199]

3.2.3.2 European Public Policy

Although it is said that there is no textual support for the expression 'European public policy' nor does the notion of 'European Community Public Policy' appear in any Community or national legislation,[200] there is some European Community (EC) public policy which has emerged over the years of regional integration amongst the member States of the European Union[201]. This EC public policy is said to comprise of fundamental rules of European Community Law.[202] This is an independent legal order interpreted by the European Court of Justice (ECJ) to have been created as a necessary legal condition for the effective functioning of the European Community. It has also become instantly an integral part of the national legal systems of the Member States.[203]

---

[197] Op cit note 195 at 348.
[198] Saleh ibid.
[199] Ibid at 349.
[200] Shelkoplyas note 102 para 6.2.3 at 176.
[201] Mistelis note 192 at 251.
[202] Christopher Liebscher *The Healthy Award :Challenge in International Commercial Arbitration* (2003) para 1.4.2 at 35.
[203] Shelkoplyas note 102 para 2.1 at 27.

The EC law which is of potential relevance to arbitration is the EC Treaty[204] which contains competition rules from Article 81 through to 89. It is in this aspect that the role of European Public Policy in arbitration has received attention in legal writing and court decisions. [205] One notable case in which the ECJ directly dealt with the issue of public policy and arbitration is the case of *Eco Swiss China Time v. Benetton International NV*[206] . The decision passed is fundamental and it will suffice to mention the facts briefly.

In 1986 Benetton concluded an eight-year licensing agreement with Eco Swiss, Hong Kong, and Bulova, New York relating to the manufacture and distribution of watches and clocks bearing the words 'Benetton by Bulova' which could be sold by Eco Swiss and Bulova. All disputes were to be settled by arbitration.

By a letter of 24 June 1991, Benetton purportedly terminated the license agreement three years before the end of the fixed term and so arbitration proceedings were initiated. An arbitral tribunal, applying Dutch law, in a Partial Award found in favour of Eco Swiss, and in the later Final Award awarded damages of over US $ 26 million.

Benetton then applied to annul the award on the grounds *inter alia,* that the award was contrary to public policy by virtue of the nullity of the underlying agreement under Article 81 of ECT(even though neither party nor the tribunal had raised the point during the arbitration.)[207] Article 81 (ex Article 85) prohibits practices which restrict or distort competition between Member States and agreements that do so are void.

After several applications the matter reached the Supreme Court of Netherlands *(Hoge Raad*) which in turn referred it to the ECJ for preliminary ruling on five questions on the interpretation of Article 81 which rose in the proceedings brought by Benetton International in relation to the enforcement of an arbitration award. Under Dutch procedural law, one of the grounds for annulment was infringement of public policy

---

[204] The Treaty establishing the European Community.
[205] Liebscher note 202 at 26-27.
[206] [2005] 5 C.M.L.R 816.
[207] Ibid at 822 para 2.

which was not generally regarded to include breach of national competition law. The ECJ held:

> Even though arbitrators were not in a position to make a request to the Court for a preliminary ruling, it was in the interest of the Community legal order that national courts reviewing arbitration awards could make such a request if in the circumstances of the case questions of interpretation of Article 81 (1) were involved. Although the annulment of an arbitration award would be possible only in exceptional circumstances, failure to comply with Article 81 justified such approach that consequently, the Dutch procedural law should be interpreted such that the failure to observe rules of public policy should include failure to comply with the prohibition laid down in Article 81(1) Accordingly, community law did not preclude the application of national limitations even where the result was upholding of an agreement which was void in accordance with Article 81(2).[208]

By this decision, the ECJ elevated Article 81 to the level of public policy within the meaning of the New York Convention[209] because of its fundamental and mandatory nature. It is important to mention that it is not all rules of European law which pertain to public policy[210] and therefore this decision has been described as a far reaching and novel pronouncement. [211]

However, it is beyond the scope of this thesis to delve into the criteria for determining which European legal rules pertain to public policy, suffice to say that Article 81 has been recognized as a public policy rule indicative of public policy intra- community -that is the regional public policy for the European Community. It is important to mention that European public policy manifests some features of international public policy in that it is part of the national public policy of the member States and is transnational because of its extra-territorial or cross- border operation.[212]

---

[208] Ibid at 817.
[209] Sheppard note 31 ILA Interim Report at 233.
[210] Liesbcher note 202 at 35.
[211] Shelkoplyas note 102 at 125.
[212] Winnie Ma note 149 para 3.5.2.

4 THE CONTENT OF PUBLIC POLICY

Public policy under the New York Convention has further been categorized by reference to the substance-procedure distinction.

4.1 Substantive Public Policy

This relates to the contents of an arbitral award[213] and therefore goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award.[214] Examples of a substantive public policy include the principle of good faith, the prohibition of abuse of rights (especially in civil law countries), prohibition against discrimination, prohibition against uncompensated expropriation, *pacta sunt servanda.*[215] The prohibition of activities that are *contra bonos mores*[216] also comes within this category and this includes piracy, terrorism, genocide, slavery, smuggling, drug trafficking and pedophilia.[217]

4.2 Procedural Public Policy

This relates to the procedure pursuant to which an arbitral award is rendered, [218] that is to say, the process by which the dispute was adjudicated.[219] Examples of procedural public policy include the following:

4.2.1 Impartiality

A lack of impartiality on the part of the tribunal is a ground for refusing enforcement although it is more usual for this ground to be raised before the arbitration institution

---

[213] Mayer and Sheppard note 158 at 253 ILA Recommendation 1(c).
[214] Sheppard note 31 ILA Interim Report at 230.
[215] Article 26 of Vienna Convention on the Law of Treaties defines *Pacta sunt servanda* to mean that a contract or treaty should be enforced and performed in good faith.
[216] According to the ILA Interim report, *contra bonos mores* means 'contrary to good morals or public order'.
[217] Mayer and Sheppard note 158 at 255 ILA Recommendation 1(e).
[218]Ibid at 253 ILA Recommendation 1(c).
[219] Sheppard note 31 ILA Interim Report at 230.

administering the arbitration at the time of commencement of the arbitration.[220] In this regard, the French Cour de Cassation in the case of *Excelsior Film TV v. UGC –PH*[221] drew a conclusion that the disloyalty of an arbitrator who was connected to one of the parties as revealed in the award, so that it could not be inferred from the UGC-PH's failure to challenge the arbitrator that it waived its right to rely on the irregularity created an imbalance between the parties amounting to a violation of due process. The award rendered in Italy under such conditions violated French public policy.[222] This decision by the court therefore confirmed that the lack of impartiality constituted a breach of French international public policy.

4.2.2 Fraud or Corruption

There is undoubtedly an international consensus that the enforcement of an award should be refused if its making was induced or affected by fraud or corruption.[223] Countries like Australia[224], New Zealand[225], India[226] and Zimbabwe[227] have enacted modified versions of the UNCITRAL Model law, which provide that, 'for the avoidance of doubt' and without limiting the generality of Articles 34 and 36 (of the Model law), an award is contrary to public policy if the making of the award was induced or affected by fraud or corruption. The Zambian Arbitration Act of 2000 has gone further in that it not only provides for refusal of awards induced by fraud or corruption, but also misrepresentation.[228]

4.2.3 Breach of natural justice/due process

---

[220] Ibid ILA Interim report at 240.
[221] Reported in Year book Commercial Arbitration A J van den Berg (ed) Vol XXIVa (1999).
[222] Ibid para 3.
[223] Op cit ILA Interim Report at 238.
[224] Ibid. See S 19(a) of the International Arbitration Act- International Handbook of Commercial Arbitration, J Paulsson (ed) Suppl 13 (Sept 1992) Kluwer Law International CD ROM.
[225] S 36(3) (a) of the Arbitration Act 1996-International Handbook on Commercial Arbitration, J Paulsson (ed) Supp 24(October 1997) Kluwer International.
[226] S 48(2) of The Arbitration and Conciliation Act 1996- International Handbook on Commercial Arbitration, J Paulsson (ed) Supp (January 2000).
[227] S 36(3) (a) of The Zimbabwe Arbitration Act 1996- International Handbook on Commercial Arbitration, J Paulsson (ed) Supp (October 1997).
[228] S19 (1) (b) (iii).

Although Article V (1) (b) of the New York Convention provides for refusal of enforcement if the party against whom the award was invoked was not given proper notice of the formation/identity of the tribunal or the arbitration proceedings, or was otherwise unable to present his case, this ground also constitutes a breach or procedural public policy.[229] This is in the event of a breach of natural justice, lack of due process, or the parties were on an unequal footing in the appointment of the tribunal. Again Australia,[230] New Zealand[231] and Zimbabwe[232] have modified the Model law to the effect that it would be contrary to public policy if a breach of the rules of natural justice occurred.

These fundamental policy requirements include general principles of what has been termed 'international due process' which include: equal treatment of the parties, fair notice (to both appointment of the tribunal and conduct of the proceedings) and a fair opportunity to present one's case in the sense of ensuring that there has been a fair and even handed approach to the elucidation of evidence from the parties.[233] However, a violation of the mandatory arbitration rules of the place of enforcement (which would allow annulment of a domestic award) may not be a breach of due process, for example a failure to give reasons.[234]

4.2.4 Res judicata

It may also be a breach of procedural public policy to enforce an award that is inconsistent with a court decision or arbitral award that has *res judicata* effect in the enforcement forum.[235] Egypt has a provision to this effect in Article 58(2) (a) of the Law Concerning Arbitration in Civil and Commercial Matters which provides that: 'application to obtain leave for enforcement of the arbitral award shall not be granted except after having ascertained that it does not contradict a judgment previously rendered

---

[229] Sheppard ILA Interim Report at 239
[230] ILA Interim report. See s 19(a) note 224.
[231] Ibid. See s 36(3) (b) note 225.
[232] Ibid. See s 36(3) (b) note 227.
[233] Sheppard ILA Interim Report at 239 citing Schwebel and Lahne, 'Public Policy and Arbitral Procedure' in the ICCA Congress Series No. 3.
[234] Ibid.
[235] Ibid at 242.

by the Egyptian courts on the subject matter'. The English courts have also held that the principle of *res judicata* is a rule of public policy.[236]

4.2.5 Manifest disregard of the law and facts

It is widely accepted that procedural public policy should not include manifest disregard of the law or facts.[237] The rationale behind this is that 'an award of an arbitral tribunal irrespective of whether it is partial, interim or final disposes of matters in dispute, is binding on the parties (unless set aside) and therefore in principle should be enforceable against the losing party'.[238]

In this regard, in the case of *Norsolor SA v Pabalk Ticaret Ltd*[239], Norsolor objected to the enforcement of an arbitral award on the ground that the arbitral tribunal sitting in Vienna applied 'international *lex mercatoria*' which was not law but equity and therefore violated public policy. The Austrian Supreme Court found no infringement of public policy.

In relation to manifest disregard of facts, the Zimbabwean courts had opportunity to consider this issue in the case of *Zimbabwe Electricity Supply Authority v Maposa*[240] where an employer sought to have the award set aside on the basis that the arbitrator had made reviewable factual error in calculating the back-pay, and that the error under the Zimbabwe's Arbitration Act 1996, rendered the award contrary to public policy. The court considered that an award would be contrary to public policy if it undermined the integrity of the system of international arbitration put in place by the model law and this would include cases of corruption, fraud, bribery and serious irregularity. The court found that the error made by the tribunal was one of computation for which the law adequately provided for. This decision exemplifies the characteristic of fundamentality of

---

[236] *Vervaeke v. Smith* [1983] 1 AC 145 at 146- it was held that the proceedings brought before the court came within the rules governing res judicata and therefore public policy and res judicata would prevent petitioner to claim recognition in the English courts.
[237] Mayer and Sheppard note 158 ILA Final Report 256.
[238] Redfern and Hunter para 9-35 at 500.
[239] [1984] IX Yearbook Commercial Arbitration 159.
[240] Case dated 29 March and 9th December 1998 Clout case 267 Extract in Yearbook Commercial Arbitration A J van den Berg (ed) Vol XXV (2000) Kluwer Law International CD ROM.

public policy confining the refusal to enforce the award in matters where the conception of justice and morality would be intolerably hurt by the award.

4.3 Effect of distinction between substance and procedural public policy

Although the distinction between substantive and procedural public policy may not be controversial[241], as contravention of either may fall under the public policy exception, this distinction creates a relationship between paragraph 1 (b) dealing with due process and 2 (b) dealing with public policy of Article V of the New York Convention. As due process is generally conceived as pertaining to public policy, the question is raised whether the specific provision of Article V 1 (b) would have the effect of excluding due process from Article V 2(b) which concerns public policy in general.[242] This question is important because if the due process were only covered by Article V (1) (b) (which can only be considered by the court if raised by the party refusing enforcement) then the court would not be allowed to refuse enforcement of the award on its motion if it finds that the award is tainted by a serious violation of due process.[243]

However, it has been stated that Article V (1) (b) has been inserted in the Convention due to the specific importance attached to the fundamental requirement of a fair hearing. Accordingly, Article V 1 (b) cannot be considered as having the effect that a violation of due process would not fall under the public policy provision of Article V (2) (b). This means that a violation of Art V (1) (b) may constitute a violation of public policy under Article V(2) (b) and therefore Article V (2) (b) is not limited to questions regarding the substance of the award involving public policy aspects, but also covers procedural irregularities.[244]

This does not mean that the public policy exception should become a 'catchall' means for parties seeking to refuse enforcement. Refusal to enforce an award based on due process or public policy should depend on the circumstances of each case. In the Hong Kong case

---

[241] Winnie Ma note 149 at 70.
[242] Jan van den Berg note 17 at 299.
[243] Ibid.
[244] Ibid at 300.

of *Paklito Investment Limited v Klockner East Africa,*[245] a dispute arose concerning the condition of galvanized steel coils sold by the defendant Klockner to the plaintiff Paklito. The defendant objected to the report made by the expert witnesses appointed by the arbitral tribunal (CITEAC) which report revealed some deficiencies in the goods delivered. The defendant contended that there was procedural irregularity as they were not given an opportunity to cross-examine the expert witnesses nor did the tribunal consider their submissions.

The Supreme Court of Hong Kong where enforcement was sought concluded that there was a serious breach of due process and denied enforcement. However, it declined arguments based on public policy. It was therefore stated:

> The public policy defence is construed narrowly and I deprecate the attempt to wheel it out on all occasions...the present case does not involve issues of public policy and is decided solely on the breach of the requirement of an opportunity to present a case which I have held to be a serious enough irregularity to justify refusal of enforcement.[246]

It is important that caution is taken in drawing the distinct line between procedural matters and those matters falling under the public policy exception.

4.4 Other categories of public policy

Apart from making a distinction between substantive and procedural public policy, international public policy has further been broken down into three categories namely fundamental principles; public policy rules- lois de police (French) and international obligations.

4.4.1 Fundamental Principles

These pertain to justice and morality that a State wishes to protect even when it is not directly concerned.[247] Therefore, reference should be made to those principles which are

---

[245] Reported in Year Book Commercial Arbitration, A.J. van den Berg (ed) Vol XIX (1994). See also Clout case 371, Germany (2001) Year Book Commercial Arbitration XXVI 326.
[246] *Paklito* case at paras 51 and 52.
[247] Mayer and Sheppard note 158 ILA Final Report Recommendation 1(d) at 255.

considered fundamental within its own legal system rather than the context of the law governing the contract, the law of the place of performance of the contract or the seat of arbitration.[248] Fundamental principles may either be substantive, for example the prohibition of abuse of rights or procedural for example, the requirement that the tribunal be impartial.

The criteria for determining whether a principle forming part of its legal system is sufficiently fundamental to justify refusal to recognize or enforce is 'to take into account the international nature of the case and its connection with the legal system of the forum, on the one hand and the existence or otherwise of a consensus within the international community as regards the principle under consideration on the other hand'.[249] This further categorisation reflects the public policy characteristics of territoriality and fundamentality referred to above in 3.1 which narrows the public policy exception.

4.4.2 Public Policy Rules or 'lois de police'

These are rules designed to serve the essential, political, social or economic interests of the State. A further analysis of this is given in paragraph 5 below.

4.4.3 International Obligations

This is the duty of the State to respect its obligations towards other States or international organisations. An example of this obligation given by ILA is the member State's of the United Nations abiding by resolutions of the Security Council pursuant to Chapter V, Article 25 of the United Nations Charter[250].

---

[248] 'Resolution of the ILA on Public Policy as Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 213 at 214.
[249] Resolution Ibid.
[250] Mayer and Sheppard ILA Final Report at 263.

5 PUBLIC POLICY AND MANDATORY RULES

It is important to distinguish public policy from mandatory legal provisions also known as *'normes d'application immediate ou necessaire'* or *'lois de police'*. Although not always used as synonymous, these terms describe a similar concept in different jurisdictions[251] and are generally referred to as mandatory provisions.[252] Mandatory rules are "laws that purport to apply irrespective of a contract's proper law or the procedural regime selected by the parties.[253] According to another definition, mandatory provisions are provisions 'set out in public interest, which compulsorily apply to all relationships which have a connection with that legal system and which prevail on any contrary conflict of laws rule'.[254] These rules embody the fundamental policy of a given State and are therefore applicable by virtue of their imperative nature.[255]

Two characteristics of mandatory provisions follow from this definition: first, these are rules introduced to protect some policy essential to the state and secondly, their application is demanded irrespective of, and even prior to the designation of, the substantive law governing the dispute.[256] The question which can be asked from these definitions and characteristics is: what is the relationship between mandatory rules and public policy and is there a distinction?

From the foregoing it is evident that mandatory rules reflect the State's public policy by generally protecting the economic, social or political interests. Thus there is a close relationship. They can be either procedural for example requiring due process, or substantive such as certain tax, competition and import/export laws,[257] environmental

---

[251] In France lois de police is considered to be part of public policy, Switzerland makes a distinction between mandatory rules and public policy, Austria and Germany follows the approach of France- See Christopher Libscher *Healthy Award* note 202 at 353.
[252] Thomas Guedji note 121 at 664.
[253] Pierre Mayer 'Mandatory Rules of Law in International Arbitration' (1986)2 *Arbitration International* 274 at 275.
[254] Shavela note 119 at 72 citing Mario Rubino- Sammartano, *International Arbitration Law and Practice* (2001)2ed at 505.
[255] Chukwumerije note 188 at 180.
[256] Op cit note 119 at 72.
[257] For example Article 81 of the ECTreaty as decided in the Eco Swiss case see para 3.2.3.2 above.

protection laws, measures of embargo, blockade or boycott.[258] The application of substantive mandatory rules creates the most controversy[259] and the distinction lies in this aspect.

Although all rules of public policy are of mandatory character, because they reflect the basic notions of morality and justice, not all mandatory rules rise to the level of public policy. Similarly, not all violations of the enforcement State's mandatory rules would lead to non-enforcement of awards under the public policy exception.[260] This is because the interests protected may not concern the society's fundamental values. A good illustration of this is the Indian case of *Renusagar*. The Indian Supreme Court rejected the alleged contravention of India's Foreign Exchange Regulation Act 1973 which Act was enacted for the national economic interest. The court commented that:

> Contravention of law alone will not attract the bar of public policy and something more than contravention of law is required... Public policy in Sect. 7(1) (b) (ii) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India...Sect. 7(1) (b) (ii) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (1) fundamental policy of Indian law...[261]

In this regard, the court was unable to hold that the enforcement of the award would involve violation of any of the provisions of FERA and for that reason be contrary to the public policy of India.[262] This therefore means that the interests protected under FERA were not regarded as fundamental values. This reflects the characteristic of fundamentality.

---

[258] Pierre Mayer note 253 at 275.
[259] Andrew Barraclough and Jeff Waincymer 'Mandatory Rules of Law in International Commercial Arbitration' (2005) *Melbourne Journal of International Law* Available at http://mjil.law.unimelb.edu.au/issues/archive/2005(2)/01Barraclough.pdf [Accessed on 7th January 2008].
[260] Mayer and Sheppard note 158 ILA Final Report at 261.
[261] Renusagar case para 38 and 39.
[262] Ibid para 51.

In this regard, inconsistency with a mandatory rule is not *per se* a ground for refusing enforcement of an arbitral award. Only the violation of those mandatory rules which are at the same time *'lois de police'* may be a ground for refusing enforcement.[263] In jurisdictions where a distinction is made between mandatory rules and public policy rules, the challenge is for the courts to make the distinction. This can be done by considering the circumstances of the case especially where recognition or enforcement of the award would *manifestly* disrupt the essential political, social or economic interests protected by the rule.[264]

6 CONCLUSION

This chapter has been concerned with defining the concept of public policy both under private international law and arbitration process. Although, it has been likened to an unruly horse, what is certain from a theoretical point of view, is that it is generally accepted that public policy comprises a body of fundamental principles and values which reflect the economic, legal, moral, political, religious and social standards of every State or extra-national community thereby serving as a protective device for their safeguard. Its meaning and function are therefore intertwined.

However, the unruliness of the horse manifests itself in when an attempt is made to define those principles and values which are considered fundamental. This is because the conception of fundamentality differs from State to State as is evidenced by the definitions given under private international law in England, Canada and China. It is because of this difficulty that the ILA in its resolution sought to provide criteria for determining fundamentality of principles sufficient to justify refusal to recognize and enforce an award.

---

[263] Mayer and Sheppard ILA Final Report Rec 3(a) at 261.
[264] Ibid ILA Recommendation 3(b).

It is also evident that the general definition of public policy does not distinguish between domestic and international public policy. This distinction has been made in private international law and has crept through to the arbitration process and in particular in relation to the enforcement of foreign arbitral awards. Theoretically, it is easy to make a distinction which mainly lies in their territorial scope and field of operation. The challenging part is to determine how in practice this distinction is made.

While Articles V (2) (b) of the New York Convention and Article 36 1(b) (ii) of the UNCITARL Model Law do not explicitly refer to international public policy, it can be inferred that what led to the conclusion by many authors that public policy referred to is international public policy, is the narrow interpretation of international public policy under private international law. This narrow interpretation accords with the New York Convention pro enforcement bias.

Further, public policy has been defined by reference to the categorization of public policy into international, transnational and regional creates uncertainty as some public policy permeates all three categories for instance, European Public policy.

What can be mentioned at this juncture with certainty is that categorizing public policy as substantive/procedural as well as fundamental principles, mandatory rules, international obligations is an attempt to give content to the public policy exception and rather than having a broad one. This in effect narrows its scope. However, there are problems inherent in these categories as not all States make these distinctions. Further, the characteristics of public policy are evident that it has by its very nature, a dynamic character so that any classification may crystallize public policy at a certain period of time but not *ad infinitum.*[265] The crucial question to ask is: given this theoretical definition and content of public policy, how have the major trading nations of the world interpreted it in practice? This will be the subject of analysis under chapter 4.

---

[265] Mistelis note 192 at 252.

CHAPTER FOUR

THE JUDICIAL INTERPRETATION OF PUBLIC POLICY

1. Introduction

As already alluded to in chapter two, the New York Convention has been praised in glowing terms as one of the most successful Conventions in International Trade. This is because of its overall pro-enforcement bias aimed at securing a considerable degree of uniformity.[266] However, Article V 2 (b) dealing with the public policy exception is most prone to misinterpretation and most open to abuse by national courts, displaying skepticism of non-national sources of law and bias against foreigners who wish to enforce awards in their territories.[267]

From what has been exposed in chapter three, attempts have been made to define and give content to public policy in the hope of avoiding the misinterpretations as to what constitutes a violation of public policy. To stay with the metaphors for a moment, it is pertinent to explore how those who have ridden the 'unruly horse' have interpreted and applied the public policy exception.

The chapter will cover seven jurisdictions: England, United States of America, India, Germany, France, Switzerland and China. These countries have been chosen based on the role they play in arbitration being the major trading nations of the world.

An overview of their legislative framework both at international and national level regarding the recognition and enforcement of foreign arbitral awards is pertinent as a backdrop to the analysis of the judicial interpretation.

---

[266] Redfern and Hunter note 2 para 10-20 at 520.
[267] Troy L. Harris note 6 at 10

2 ENGLAND

2.1 The Legal Framework

The United Kingdom is a party to the New York Convention of 1958 which it ratified on 25th December 1975 and came into force on 23 December 1975. [268] The principal source of arbitration law is the Arbitration Act 1996 which came into force on 31st January 1997. The 1996 Act applies in England and Wales, and Northern Ireland (but not Scotland)[269]. The terms 'England' and English for shall be used for brevity. The Act reflects the format and language of the UNCITRAL Model Law although significant changes and additions have been made.

Various regimes exist for the enforcement of different categories of awards although they are not mutually exclusive and therefore tend to overlap[270]. Section 66 of the 1996 Act provides for the enforcement of domestic and foreign awards. The New York Convention is implemented by Sections 100-104.[271] These are the most important provisions for the enforcement of foreign awards as the vast majority of jurisdictions in which arbitrations with an international flavour are held are parties to the New York Convention.[272]

Section 103 (3) of the 1996 Act echoes Article V 2 (b) of the New York Convention by providing that recognition and enforcement of a New York Convention award may be refused if it would be contrary to public policy to recognize and enforce the award. The question is: how have the courts interpreted this public policy exception?

---

[268] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008]

[269] Audley Sheppard "England and Wales" in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) at 63.

[270] Robert Merkin *Arbitration Law* (2004) para 19.21 at 806.

[271] Section 100(1) refers to New York Convention awards which means awards made in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention.

[272] Op cit para 19.21 at 806.

2.2 The Interpretation of Public Policy by the English Courts

It has been acknowledged that in the context of enforcement of foreign awards, it has just been as difficult to define public policy.[273] One of the first cases to consider the interpretation of public policy is the case of *Deutsche Schachtbau-und Tiefbohrgesllscaft v Ras Al Khaimah National Oil Co.*[274] The Court of Appeal observed in this case that considerations of public policy can never be exhaustively defined, but that they should be approached with extreme caution. Sir John Donaldson MR then formulated the English public policy by stating that:

> It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the State are exercised.[275]

The Court of Appeal in the above case could not find any violation of public policy as it was found that the parties intended to create legally enforceable rights and liabilities and the arbitral tribunal had the power to select the applicable law and applied 'internationally accepted principles of law governing contractual relations'.

This definition reflects the substantive public policy which goes to the recognition of rights and obligations by a tribunal or enforcement court in connection with the subject matter of the award. Illegality therefore would include instances of corruption, bribery and fraud.

Another case to give effect to this definition of public policy is *Solemainy v Solemainy.*[276] In this case, an English court refused to enforce an award giving effect to a contract between a father and son that involved the smuggling of carpets out of Iran in breach of Iranian revenue laws and export controls. The father and son had agreed to submit their dispute to arbitration by the Beth Din, the Court of the Chief Rabbi in London, which

---

[273] Julian D M Lew et al note 175 para 26-120 at 724.
[274] [1987] 2 Lloyds Law Report 246.
[275] Ibid at 254 para 2.
[276] [1999] Q B 785.

applied Jewish law. Under this law, the illegality of the enterprise did not affect the rights of the parties. The High Court granted the son leave to enforce the award but the father applied to set it aside contending that it would be contrary to public policy to enforce an award founded on an illegal transaction. That application was dismissed and on appeal the Court of Appeal held that:

> The court would not enforce an arbitration award, whether foreign or domestic, if enforcement would be contrary to English public policy. Such policy would not allow the parties to conceal, through the procurement of an arbitration that one of them sought to enforce an illegal contract, since a private agreement could not override the court's concern to preserve the integrity of its process.[277]

Although this case does not stem from a traditional international commercial arbitration, it is illustrative of the approach taken by the English courts when questions of illegality are raised and is the first ever case which refused enforcement of an award because of public policy considerations.[278]

It is important to note that the English courts have not expressly mentioned international public policy which is construed restrictively and narrows the scope of the public policy exception but have affirmed the importance of finality of awards and effectively endorsed a restrictive concept of public policy.[279]

The case illustrating this is *Westacre Investment Inc v Jugoimport – SDPR Holding Co Ltd and others.*[280] The parties had entered into an agreement, governed by Swiss law, for the sale of military equipment to Kuwait. The respondent repudiated the agreement and Westacre instituted arbitration proceedings. The respondents submitted that the contract was void as it involved Westacre having to bribe various Kuwait officials but the arbitrators rejected the allegations and made the award in favour of Westacre. The enforcement of the award was challenged in England on the ground that the contract was

---

[277] Solemainy case Ibid at 847.
[278] Julian D M Lew et al note 175 para 26-120 at 724.
[279] Sheppard note 31 ILA Interim Report at 227.
[280] [1999] 2 Lloyds Report 65.

one for the purchase of personal influence and was therefore contrary to public policy in England.

The English courts rejected the challenge to the enforcement both at first instance and in the Court of Appeal. The court determined that although the contract for purchase of personal influence was contrary to public policy of Kuwait, its enforcement was not contrary to Swiss public policy, Swiss law having been the governing law. Therefore, they found no public policy objections to enforce the award in England.

In holding thus, the court observed that there was a need to balance the public policy of discouraging international commercial corruption with the public policy of sustaining international arbitration awards.[281] This reasoning may be difficult to comprehend in the light of the international community's abhorrence to corrupt activities. However, some leading authors have stated that since 'lobbying' was found not to be such an illegal activity under the governing law and the court was faced with international arbitration awards, the award was enforced as the public policy of upholding arbitral finality outweighed the public policy of discouraging corruption.[282]

Similarly, in the case of *Ominium de Traitement et de Valorisation SA v Hilmarton Ltd*[283] it was alleged in an arbitration conducted under the curial law of the canton of Geneva that the contract was illegal as it breached the Algerian statute which prohibited the intervention of a middleman in connection with any public contract within the ambit of foreign trade.[284] The arbitrator had found that even if the contract was contrary to Algerian law, no corruption was involved and there was no basis under Swiss law[285] for refusing to uphold the agreement. The English court held that the award was enforceable in England on the arbitrators finding of fact that the element of corruption and illicit

---

[281] *Westacre Investment Inc v Jugoimport – SDPR Holding Co Ltd and others* [1999] 2 Lloyds Report 65 per Colman J.
[282] Redfern and Hunter note 2 para 10-52 at 543.
[283] [1999] 2 Lloyd's Rep 222.
[284] Ibid.
[285] Proper law chosen by the parties.

practice were not present.[286] The court refused to entertain any attempt to go behind the explicit and vital finding of the arbitrators.

The court in this case distinguished and justified the possible contradiction with the *Soleimany* case by stating that:

> It was apparent from the face of the award in that case that the arbitrator was dealing with an illicit enterprise for smuggling carpets out of Iran. It was quite simply a smuggling contract and therefore it fell under the public policy exception.[287]

In this regard, both *Westacre* and *Hilmarton* cases illustrate that the English courts may still enforce an award based on a contract which is illegal in the place of performance, if the arbitrator finds after an assessment of facts that the contract is valid under the proper law of the contract. Going by these two cases, the English courts have demonstrated a narrow approach to the public policy exception, impliedly applying international public policy. This confirms the pro enforcement bias of the New York Convention which is considered to be also a matter of public policy.[288]

3. UNITED STATES OF AMERICA

3.1 The Legal Framework

The United States of America ratified the New York Convention on 30th September and it came into force on 29th December 1970.[289] It is also a State party to the Panama Convention which entered into force on 27th October 1990. Being a federal system, the United States arbitration law is governed both by the federal statutes enacted by the United States Congress and by the State laws enacted by the 50 State legislatures. The primary federal statute governing arbitration is the Federal Arbitration Act (FAA) first promulgated in 1925. Each of the States has a statute governing arbitration and because

---

[286] *Ominium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 Lloyd's Rep 222 at 283 para 2.
[287] Judgment of Timothy Walker in *Hilmarton* case at 225.
[288] Redfern and Hunter para 10-51 at 542.
[289] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].

the United States is a common law country both federal and state court decisions have the force of law.[290]

The principal sources of authority for the recognition and enforcement of foreign arbitral awards in the United States therefore are the New York Convention and Panama Convention.[291] The two Conventions have been given legislative effect and so they are implemented under chapters 2 and 3 of FAA. Consequently, successful parties to arbitration may seek enforcement of foreign award in the United States courts via New York or the Panama Conventions. It is under these two Conventions that a losing party may also raise the public policy defence as the FAA grounds for refusal do not contain the 'public policy' language.[292]

It is important to mention that when recommendations for the United States to become a signatory to the New York Convention were made, the public policy exception was emphasized as a way to calm fears held by those who were still suspicious of the unbridled power given to arbitrators.[293] On the other hand, a leading scholar of the day felt the language of Article V (2) (b) might be overly broad writing that the 'perennially vague public policy concept' could be abused as a 'catchall' by those evading enforcement.[294] In the light of this, the question to be asked is: how have the courts in the United States defined the public policy exception?

3.2 The Interpretation of Public Policy by the United States Courts

One of the first cases to reach the appellate level after the Convention's adoption did much to dispel the fears of frequent vacation earlier envisioned under Article V 2(b) claims. This is the *Parsons & Whittemore Overseas Co.v Société Générale de l'Industrie*

---

[290] David W Rivkin and Donald Francis Donovan "United States" in J W Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) at 395.
[291] Bishop and Martin note 63 at 1.
[292] Eloise Henderson Bouzari "The Public Policy Exception to the Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence" (1995) 30 *Texas International Law Journal* 205 at 212
[293] Ibid at 210.
[294] Bouzari Ibid citing Samuel Pisar "The United Nations Convention on Foreign Arbitral Awards" 33(1959) *S.CAL. L.Rev* 14 at 25.

du Papier (RAKTA)[295] case which is the landmark public policy decision in the New York Convention line of cases.[296] The case concerned a 1962 contract between the United States corporation Overseas and the Egypt corporation RAKTA for the construction of a paper board mill in Egypt financed by the United States Agency for the International Development (AID). There was a delay in the construction and this was the arbitrated dispute. The American company argued that the contract's *force majeaur* clause should be recognized in the light of the United States government's severing of diplomatic ties with Egypt and the United States government's subsequent withdrawal of financial backing for the project. The Second Circuit rejected this attempt to equate United States foreign policy with United States public policy as follows:

> In equating 'national' policy with United States 'public' policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of 'public policy.' Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention meant to subscribe to this supranational emphasis.[297]

The court noted the pro enforcement bias of the New York Convention and adopted a narrow construction of the public policy defence to enforcement. Thus in defining public policy, Judge Smith held that:

> Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice.

This is the most often quoted definition of public policy and has been adopted by other courts when confronted with an Article V (2) (b) public policy argument. For instance, in the case of *Waterside Ocean Navigation Co. v International Navigation Ltd*[298] the respondent opposed the confirmation of an award alleging that it would be contrary to the nation's public policy against granting relief on the basis of sworn testimony directly

---

[295] [1974] 508 F.2D 969 (2D Cir).
[296] Bouzari at 211.
[297] *Parsons* case para 3 and 4.
[298] 737 F. 2d 150 (2d Cir. 1984).

contradictory to prior sworn testimony and in favour of the sanctity of the oath and maintenance of the integrity of the judicial system. They also contended that it would be contrary to public policy against fraud.[299] The court rejected the argument by applying the *Parson's* standard and held "that the assertion that the policy against inconsistent testimony is one of our nation's most basic notions of morality and justice goes much too far."[300]

Similarly in *La Societe Nationale Pour La Recherche and others v Shaheen Natural Resources Co,*[301] the court rejected the public policy defence where it was alleged that a restrictive trade clause existed in the contract which was a violation of United States public policy. However, the public policy defence was successful in the case of *Laminoirs- Trefileries- Cableries de Lens, S.A v Southwire Co*[302] where the court refused to enforce that part of an award that imposed an additional 5 per cent interest as it was penal in nature and amounted to a violation of public policy.

Clearly and without a doubt the decisions reached by the United States courts enforcing awards, show that the 'injustices' at issue are not 'basic' enough to meet the *Parson's* standard.[303] The United States courts make a distinction between domestic and international public policy and therefore endorse the narrow interpretation of Article V (2) (b) which has its roots in the free international trade jurisprudence of the United States Supreme Court.[304]

The leading case for this distinction is *Fritz Scherk v Alberto- Culver Co.*[305] The court recognized the difference between international and domestic public policy by enforcing an agreement to arbitrate a claim arising in international trade although arbitration of a similar claim would have been barred had it arisen from a domestic transaction. The Court referred to its earlier decision in *The Breman v Zapata Off shore Co.*[306] and

---

[299] Ibid para II.
[300] Ibid para 2.
[301] 585F. Supp.57.
[302] 484F. Supp 1063.
[303] Bouzari note 292 at 216.
[304] Troy Harris note 6 at 12
[305] [1974] 417 US 506.
[306] [1972] 407 US 1.

repeated in the *Scherk* case that the invalidation of such agreement would not only allow the respondent to repudiate its solemn promise but would as well reflect a:

> Parochial concept that all disputes must be resolved under our laws and in our courts...We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws and resolved in our courts.[307]

The Supreme Court justified and confirmed this decision by the adherence of the United States to the New York Convention whose principal purpose as mentioned in Chapter two is: 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries'.[308]

4 INDIA

4.1 The Legal Framework

Since 1950, the Republic of India has ratified only one multilateral Convention in the field of arbitration and this is the New York Convention.[309] This was ratified on 13 July 1960 and entered into force on 11th October 1960.[310] Currently, the principal source of arbitration in India is the Arbitration and Conciliation Act, 1996 which broadly incorporates the UNCITRAL Model law. It is a comprehensive legislation covering both domestic and international arbitrations.[311]

Enforcement of foreign awards is governed principally by the New York Convention as implemented in Part II of the Act. [312] Section 48 is a virtual reproduction of Article V of the New York Convention. Subsection (2) therefore provides that enforcement of an arbitral award may also be refused if enforcement of the award would be contrary to the

---

[307] *Scherk* case para 519.
[308] *Scherk* case at 520.
[309] Fali S Nariman "India" J Paulsson (ed) *International Handbook Commercial Arbitration* 30 Januray 2000 chapter II para 53 Kluwer Law International CD ROM.
[310] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].
[311] Ciccu Mukhopadhaya and Stephen Douglas York "India" in J W Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) at 123.
[312] Nariman note 309 para 2 (a) at 45.

public policy of India. It is statutorily declared that an award is in conflict with public policy of India if the making of the award was induced or affected by fraud or corruption.[313] In this regard, how have the Indian courts defined public policy?

4.2 The Interpretation of Public Policy by the Indian Courts

The leading case dealing with the definition of public policy is *Renusagar Power Co Ltd v General Electric Co. (GEC)*[314] By a contract dated August 24 1964, GEC agreed to supply to Renusagar, equipment and power services for constructing a thermal power plant at Renukoot, in the district if Mirzapur, India. After an initial payment of 10 per cent, the contract price was to be paid in 16 biannual installments at an interest rate of 6.5 per cent. GEC received a tax exemption from the government for Renusagar with an interest rate reduction of 6 per cent per annum. However, Renusagar defaulted in the payments and GEC instituted arbitration proceedings in which the majority of arbitrators made an award in favour of GEC.

Renusagar objected to the enforcement of the award before the High Court and after a protracted litigation, an appeal was made to the Indian Supreme Court against the decision of the High Court confirming the enforcement of the award. The Supreme Court issued the third and most comprehensive of its trilogy of judgments which has been deemed by the Indian Bar as passing upon a matter of first impression for the Supreme Court.[315]

Before the Supreme Court, Renusagar objected to the enforceability of the award based on Section 7(1) (b) (ii) of the Foreign Awards Act, on the ground that the enforcement of the award would be contrary to public policy. In determining the meaning of public policy, the court had to establish whether the award was unenforceable as being contrary to public policy based on the ground that:

---

[313] Section 48 (2) of the Act. See Ciccu op cit at 144.
[314] *Renusagar v General Electric Co. (GEC)* Supreme Court of India 7 October 1993. Reported in Yearbook Commercial Arbitration A J van den Berg (ed) Vol XX (1995)
[315] Lawrence F Ebb 'Reflections on the Indian Enforcement of the GE/Renusagar Award' (1994) 10 (2) *Arbitration International* at 141.

(a) it contravened the provisions of the Foreign Exchange Regulation Act 1973(FERA);
(b) It penalized Renusagar for not disregarding the interim orders passed by the Delhi High Court in the writ petition filed by Renusagar;
(c) It would enable recovery of compound interest on interest;
(d) It would lead to unjust enrichment for General Electric.[316]

The Supreme Court observed that the concept of public policy was incapable of precise definition but it did confirm that:

> Public policy 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.[317]

In this regard, it was held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if:

> Such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality.[318]

In formulating this definition of public policy, the court had to consider whether the courts should use a narrower concept of public policy as applicable in private international law (international public policy) or broader interpretation as applicable in the field of municipal law (domestic public policy).[319] It is important to note that although the violation of public policy is a ground for refusal, Indian law does not restrict (or extend) this ground to violation of international public policy even where the arbitration is an international commercial arbitration.[320]

In this regard, the court found it difficult to construe the expression 'public policy' in Article V 2(b) of the New York Convention to mean international public policy in the absence of a workable definition of 'international public policy.' The meaning of this therefore is that, where enforcement of a foreign award is sought in any court in India, the rules of public policy applicable would only be the "public policy of India."

---

[316] Op cit para 40.
[317] Ibid para 24.
[318] Ibid para 39.
[319] Ibid para 38.
[320] Nariman note 309 para 4 at 47.

However, although the Indian courts do not endorse the concept of international public policy, the court unhesitatingly rejected the broader concept of violation of public policy. Instead it followed well- established views to the contrary, quoting with approval the view of the United States *Parsons* case 'that the general pro enforcement bias informing the Convention points towards a narrow reading of the public policy defence'.[321]

Having made these observations, the court concluded that public policy in Section 7(1) (b) (ii) had been used in a narrow sense and in order to attract the bar of public policy, the enforcement of the award had to invoke something more than the violation of the law of India.[322] Therefore, based on this scope of public policy, the court rejected the above mentioned grounds for refusing enforcement and directed the enforcement of the United States dollar international award.

The Supreme Court applied the same standard in the later case of *Smita Conductors Ltd v Euro Alloys Ltd*[323] and proceeded on the premise of construing the violation of public policy in a narrow sense as interpreted under private international law.[324]

5 GERMANY

5.1 The Legal Framework

Germany ratified the New York Convention on 30th June 1961 and it came into force on 28th September 1961.[325] The law on arbitration in Germany is contained in the 10th Book of the German Code of Civil Procedure (*Zivilprozeßordnung,* ZPO)[326] The 10th Book starts with Section 1025 and ends with S. 1066. These provisions are effective as of 1

---

[321] Ebb note 313 para (I). See *Renusagar* para 35.

[322] See Chapter three para 4 for the reasoning of the court.

[323] Supreme court of India, 31 August extract in Yearbook Commercial Arbitration A.J. van den Berg (ed) Vol XXVII pp 462-491 at para 38).

[324] *Smita* case para 15.

[325] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].

[326] Karl-Heinz Böckstiegel "Germany" in J Paulsson (ed) *International Handbook on Commercial Arbitration* (2001).

January 1998 and they rely on the UNCITRAL Model Law.[327]Section 1061(1) expressly provides for the recognition and enforcement of foreign awards in accordance with the New York Convention. Being a civil law jurisdiction, Germany refers to *'ordre public'*. The question is: how have the courts interpreted the *ordre public*?

5.2 The Interpretation of Public Policy by the German Courts

The German courts have had an opportunity to interpret the public policy exception referred to in the New York Convention. The standard for refusing to enforce a foreign arbitral award under Article V 2 (b) was stated by the *Bundesgerichtshof*[328] in a 1986 decision.[329] In this case, two party arbitrators were supposed to appoint a third arbitrator, but the party challenging enforcement had failed to name one. The sole arbitrator eventually ruled in favour of the party that had appointed him. The matter reached the Federal Supreme Court which had to determine whether a foreign arbitral award rendered by an arbitrator appointed solely by one of the parties was contrary to German public policy and therefore not enforceable. The court held that:

> From the view point of German procedural public policy, the recognition of a foreign arbitral award can only be denied if the arbitral procedure suffers from a grave defect that touches the foundation of the State and economic functions. [330]

In this regard, the court found that the recognition of an arbitral award could only be denied in those cases where the violation of the duty of impartial administration of justice had a real impact on the arbitral proceedings. Therefore the finding that a party had a predominant weight in constituting the tribunal was not sufficient to refuse the enforcement of the award.

This decision marked the first time that the *Bundesgerichtshof* accepted the distinction between domestic and international public policy in relation to the enforcement of foreign

---

[327] Wolfgang Kühn and Ulrike Gantenberg "Germany" in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2d (2006) at 93.
[328] Federal Supreme Court in Germany.
[329] Bundesgerichtshof 15 May 1986 extract from ICCA.
[330] Ibid at para 3.

arbitral awards.[331] This was after considering that foreign court decisions narrowed the limits of the concept of German public policy in the interest of international trade. Therefore, the same had to be applied to the enforcement of foreign awards as public interest did not require stricter scrutiny of foreign awards.[332]

This definition of public policy also formed the basis for another decision made by the *Bundesgerichtshof* in 1990 which expressly referred to international public policy. [333] In this case the respondent objected to the enforcement of an award alleging that a legal consultant actively participated in the arbitral proceedings to the extent of even writing the award. The court held that leave to enforce an award would only be refused when the arbitral proceedings had been affected by a serious shortcoming touching upon the fundamental principles of economic and constitutional life. It was found that the participation of a legal consultant in the arbitral proceedings could not hinder the recognition of an arbitral award. What was required was an infringement of international public policy and not a deviation from mandatory domestic procedural rules.[334]

Similarly, the *Oberlandesgericht* [335] in the decision dated 30 July 1998[336], dismissed the defendant's objection to enforcement based on alleged grave procedural faults in the arbitration and the award. The court found that the awarding of compound interest, the ex officio awarding of interest or the absence of reasons did not have the effect of manifestly violating the fundamental principles of German law, in particular its constitutional principles.[337] It was observed that especially in the field of arbitration, enforcement of a foreign arbitral award could only be denied when arbitration was vitiated by grave fault, which affected the fundamentals of social and economic life. There were no grave procedural faults found in this case.

---

[331] Christopher B. Kuner 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention' (1990) 7 (4) *Journal of International Arbitration* para III at 80.

[332] Case 18 May 1986 at para 2 and 3.

[333] Bundesgerichtshof 18 January 1990 III ZR 269/88 extract in Yearbook Commercial Arbitration (Germany No. 38) Kluwer Law International.

[334] Ibid at para 5. See also Bundesgerichtshof 14 April 1988- Court found that the tribunals failure to ask the party opposing enforcement for his opinion prior to rendering the award did not constitute a serious deficiency affecting the bases of civil and economic life.

[335] Court of Appeal in Germany.

[336] Oberlandesgericht Hamburg 30 July 1998 extract in Yearbook Commercial Arbitration A.J. van den Berg (ed), Vol XXV (2000).

[337] 30 July 1998 case at para 8.

However, this was not the case in the *Oberlandesgericht* decision of 3rd April 1975 where the arbitrator accepted evidence ex parte and did not give the other party the opportunity to comment on such evidence. The court found that this was an extreme case where the basic principles of the German legal order had been violated.[338] Thus the court refused enforcement based on a fundamental procedural deficiency.

These cases illustrate that the German courts distinguish between a wider notion of domestic public policy and a more restricted notion of international public policy and they have endorsed the latter in relation to the enforcement of foreign arbitral awards.

6 FRANCE

6.1 The Legal Framework

On 26th May 1959, France ratified the New York Convention and it came into force on 6th September 1959.[339] At national level, France modernized its arbitration law in 1981. The new provisions are found in Book IV of the New Code of Civil Procedures (NCCP). Recognition and enforcement of foreign arbitral awards and of awards rendered in France in International arbitration is governed in the first place by the applicable treaty or convention which is most frequently the New York Convention. If not, on the basis of French law.[340] This occurs often since the grounds against leave of enforcement available under the New York Convention are more extensive than those available under the NCCP. That notwithstanding, one of the limited grounds for refusing recognition and enforcement of an arbitral award under the NCCP is if it is contrary to international public policy.[341] The question to be asked is: What is international public policy?

6.2 The Interpretation of Public Policy by the French Court

---

[338] Oberlandesgericht Hamburg 3rd April 1975 extract in Yearbook Commercial Arbitration, P Sanders (ed), Vol II (1977) at 241.

[339] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].

[340] Yves Derains and Rosebel E. Goodman- Everard " France" in J. Paulsson (ed) *International Handbook on Commercial Arbitration* (February 1998) Suppl 26 Kluwer Law International CD ROM.

[341] Article 1498 dealing with seeking of enforcement and Article 1502 para 5 dealing with appeal against enforcement.

France is one of the few countries which expressly refer to international public policy in the legislation. Therefore, one of the principles which the courts will look at when determining whether an award is contrary to public policy is the international nature of public policy.[342] This is because the courts draw a distinction between domestic public policy and international public policy pointing out that for the purposes of Article 1502 (5), no account should be taken of the domestic public rules of a foreign jurisdiction or the rules of French domestic public policy.[343] In this regard, the Paris Court of Appeal held that:

> A breach of domestic public policy- assuming it has been established- does not provide the grounds on which to appeal against a ruling granting in France of a foreign arbitral award, because Article 1502 (5) only refers to cases in which the recognition or enforcement of an award would be contrary to international public policy.[344]

The same distinction is applied to enforcement under Article V (2) (b) of the New York Convention. The Cour d' appel[345] of Reims in the case of *Denis Coakely v Michael Reverdy*[346] had to examine whether the awards were compatible with the French concept of public policy and due process. The court observed that the public policy which governed the enforcement of foreign arbitral awards was not domestic public policy but the public policy of international law of the State where the decision was invoked.[347] Leading French authors have defined this international public policy to mean:

> The French conception of international public policy or in other words the set of values a breach of which could not be tolerated by the French legal order, even in international cases.[348]

This means that enforceability of an arbitral award should be examined in the light of the fundamental considerations of French law. Therefore the award should meet the requirements of international public policy which concern both the procedural and the

---

[342] Fourchard Gaillard Goldman note 9 para 1646
[343] In other words the mandatory provisions of French domestic law. Ibid para 1647.
[344] Fourchard citing CA Paris March 12 1985.
[345] Court of Appeal in France.
[346] Cour d'appel of Reims 23 July 1981 extract from Yearbook Commercial Arbitration, P. Sanders (ed) Vol IX (1984) at 400-402
[347] Ibid para 2.
[348] Fourchard Gaillard Goldman note 9 para 1648.

substantive aspects of the dispute. One of the requirements for procedural public policy is compliance with due process. However, the courts have recognized the principle of equality of the parties which is not considered separately in French law, to exist under the umbrella of international public policy. This was established by the Cour de cassation in the case of *B.K.M.I v Dutco.*[349]

In the case of *Excelsior Film TV v UGC-PH* [350] which has been discussed in chapter three para 4.2.1, the Cour de Cassation[351] found a ground for violation of international public policy where one of the arbitrators who was also sitting in a parallel arbitration, communicated erroneous information to the arbitral tribunal. The court refused to enforce the award as it determined that the communication had an influence on the decision of the tribunal. Therefore the court held that:

> This irregularity created an imbalance between the parties, amounting to a violation of due process, so that the award rendered in Italy under such conditions violate French public policy in the sense of Article 1502 (5) and Article V 2 (b) of the New York Convention.[352]

Similarly the Cour d'appel in Paris in the case of *Dubois &Vanderwalle v Boots Frites BV*[353] refused to enforce an award which was rendered after the arbitral tribunal had extended the time limit set by the parties to render the award. The refusal to enforce was inherent in the contractual character of arbitration which reflected the needs of both domestic and international public policy. The court observed that by extending the time limit therefore, the arbitrators took powers which they did not have and thereby violated international public policy.[354]

These cases indicate clearly that the courts interpret and give content to the international public policy which is referred to in the NCCP Act. Accordingly, when interpreting the

---

[349] Cass 1e cave 7 January 1992.
[350] March 24 1998 extract Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXIVa (1999) pp 643-644.
[351] The Supreme Court.
[352] *Excelsior* case para 2.
[353] Cour de' appel Paris 22 September 1995 extract from Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXIVa (1999) at 640.
[354] Ibid at para 5.

public policy under the New York Convention, regard is had to the French concept of public policy in international law which is international public policy.

7 SWITZERLAND

7.1 The Legal Framework

Switzerland is a signatory to the New York Convention by virtue of the ratification made on 1st June 1965 and which came into force on 30th August 1965.[355] The rules applicable to international arbitration are set forth in Chapter 12 (Articles 177-194) of Switzerland's Federal Act on Private International Law (PILA).[356] With respect to the recognition and enforcement of arbitral awards, the Swiss law distinguishes between domestic and foreign awards. The recognition and enforcement of foreign arbitral awards is governed by the New York Convention by virtue of Article 194 of PILA.

7.2 The Interpretation of Public policy by the Swiss Court

When it comes to interpreting the New York Convention, the Swiss courts are required to take into account not only Swiss decisions but also foreign decisions. This is because the New York Convention is applied in Switzerland not as a national law but as an international treaty.[357] In this regard, the Swiss courts have set a standard for interpreting public policy exception under the New York Convention. In the case of *Leopold Lazarus Ltd v Chrome Ressources S.A.*[358] the respondent had objected to the enforcement of an arbitral award alleging that the arbitrators had not given them an opportunity to express their opinion on the conclusions of an expert who had been consulted in their absence. Therefore they argued that this constituted a violation of Swiss public policy.

---

[355] Available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].

[356] Georg von Segesser and Alexander Jolles "Switzerland" in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) at 360.

[357] Martin Bernet and Anna K. Müller "Recognition and Enforcement of Foreign Arbitral Awards" in Gabrielle Kaufmann-Kohler & Blaise Stucki (eds) *International Arbitration in Switzerland: A Handbook for Practitioners* (2004) at 169.

[358] Cour de Justice (Fist Section) Canton of Geneva 17th September 1976 extract in Yearbook Commercial Arbitration P Sanders (ed) Vol IV (1979) at 311.

The Court of Appeal of Geneva considered how public policy had to be dealt with by referring to a decision taken under the rules of the Geneva Convention 1927. It was stated:

> There must be a violation of fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice.....This exception of public order should not be twisted in order to avoid application of international Conventions which are signed by Switzerland and which form part of Swiss law.[359]

On the basis of this standard, the Court found that such procedural irregularity had not violated the Swiss public order in an intolerable manner to warrant non- enforcement of the award. The same standard was applied by the Tribunal Fédéral[360] in the case of *Inter Maritime Management SA v Russin & Vecchi.*[361] The court stated that public policy as understood in a narrow sense and even more so in enforcement proceedings opposed the enforcement of foreign arbitral awards which hurt the Swiss legal feeling in an intolerable manner and violated the fundamental principles of the Swiss legal system.[362] In this regard, the court held that a fee agreement providing for an additional fee in case of a successful outcome of the case was compatible with public policy.

The findings in these cases were also echoed *KS AG v CC SA*[363] where it was stated that Swiss public policy had a more limited scope in the context of recognition and enforcement of foreign arbitral awards. Thus the court rejected an argument alleging violation of Swiss public policy on the ground that one of the arbitrators had not signed the award. In rejecting this argument, the court stated that the rendition of an arbitral award by a majority of votes of the arbitral tribunal agreed with the principles of the Swiss legal system.[364]

---

[359] Ibid at para 2.
[360] The Swiss Supreme Court.
[361] Tribunal Fédéral 9 January 1995 extract from Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXII (1997) at 789.
[362] Ibid para 22.
[363] Camera di Esecusione e Fallimenti [Execution and Bankruptcy Chamber] Canton Tessin 19 June 1990.
[364] Ibid para 8.

These cases illustrate that the Swiss courts give a narrow interpretation to public policy and that although they do not expressly state it, the relevant concept referred to in the context of enforcement is the Swiss international public policy. This is said to address violations of both procedural and substantive principles of justice[365] which are considered to be fundamental.

8. PEOPLE'S REPUBLIC OF CHINA

8.1 The Legal Framework

On 2nd December 1986 China accessed to the New York Convention which came into force on 22nd April 1987.[366] China's primary source of arbitration law is the Arbitration Law of the PRC which came into effect on 1 September 1995. Though it differs significantly in several key respects, the Arbitration Law was heavily influenced by the Model law.[367] The other laws are the PRC Civil Procedural law[368] and the PRC Contract law.[369] The Chinese law has been influenced by the civil law system.[370]

The regime for enforcement of arbitral awards is a three- pronged mechanism, that is, one for domestic arbitral awards, for foreign- related awards[371] and foreign arbitral awards. The enforcement of foreign arbitral awards falls under the regulation of Article 269[372] of the PRC Civil Procedural law and the New York Convention. These two laws are supplemented by the Notice of the Supreme People's Court of China[373] which clarifies *inter alia* the grounds on which the competent authority may refuse to recognize or

---

[365] Bennet and Müller note 357 at 179.

[366] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February, 2008].

[367] Peter Murray and John Lin "People's Republic of China" in J William Rowley (ed)*Arbitration World Jurisdictional Comparisons* 2ed (2006) at 257.

[368] Came into force on 9 April 1991.

[369] Came into force on 1 October 1999.

[370] Tang Houzhi and Wang Shengchang "PR China" in J Paulsson (ed) *International Handbook on Commercial Arbitration* (January 1998) Kluwer Law International CDROM.

[371] These are awards rendered during an arbitration involving foreign elements.

[372] Article 269 permits the applicant to apply for the recognition and enforcement of foreign arbitral awards either by invoking relevant international treaties or in the absence of treaties, by relying on the principle of reciprocity. In most cases the enforcement of foreign arbitral awards will fall within the ambit of the New York Convention- Tang Houzhi and Wang Shengchang "PR China" in J Paulsson (ed) *International Handbook on Commercial Arbitration* (January 1998).

[373] The Notice on the Implementation of China's Accession to the New York Convention issued by the Supreme People's Court of China on 10th April 1987.

enforce a foreign arbitral award. This includes the violation of public policy specified in Article V (2) (b) of the New York Convention.

It is important to mention that under Chinese law, the word 'public policy' is not mentioned instead 'social and public interest' is used. Therefore, Article 260 (2)[374] of the CPL which relates to foreign related arbitration awards also provides for refusal of enforcement of an arbitral award if the enforcement of it goes against the social and public interest. However, under the Arbitration Law, refusal of recognition and enforcement of arbitral awards on "social and public interest" is not authorized. This position is said to have been criticized by the Chinese scholars.[375]

China gives precedence to the provisions of international treaties to which it is a party in case of conflicts with Chinese law, therefore a party involved in recognition and enforcement of Convention awards may invoke the provisions of the New York as well as relevant Chinese laws. Once the New York Convention comes in to the picture, the public policy ground to oppose the enforcement of the award may be invoked by the parties.[376] The crucial question is: how have the courts interpreted public policy?

8.2 The Interpretation of Public Policy by the Chinese Courts

It is should be mentioned from the outset that the recognition and enforcement of foreign arbitral awards in the Chinese courts have long been invisible because very few reports have ever been published.[377] This has been attributed to China being a civil- law country with a young legal system.[378] In addition, the public policy ground has seldom been argued as a ground for refusing enforcement.[379] However, the *Dongfeng Garments Factory of Kai Feng City and Tai Chu International Trade (HK) Co Ltd v Henan*

---

[374] Article 260 is a close reflection of Article V of the New York Convention although the versions are not identical-Guiguo Wang "One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China" (1997) 14 (1) 5*Journal of International Arbitration* Kluwer International CD Rom.
[375] Wang Ibid para 2 at 12-13.
[376] Ibid at 15.
[377] Wang Sheng Chang "Enforcement of foreign Arbitral awards in China" 30 (2002) *International Business Law* 133 at 137.
[378] Wang note 374 at 6
[379] Ibid Part III at 31.

Garments Import and Export Group Co[380] was the first to deal with the issue of public policy. The Intermediate People's Court turned down an application of the plaintiff for enforcement of the award on the ground that:

> According to current State polices and regulation, enforcement...would seriously harm the economic influence of the State and public interest of the society and adversely affect the foreign trade order of the State.[381]

This was the Chinese understanding of public policy. However, this decision was subsequently overruled by the Supreme People's Court who opined that the Intermediate People's Court was incorrect to have refused to enforce the arbitral award on the ground that enforcement would seriously harm the economic interests of the State.[382] This case shows that there is a lack of understanding of public policy in China and this has been attributed to the lack of legal training for both the judges and the lawyers on the interpretation of "public policy" as it is commonly understood.[383]

The concept of 'international public policy' has also not been developed in the Chinese courts[384] and therefore there is no explanation on it[385]. That notwithstanding, the well-known cases indicate judicial acceptance of the concept as public social interest (public policy) is subject to strict interpretation in so far as domestic, foreign-related and foreign awards are concerned.[386]

Thus, the Gaungzhou Maritime Court in the case of *Guangzhou Ocean Shipping Co v Marships of Connecticut Co Ltd* [387] and the Dalian Maritime Court in the case of *Dalian*

---

[380] Case referred to in Wang note 374 Part III at 31 -32 also citing Michael Moser "China and the Enforcement of Arbitral Awards" (1995) 61 (1) *Arbitration, the Journal of Chartered Institute of Arbitrators* at 50.

[381] Ibid at 32.
[382] Ibid.
[383] Ibid. Lack of trained personnel to properly interpret the laws in China has also been identified by other commentators as a hindrance to the implementation of the New York Convention. See Wang Sheng Chang note 377 at 137.
[384] Houzhi and Sheng Chang note 370 at Part 4 (Rules of Public Policy).
[385] Li Hu "Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China" (2004) 20 (2) *Arbitration International* 167 at 177.
[386] Houzhi and Sheng Chang note 370 at Part 4.
[387] Gaungzhou Maritime Court 17 October 1990 extract in Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXIII (1998) at 641.

Ocean Transportation Co and Tesko[388] enforced foreign arbitral awards rendered by two *ad hoc* and two-arbitrator tribunals. Ad hoc arbitration and the uneven- arbitrator tribunal are contrary to China's long standing policy favouring institutional arbitration and uneven-arbitrator tribunals. Although public policy was not an issue in both cases, the courts nonetheless, invoked public policy reasons to denounce these domestically unfavoured but internationally accepted practices.[389]

What the court considered in the *Gaungzhou* case, were the laws of PRC and therefore held that the recognition and enforcement of the three awards would not be contrary to public policy as charter party disputes between parties were capable of settlement by arbitration under the laws of PRC.[390] Similarly in the Dalian case, the court held that enforcement of the award would not be contrary to the social and public interest of the PRC.[391]

Although there is no indication as to what constitutes a violation of public policy in China, it has been stated that at least in the context of enforcement of foreign arbitral awards, the courts have confirmed and accepted the concept of international public policy.[392] This is as result of the narrow interpretation of public policy in these cases that the courts have had to deal with.

9 CONCLUSION

What can be stated at this juncture is that in interpreting the public policy exception all the countries except China have seminal cases which have set the standards for finding a violation of public policy under Article V (2) (b) of the New York Convention. In applying the public policy exception most of the courts from these different jurisdictions make a distinction between domestic and international public policy either expressly or impliedly and therefore adopt a narrow interpretation of the public policy exception. more detailed analysis of the findings of this chapter shall be made in chapter five which is meant to draw conclusions on the study this paper is focused on. A summary of the findings of this chapter are shown in Table 1 below

---

[388] Unreported case but cited in Li Hu note 373 at 136.
[389] Xiabing Xu and George D Wilson note 15 "One Country, Two- International Commercial Arbitration-Systems (2000) 17(6) *Journal of International Arbitration* 47 para C.
[390] *Gaungzhou* case at para 2.
[391] Li Hu note 385 at 177.
[392] Ibid.

Table 1: Summary

Country	Legal framework for enforcement of awards at international and national level	Interpretation of public policy by the national court	Broad or narrow interpretation of public policy by courts
England	NYC. Main arbitration law is the Arbitration Act of 1996. Enforcement of foreign arbitral awards done through both legal regimes	*DST v Rakoil*: Enforcement of award must show element of illegality or be injurious to the public good.	Impliedly endorse international public policy: narrow interpretation.
USA	NY and Panama Conventions. Primary federal statute is Federal Arbitration Act. Enforcement of foreign awards done through NY and Panama Convention.	*Parsons* case: Public policy protects only the forum state's most basic notions of morality and justice.	Impliedly endorse international public policy: narrow interpretation.
India	NYC is main enforcement law for foreign awards. The Arbitration and Conciliation Act main Act on arbitration	*Renusagar* case: Enforcement refused if contrary to fundamental policy of Indian law or interests of India or justice or morality.	Courts reject International public policy but construe public policy narrowly
Germany	NYC. ZPO main law on enforcement implementing NYC.	*1986 decision:* Enforcement denied if arbitral procedure suffers grave defect that touches foundation of State and economic function.	Expressly endorse International Public Policy: narrow interpretation.
France	NYC. Main Act is NCCP, enforcement through both regimes.	Enforcement denied if breach of values which could not be tolerated by French legal order	Expressly endorse International public policy: narrow interpretation
Switzerland	NYC main enforcement law implemented through PILA	*Leopold*: Enforcement denied if contrary to Swiss legal order	Expressly endorse International public policy: narrow interpretation.
China	NYC. CPL main law for enforcement of foreign awards	No definition of 'social and public order'	Impliedly endorse international public policy: narrow interpretation.

CHAPTER FIVE

CONCLUSION

The thesis embarked on ascertaining the definition of the public policy under Article V (2) (b) of the New York Convention. This was done because of the role public policy plays as a guardian of the fundamental moral convictions or policies of a given State. In order to deal with this, the following pertinent questions were asked:

(a) How has public policy been defined and how far has the definition been accepted?
(b) Is it possible to have a uniform interpretation in the light of the objectives of the New York Convention of attaining certainty and predictability?

The above questions have been dealt with by looking at the international legal framework, the theoretical definition of public policy and analyzing the interpretations given by the major trading nations of the world who have a role to play in international commercial arbitration. In answering these questions it is important to highlight what this study has revealed.

Most of the legal writings refer to the 'unruly horse' metaphor in describing public policy. This is because it is acknowledged that it is difficult to give a precise definition of public policy because of its dynamic character. That notwithstanding, its role as a guardian of fundamental moral convictions or policies of a given State is evidenced by the legal framework available in the context of recognition and enforcement of foreign arbitral awards which makes reference to it as a ground for refusing enforcement. This is both at international and national level.

This study has revealed that theoretically, it is generally agreed that the concept of public policy is the same in nature and therefore the basic spirit and function is similar no matter where it is invoked. In this regard the general definition that public policy reflects the economic, legal, moral, political, religious and social values and principles considered to be fundamental to any society does not seem to be controversial.

In the context of enforcement of foreign arbitral awards under Article V (2) (b) of the New York Convention, it has been presumed that the 'public policy' referred to is in fact 'international public policy' of the enforcing State. In this regard, in defining the public policy exception under the New York Convention, a distinction is made between domestic and international public policy. This distinction which finds its origins in Private International Law is said to lie in its territorial scope and field of application. Consequently, international public policy is said to be narrower than domestic public policy as it results in a much more limited set of rules representing every basic belief of a particular country. Therefore the number of matters considered to fall under the public policy in international cases is smaller than domestic cases.

Considering the New York Convention's pro enforcement bias and the effect that this distinction has of narrowing the public policy exception, a justification is made for the inference that public policy under the New York Convention is 'international public policy'.

Some authors have defined international public policy but the definition given is quite vague.[393] In addition, the term 'international' as used to refer to public policy is considered to be a misnomer.[394]In an attempt to find a working definition the ILA defined international public policy to designate a body of principles and rules recognized by a State which includes fundamental principles of justice and morality, public policy rules and a State's international obligations. This may be classified as applying to both the substantive and procedural aspect of an arbitral process.[395]

Although the classifications may have merit, the dynamic character of public policy enables any classification to crystallize public policy only at a certain period of time.[396] So what may pertain to public policy in this age may change over time. Moreover, a study of the judicial interpretations made by the major trading nations reveals that the

---

[393] See definition para 3.2.1.2 at 39.
[394] Lew *Applicable law in International Commercial Arbitration* note 122 at 533.
[395] See classification para 4.1 and 4.2 at 47.
[396] Julian DM Lew et al *Comparative International Commercial Arbitration* note 175 at 723.

notion is not accepted by some jurisdictions. India for instance, has rejected this concept because of a lack of workable definition.[397] China has not developed it. The United States of America and England are said to have adopted this concept impliedly because of the narrow construction of public policy by the courts. France, Switzerland and Germany are the only countries under study which have expressly endorsed this concept. This lack of consensus is bound to exist in so far as there is no workable definition of 'international public policy'.

Perhaps this is why the courts of all the countries under study except China have seminal cases setting their own standards for finding a violation of public policy in enforcement proceedings. From the standards set as shown in the Summary Table 1, it is evident that the interpretations given by the courts present diverse notions of public policy. These interpretations reflect what is considered to be fundamental from the view point of the respective legal system as the content of public policy whether substantive or procedural differs from country to country resulting in the variation in the interpretation.

Further, these variations in the interpretation are explained by the fact that the scope of the public policy depends on the court's perception of what values, principles or rules will rise to the level of public policy. For example in the United States case of *Parsons*, the court rejected equating the national [foreign] policy of the United States with the public policy under the New York Convention by holding that the public policy exception was not intended to encompass parochial interests of a particular enforcing country.[398]

However, there are widely accepted examples of violations of public policy like due process,[399] awards affected by fraud or corruption and awards involving terrorist activities which are hardly just a parochial interest of the enforcing State. The application of public policy in these respects is therefore not expected to vary substantially.

---

[397] See *Renusagar* case at 32.
[398] See *Parsons* case at 10.
[399] This is particularly true for most civil law countries like France, Germany and Switzerland. See France case of *Excelsior* at 47 and *Oberlandesgericht* decision of 3rd April 1975 at 73.

This study has also revealed that there is a consensus regarding the approach to be taken when interpreting the public policy exception. Despite a rejection of 'international public policy' by Indian courts and a lack of development by the Chinese courts, all the countries under study have taken a narrow interpretation of public policy which accords with the pro enforcement bias of the New York Convention. This pro enforcement bias is in itself a 'public policy' consideration[400] aimed at promoting finality of awards which in turn ensures certainty and predictability. Therefore, the narrow approach taken by China in the enforcement of foreign arbitral awards, will to a certain extent remove the misty veil of doubt looming over the international business community as a result of a lack of judicial interpretation of the wording 'socio-public interest'.

However, there is a problem inherent in this narrow approach. In the hope of achieving certainty in the interpretation, there is a danger of the courts being locked into a pattern of blanket rejection of the public policy exception regardless of the facts of an individual case.[401] This is because some of the standards set are too high. For example, in the United States, enforcement is denied 'only where there is a violation of the forum state's most basic notions of morality and justice'. This definition has had tremendous influence not only in the United States courts but also the international community.[402] As a result of this standard, public policy exception was rejected in most of the cases alluded to as they could not meet this *Parsons* standard.

Further, it is difficult to determine where the line is drawn for those countries where a distinction is made between domestic and international public policy. This is particularly true when dealing with cases of illegality as evidenced by some of the English cases. This is because there cannot be different categories of illegality.

It is important to note that the public policy exception was intended to be a safeguard against the injustice of an unfair arbitral award therefore, when considering questions of

---

[400] Redfern and Hunter note 2 para 10-51 at 542.
[401] Eloise Henderson Bouzari note 292 at 216.
[402] See ILA Interim report where Judge Smith's definition is mentioned as the most often quoted definition.

public policy extreme caution should be taken as there are some clearly substantive and procedural limits[403] beyond which the courts may not go. In this regard, since the finality of awards is of paramount importance in international commercial arbitration, a balance should be struck between these two 'public policies' so that injustice is not promoted under the guise of promoting finality of awards.

To get back to the questions, it is evident that some countries do not accept the concept of international public policy due to lack of a workable definition. England, United States of America, India, Germany, France and Switzerland have their own interpretation of what constitutes a violation of public policy. Therefore, there is no uniform understanding of public policy. The only element which permeates these interpretations is fundamentality of the principles and values that underpin the operations of respective legal systems. However, the degree of fundamentality differs from country to country.

The lack of interpretation of 'social and public interest' by the Chinese courts makes a uniform understanding of public policy even more difficult. Since the problem of lack of training on the part of the judiciary has already been identified, it is incumbent upon the relevant authorities to ensure that the training required is received so that when the courts are faced with a public policy argument they can meaningfully interpret its meaning and therefore remove any ambiguity or uncertainty.

However, this lack of uniform understanding does not mean that the New York Convention's objective of promoting the enforcement of foreign arbitral awards which in turn ensures certainty and predictability. It is clear that the role of public policy in the recognition and enforcement is foreign arbitral awards is crucial and therefore public policy cannot be avoided. We can be optimistic if we go with Lord Denning's assurance that with a good man in the saddle, the unruly horse can be kept in control[404]. Certainty and predictability in the application of the public policy exception can be attained if the courts are consistent in the approach they take in applying the public policy exception when faced with an enforcement application. This will not only reduce on 'forum

[403] Troy Harris note 6 at 16.
[404] *Enderby Town Football Club v FA* (1971) AC 591 at 606-607 (CA).

shopping' by those seeking enforcement but will also help in keeping the unruly horse under control in a more defined stable. This is possible because as it has been said 'it is hard to find a legal doctrine which has endured such extensive criticism and nonetheless survived.'[405]

[405] Yongping Xiao and Zhengxin Huo "Ordre Public in China's Private International Law" The American Journal of Comparative Law 53(2005)654 citing Michael Mousa Karayanni, The Public Policy Exception to the Enforcement of Forum Selection Clause, 34 DUQ.L.Rev 1009(1996).

BIBLIOGRAPHY

PRIMARY SOURCES

Cases

CHINA

Dalian Ocean Transportation Co and Tesko[Unreported case but cited in Li Hu 'Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China' (2004) 20 (2) *Arbitration International* 167 at 177].

Dongfeng Garments Factory of Kai Feng City and Tai Chu International Trade (HK) Co Ltd v Henan Garments Import and Export Group Co [Unreported case cited in Wang, Guiguo 'One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China'14 (1997) 1 *Journal of International Arbitration* Kluwer International CD Rom].

Guangzhou Ocean Shipping Co v Marships of Connecticut Co Ltd Gaungzhou Maritime Court 17 October 1990 extract in Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXIII (1998) at 641.

ENGLAND

Deutsche Schachtbau- und Tiefbohrgesellschaft v Ras al Khaimah National Oil 1987 2 ALL ER 769 (CA).

Enderby Town Football Club v FA 1971 AC 591(CA).

Kaufman v Gersom 1904 1 KB 591.

Omnium de Traitement et de Valorisation SA v Hilmarton [1999] 2 Lloyd's Rep 222.

Richardson v Mellish [1824-34] ALL ER 258.

Solemainy v Solemainy [1999] QB 785.

Vervaeke v Smith [1983] 1 AC 145.

Westacre Investment Inc v Jugoimport-SPDR Holing Co Ltd [1999] 2 Lloyds Report 65.

FRANCE

B K M I v Dutco Cass 1e cave 7 January 1992.

Excelsior Film TV v. UGC –PH Reported in (1998) XXIII Year book.

Denis Coakely v Michael Reverdy Cour d'appel of Reims 23 July 1981 extract from Yearbook Commercial Arbitration, P. Sanders (ed) Vol IX (1984) p 400-402.

Dubois &Vanderwalle v Boots Frites BV Cour de' appel Paris 22 September 1995 extract from Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXIVa (1999) p 640.

GERMANY

Oberlandesgericht Hamburg 3rd April 1975 extract in Yearbook Commercial Arbitration, P Sanders (ed), Vol II (1977) at 241.

Bundesgerichtshof 15 May 1986 extract from ICCA.

Bundesgerichtshof 14 April 1988.

Bundesgerichtshof 18 January 1990 III ZR 269/88 extract in Yearbook Commercial Arbitration (Germany No. 38) Kluwer Law International.

Oberlandesgericht Hamburg 30 July 1998 extract in Yearbook Commercial Arbitration AJ van den Berg (ed) Vol XXV (2000).

INDIA

Renusagar v General Electric Co. (GEC) Supreme Court of India 7 October 1993. Reported in Yearbook Commercial Arbitration A J van den Berg (ed) Vol XX (1995).

Smita Conductors Ltd v Euro Alloys Ltd Supreme court of India, 31 August extract in Yearbook Commercial Arbitration A.J. van den Berg (ed) Vol XXVII pp 462-491 at para 38).

UNITED STATES OF AMERICA

Fritz Scherk v Alberto- Culver Co [1974] 417 US 506.

Laminoirs- Trefileries- Cableries de Lens, S.A v Southwire Co 484F Supp 1063.

La Societe Nationale Pour La Recherche and others v Shaheen Natural Resources Co 585F. Supp 57.

Scherk v Alberto- Culver Co 417 US 506.

Parsons & Whittemore Overseas Co. v. Societie Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974).

The Breman v Zapata off shore Co [1972] 407 US 1.

Waterside Ocean Navigation Co. v International Navigation Ltd 737F.201 150 (2D Cir. 1984).

SWITZERLAND

Inter Maritime Management SA v Russin & Vecch Tribunal Fédéral 9 January 1995 extract from Yearbook Commercial Arbitration A.J van den Berg (ed) Vol XXII (1997) at 789.

KS AG v CC SA Camera di Esecusione e Fallimenti [Execution and Bankruptcy Chamber] Canton Tessin 19 June 1990.

Leopold Lazarus Ltd v Chrome Resources SA Cour de Justice (Fist Section) Canton of Geneva 17th September 1976 extract in Yearbook Commercial Arbitration P Sanders (ed) Vol IV (1979) at 311.

W v F and V Case cited in Sheppard ILA Interim Report foot note 19; Case dated 30 December 1994.

OTHER COUNTRIES

Austria - *Norsolor SA v Pabalk Ticaret Ltd* 184 IX Year book 159.

Hong Kong

Heibei Import & Export Corp v Polytek Engineering Co. Ltd Court of Appeal of Hong Kong: Special Administrative Region 9 February (1999) Reported in *Year Book Commercial Arbitration* A J van den Berg (ed) Vol XXIVA (1999) at 652.

Paklito Investment Ltd v Klockner East Asia Ltd Reported in Year Book Commercial Arbitration, A J van den Berg (ed) Vol XIX (1994).

Italy- *Allsop Automatic Inc v Technoski* 4 December 1992, extract in the Year Book Commercial Arbitration XXII (1997)725.

Zimbabwe- *Zimbabwe Electricity Supply Authority v Maposa* Dated 21 December 1999, Judgment No 114/99.

Statutes

The Arbitration Act 1996 (England).

The Arbitration Act 1996 (Zimbabwe).

The Arbitration Act 2000 (Zambia).

The Arbitration and Conciliation Act 1996 (India).

The Arbitration Law, Civil Procedural Law and Contract Law (People's Republic of China).

The Federal Act on Private International Law (Switzerland).

The Federal Arbitration Act 1925 (United States of America).

The German Code of Civil Procedure (Germany).

The International Arbitration Act (Australia).

The Law Concerning Arbitration in Civil and Commercial Matters (Egypt).

The New Code of Civil Procedure 1981(France).

INTERNATIONAL AND REGIONAL CONVENTIONS

The Amman Arab Convention on Commercial Arbitration.

The Arab Convention on Judicial Cooperation (Riyadh).

The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific- technical Cooperation (Moscow Convention).

The Convention on the Settlement of Investment Disputes Between States and Nationals of other States (Washington or ICSID Convention).

The Geneva Protocol 1923.

The Geneva Convention 1927.

The European Convention 1961.

The European CommunityTreaty

The Inter-American Convention on International Commercial Arbitration (Panama Convention).

Treaty on the Harmonisation of Business Law in Africa (OHADA).

United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958 (New Convention).

Vienna Convention on the Law of Treaties

SECONDARY SOURCES

Books

Berg, Albert Jan van den *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) Kluwer Law and Taxation Publishers, Deventer/ Netherlands.

Bernet, Martin and Müller Anna K 'Recognition and Enforcement of Foreign Arbitral Awards' in Gabrielle Kaufmann-Kohler & Blaise Stucki (eds) *International Arbitration in Switzerland: A Handbook for Practitioners* (2004) Kluwer Law International, The Hague, Netherlands.

Castel Jean Gabrielle and Walker Janet *Canadian Conflict of Laws* 5ed (2003) (loose leaf) 5ed (2003) Butterworths, Canada.

Chukwumerije Okezie *Choice of Law in International Commercial Arbitration* (1994) Quorum Books, United States of America.

Collins, Lawrence (ed) *Dicey and Morris The Conflict of Laws* 13ed (2000) Sweet and Maxwell, London.

Fourchard Gaillard Goldman, *International Commercial Arbitration* (1999) Gaillard E and Savage J(eds) Kluwer Law International CD ROM.

Garner, Bryan A (ed) *Blacks Law Dictionary* (2004) 8th ed West Group, United States of America.

Hwang, Michael and Chan, Andrew 'Enforcement and Setting Aside of International Arbitral Awards-The Perspective of Common Law Countries' in Albert Jan van den Berg (ed) *International Arbitration and National Courts: The Never Ending Story ICCA International Arbitration Conference* (2001) Kluwer Law International, The Hague Netherlands.

Houzhi, Tang and ShengChang 'People's Republic of China' in J Paulsson (ed) *International Handbook on Commercial Arbitration.*

Lew, Julian D M *Applicable Law in International Commercial Arbitration* (1978) Oceana Publication, Sijthoff &Noordhoof International Publishers BV, Netherlands.

Liebscher Christopher *The Healthy Award Challenge in International Commercial Arbitration* (2003) Kluwer Law International, The Hague, Netherlands.

Kühn, Wolfang and Gantenberg, Ulrike 'Germany' in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) The European Lawyer Ltd, London.

Merkin, Robert *Arbitartion Law* (2004) Informa Professional, London.

Mukuhopadhaya, Ciccu and York, Douglas Stephen 'India' in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) The European Lawyer Ltd, London.

Murray, Peter and Lin, John 'People's Republic of China' in J William Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) The European Lawyer Ltd, London.

North, P M and Fawcett, J J *Cheshire and North, Private International Law* 12 ed (1992) Butterworth's, London.

Obrien, John *Conflict of Laws* 2ed (1999).

Pietro, Di Dominic and Platte, Martin *Enforcement of International Arbitration Awards: The New York Convention of 1958* (2001) Cameron May Ltd, Bondway, London.

Poudret, Jean-Francis and Bessan, Sebastian *Comparative Law of International Arbitration* 2ed (2007) Sweet and Maxwell Ltd, London.

Redfern, Alan and Hunter, Martin *Law and Practice of International Commercial Arbitration* 4ed (2004) Sweet and Maxwell, London.

Rivkin, David W and Donovan, Donald Francis 'United States of America' in J W Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) The European Lawyer Ltd, London.

Saleh, Samir 'The recognition and enforcement of foreign arbitral awards in the states of Arab Middle East' in Julian D M Lew (ed) *Contemporary Problems in International Arbitration* (1987) Martinus Nijhoff, Netherlands.

Segessen, Georg von and Jolles, Alexander 'Switzerland' in J W Rowley (ed) *Arbitration World Jurisdictional Comparisons* 2ed (2006) The European Lawyer Ltd, London.

Shelkoplyas, Natalya *The Application of EC Law in Arbitration Proceedings* (2003) Europa Law Publishing, Groningen, Netherlands.

Sheppard, Audley 'England and Wales' in J W Rowley (ed) *Arbitration World* 2ed (2006) The European Lawyer Ltd, London.

Stone, P *The Conflict of Laws* (1995).

Journal articles

Arfazadeh, Homayoon, 'In the Shadow of the Unruly Horse: International Arbitration and Public Policy Exception' (2002) 13 American *Review of International Law* 43.

Barraclough, Andrew and Waincymer, Jeff 'Mandatory Rules of Law in International Commercial Arbitration' (2005) *Melbourne Journal of International Law* Available at http://mjil.law.unimelb.edu.au/issues/archive/2005(2)/01Barraclough.pdf [Accessed on 7th January 2008]

Bloom, J 'Public Policy in Private International Law and Its Evolution in Time' (2003) *Netherlands International Law Review* 374. Available at http://journals.cambridge.org/download.php?file=%2FNLR%2FNLR50_03%2FS0165070X03003735a.pdf&code=ef19812221827e351d84a553e6b92ef1 [Accessed 8th February 2008].

Bouzari, Eloise Henderson 'The Public Policy Exception to the Enforcement of International Arbitral Awards: Implications for Post-NAFTA Jurisprudence' (1995) 30 *Texas International Law Journal* 205.

Buchanan, Mark A 'Public Policy and International Commercial Arbitration' 26 (1986) *American Business Law* 511.

Douajini, Kenfack G 'The Recognition and Enforcement of Arbitral Awards in OHADA Member States' 20 (2003)2 *Journal of International Arbitration* 205.

Ebb, Lawrence F 'Relections on the Indian Enforcement of the GE/Renusagar Award' 10(1994)2 *Arbitration International* 141.

El-Ahdab, Abdul Hamid 'Enforcement of Arbitral Awards in the Arab Countries' (1995) 11(2) *Arbitration International* 169-182 Kluwer International CD Rom on Arbitration.

Guedji, Thomas 'Theory of the Lois de Police, a Functional Trend in Continental Private International Law- a comparative Analysis with Modern American Theories' (1991)39 *American Journal Comparative Law* 660 .

Harris, Troy L 'The Public Policy Exception to Enforcement of International Arbitration Awards Under the New York Convention With Particular Reference to Construction Dispute' (2007) *Journal of International Arbitration 9.*

Hu, Li 'Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China' (2004) 20(2) *Arbitration International* 167.

Jalili, Mahir 'Amman Arab Convention on Commercial Arbitration' (1990) 7(1) *Journal of International Arbitration* 139.

Kuner, Christopher B 'The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention' (1990) 7(4) *Journal of International Arbitration* Kluwer Law International CD ROM.

Mayer, Pierre and Sheppard Audley 'Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' *Arbitration International* (2003) 19 (3) 249.

Mayer, Pierre 'Mandatory Rules of Law in International Arbitration' (1986)2 *Arbitration International* 274.

Mitelis, Loukas 'International Law Association- London Conference (2000) Committee on International Commercial Arbitration 'Keeping the Unruly Horse in Control' or Public Policy as a Bar to Enforcment of (Foreign) Arbitral Awards' (2000) 2 *International Law Forum du droit international* 248.

Naimark, Richard W 'Post- Award Experience in International Commercial Arbitration' February/April (2005) *Dispute Resolution Journal* 95.

Tapola, Diana V 'Enforcement of Foreign Arbitral Awards: Application of the Public policy Rule in Russia' (2006) 22 (1) *Arbitration International* 151.

Shaleva, Vanessa 'The Public Policy Exception to the Recognition and Enforcement of Arbitral Awards in Theory and Jurisprudence of the Central and East European States and Russia' (2003) 19 *Arbitration International* 65.

Serrano- Mantilla, Fernando 'Towards A Transnational Public Policy' (2004) 20 (4) *Arbitration International* 333.

ShengChang, Wang 'Enforcement of foreign Arbitral awards in China' (2002)30 *International Business Law* 133.

Sheppard, Audley 'Interim ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards' (2003) 19 *Arbitration International* 217.

Wang, Guiguo 'One Country, Two Arbitration Systems: Recognition and Enforcement of Arbitral Awards in Hong Kong and China' (1997) 14 (1) *Journal of International Arbitration* Kluwer Law International CD Rom.

Xiao, Hong 'Refusing Recognition and Enforcement of Foreign Arbitral Awards under Article V (2) of the New York Convention in China: From the Judicial Experience of Europe and USA'(2005)2*US-China Law Review* 51 http://www.jurist.org.cn/doc/uclaw2005OT/uclaw20050707.pdf [Accessed on 21st November 2007].

Xiao, Yongping and Huo, Zhengxin 'Ordre Public in China's Private International Law' (2005) 53 *The American Journal of Comparative Law* 653.

Xu, Xiabing and Wilson George D 'One Country, Two- International Commercial Arbitration- Systems (2000) 17 (6) *Journal of International Arbitration* 47 Kluwer International CD Rom.

INTERNET SOURCES

'The Amman Arab Convention on Commercial Arbitration' *Arab Law Quarterly* (1992)7 at 82-92 Available at http://links.jstor.org/sici?sici=0268-0556(1992)7%3A1%3C83%3ATAACOC%3E2.0.CO%3B2-0 [Accessed on 3rd January 2008].

Chambers Yang and Marshal Chen "International Commercial Arbitration in NET Era" Available at http://www.law-bridge.net/english/LAW/20055/0821584249562.html [Accessed on 3rd January 2008].

Al Jadaan Law firm " Enforcing Foreign Judgments and Foreign Arbitral Awards in Saudi Arabia"Legal500.comAvailable at http://www.legal500.com/index.php?option=com_content&task=view&id=470&itemid=93[Accessed 4th January 2008].

The Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington or ICSID Convention) Available at http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=AboutICSID_Home [Accessed on 21st January 2008].

http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=ShowHome&pageName=MemberStates_Home [Accessed on 21st January 2008].

Treaty on the harmonization of business law in Africa (OHADA) Available at http://translate.google.com/translate?hl=en&sl=fr&u=http://www.ohada.org/&sa=X&oi=translate&resnum=1&ct=result&prev=/search%3Fq%3DOHADA%26hl%3Den[Official site of OHADA- [Accessed on 21st January 2008].

http://www.tradeforum.org/news/fullstory.php/aid/497/OHADA_Four_Years_On:_One_Business_Law_for_16_African_Countries.html [Accessed on 21st January, 2008].

Audley Sheppard ' Public Policy and the Enforcement of Arbitral awards: Should there be a Global Standard?' (2003)1(2) *Transnational Dispute Management* Available at http://www.transnational-dispute-management.com/samples/freearticles/tv1-1-article_67.htm [Accessed 21st January 2008].

Bloom J 'Public Policy in Private International Law and its Evolution in Time' (2003) Netherlands Law Review 373 Available at

http://journals.cambridge.org/download.php?file=%2FNLR%2FNLR50_03%2FS0165070X03003735a.pdf&code=ef19812221827e351d84a553e6b92ef1[Accessed 28th January 2008].

Web definition of public policy Available at http://www.google.co.za/search?hl=en&defl=en&q=define:Public+policy&sa=X&oi=glossary_definition&ct=title [Accessed on 28th January 2008].

General Principles of Civil Law of the People's Republic of China Available at http://en.wikipedia.org/wiki/General_Principles_of_the_Civil_Law_of_the_People's_Republic_of_China [Accessed on 28th January 2008].

Status on the New York Convention http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html [Accessed on 8th February 2008].

The Inter- American Convention on International Commercial Arbitration (Panama Convention) Available at http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp [Accessed 26th February 2008].

R Doak Bishop and Elaine Martin 'Enforcement of Foreign Arbitral Awards' at 3 Available at http://www.kslaw.com/library/pdf/bishop6.pdf [Accessed on 26th February 2008].

The meaning of Sharia Available at http://en.wikipedia.org/wiki/Sharia [Accessed on 30th January, 2008].

International Commercial Arbitration: *UNCITRAL Secretariat Explanation of Model Law* Available at http://faculty.smu.edu/pwinship/arb-24.htm [Accessed on 26th February 2008].

OTHER SOURCES

Arab Convention on Judicial Cooperation *ICCA Handbook* Kluwer International CD Rom.

Berg, Albert J van den (ed) *Year Book Commercial Arbitration,* Vol. XI (1986) para 107G at 408 Kluwer Law International CD Rom.

Böckstiegel, Karl-Heinz " Germany" in J Paulsson (ed) *International Handbook on Commercial Arbitration* (2001) Kluwer Law Interntaional CD ROM.

Broches 'Commentary on the UNCITRAL Model Law on International Commercial Arbitration' *International Handbook on Commercial Arbitration* J Paulsson (ed) Supp 11(January 1990) Kluwer Law International CD Rom.

Christie, R H 'The Law Governing an International Construction Contract' (2007) at 2 Unpublished Lecture notes.

Derains, Yves and Rosebel E. Goodman- Everard " France" in J. Paulsson (ed) *International Handbook on Commercial Arbitration* (February 1998) Suppl 26 Kluwer Law International CD ROM.

Houzhi, Tang and Wang, Sheng Chang "PR China" in J Paulsson (ed) *International Handbook on Commercial Arbitration* (January 1998) Kluwer Law International CD ROM.

Lalive, Pierre *Transnational (or Truly International) Public Policy and International Arbitration* ICCA Congress series no. 3 (1986) 258 at para 76 Kluwer International CD Rom.

Nariman, Fali S "India" J Paulsson (ed) *International Handbook Commercial Arbitration* 30 Januray 2000. Kluwer Law International CD ROM.

DISSERTATIONS

Axelsen Ylva 'Public Policy as a Bar to the Recognition and Enforcement of International Arbitral Awards' Research dissertation presented for the approval of the Senate of the University of Cape town in fulfillment of part of the requirements for the Master of Laws September 2004.

Conle, Robert 'Public Policy and enforcement of international commercial awards- curse or blessing?' Research dissertation presented for the approval of the Senate of the University of Cape town in fulfillment of part of the requirements for the Master of Laws, February 2007.

Ma Winnie (Jo-Mei) ' Public Policy in the Judicial Enforcement of Arbitral Awards: Lessons For and From Australia' A thesis submitted to Bond University in the fulfillment of the requirements for the Degree of Doctor of Legal Studies (SJD) 2005. Available at http://epublications.bond.edu.au/theses/ma/
[Accessed on 12th December 2007].